

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



Alert Digest

No. 5 of 2010

12 May 2010

Senate Standing Committee
for the
Scrutiny of Bills

Alert Digest No. 5 of 2010

12 May 2010

ISSN 1329-668X

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.

TABLE OF CONTENTS

Commentary on bills

• Agricultural and Veterinary Chemicals Code Amendment Bill 2010	1
• Airport Development Ombudsman Bill 2010	3
• Broadcasting Legislation Amendment (Digital Television) Bill 2010	4
• Building Energy Efficiency Disclosure Bill 2010	8
• Carer Recognition Bill 2010	14
• Defence Legislation Amendment Bill (No.1) 2010	16
• Environment Protection and Biodiversity Conservation Amendment (Public Health and Safety) Bill 2010	20
• Immigration (Education) Amendment Bill 2010	21
• Imported Food Control Amendment (Bovine Meat) Bill 2010	24
• Insurance Contracts Amendment Bill 2010	25
• Ministers of State Amendment Bill 2010	27
• National Security Legislation Amendment Bill 2010	28
• Parliamentary Joint Committee on Law Enforcement Bill 2010	35
• Social Security and Indigenous Legislation Amendment (Budget and Other Measures) Bill 2010	36
• Tax Laws Amendment (2010 GST Administration Measures No.2) Bill 2010	37
• Tax Laws Amendment (2010 Measures No.2) Bill 2010	38
• Tax Laws Amendment (Transfer of Provisions) Bill 2010	41
• Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010	42
• Territories Law Reform Bill 2010	44

• Therapeutic Goods Amendment (2010 Measures No.1) Bill 2010	47
• Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010	49
Water (Crisis Powers and Floodwater Diversion) Bill 2010	53
Commentary on amendments to Bills	54
Provisions of Bills which impose criminal sanctions for a failure to provide information	57
Bills giving effect to National Schemes of Legislation	59
Scrutiny of standing appropriations	60

- **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.

Agricultural and Veterinary Chemicals Code Amendment Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill consists of two measures and will amend the Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994*. The bill seeks to appropriately improve the efficiency of the registration processes of the Australian Pesticides and Veterinary Medicines Authority (APVMA). The Bill provides for:

- the APVMA being effectively exempted from the general prohibition on using confidential commercial information when registering a permit for minor use or emergency use; and
- trade issues being considered when addressing the adequacy of product labels by extending the definition of 'adequate'.

Insufficient scrutiny of legislative power

Possible trespass on personal rights

Schedule 1, items 3, 4, 5 and 7

The legislation to be amended by this Bill contains a general prohibition on the disclosure of confidential commercial information. This Bill, through the proposed addition to section 3 (Schedule 1, item 3) and supported by the amendment proposed in item 7, provides for an exception in relation to consideration of 'minor use' or 'emergency use' permits. Although one of the policy objectives in the proposed legislation appears to be to protect confidential commercial information for applicants it seems possible that releasing information in relation to 'minor use' or 'emergency use' permits could amount to a trespass on personal rights.

In addition, the meaning given to these terms will be determined by regulation (Schedule 1, items 4 and 5). Therefore, the meaning given to *confidential commercial information* which is not to be disclosed is to be contained in regulations and could be modified by regulation in the future.

The explanatory memorandum notes at page 2 that this amendment is designed to increase the efficiency of the Australian Pesticides and Veterinary Medicines Authority's process for assessing and issuing permits, and also that applications 'for minor use or emergency use permits do not ordinarily contain commercially valuable information'.

The Committee acknowledges that these amendments as currently proposed are unlikely to give rise to any undue trespass on personal rights and liberties, but is concerned that the definitions of key terms such as 'emergency use' and 'minor use', which will work to alter the meaning of *confidential commercial information*, will be established in delegated legislation. Even though the regulations defining the meaning of the terms 'emergency use' and 'minor use' are already in place (in the Agricultural and Veterinary Chemicals Code Regulations 1995), it is possible that they could be modified in the future without sufficient Parliamentary scrutiny. Given the importance of the meaning of these terms for the protection of confidential commercial information the Committee **seeks the Minister's advice** about whether the terms 'minor use' and 'emergency use' can be defined in the primary legislation.

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.

Airport Development Ombudsman Bill 2010

Introduced into the House of Representatives on 15 March 2010

Portfolio: Ms S Jackson

Background

This private Member's bill seeks to establish an Airport Development Ombudsman and makes consequential amendments to the *Airports Act 1996*, *Air Services Act 1995*, *Civil Aviation Act 1988* and *Ombudsman Act 1976*.

Explanatory memorandum

This bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. While noting that the second reading speech provides some explanation of the background, intent and operation of the bill, the Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents can assist in the interpretation of bills, and ultimately, Acts. The Committee **seeks the proposer's advice** as to whether an explanatory memorandum could be provided.

Broadcasting Legislation Amendment (Digital Television) Bill 2010

Introduced into the House of Representatives on 18 March 2010
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Broadcasting Services Act 1992* and the *Copyright Act 1968* to enable provision of a satellite solution to areas of terrestrial digital television signal deficiency (black spots) and to address a range of related matters.

Determination of important matters by legislative instrument Schedule 1, item 26

This Bill addresses a range of matters associated with the provision of satellite services to areas ‘of terrestrial digital television signal deficiency (black spots)’.

Schedule 1, item 26 introduces section 38C into the Act. The new subsections 38C(11) and (12) allow Australian Communication Management Authority (ACMA) to determine a price-based system for allocating licences by a written instrument which is declared to not be a legislative instrument. The Minister may, by legislative instrument, give specific directions as to the exercise of this power. The ACMA may thus be considered to hold a broad delegation of power to determine the system for allocation of licences. The explanatory memorandum does not explain why the allocation system is not set out in more detail in the legislation. The Committee **seeks the Minister’s advice** about whether more detail about the system for the allocation of licences can be included in the primary legislation and the reasons why an instrument made under ACMA's delegation is not a legislative instrument and a direction made by the Minister in relation to the delegation is ACMA is a legislative instrument.

Pending the Minister's response, the Committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Possible trespass on personal rights and liberties
Schedule 1, item 41

The Bill contains provisions whereby satellite broadcasting service licensees are required to broadcast content which must be provided to them by commercial broadcasting licensees. The Bill contains what the explanatory memorandum describes as a 'constitutional safety net clause'. New section 43AD, to be inserted by item 41 of Schedule 1, provides that if the requirements on commercial television broadcasting licensees to provide content to satellite broadcasting service licensees are thought to result in an acquisition of property otherwise than on just terms, then reasonable compensation must be paid. The explanatory memorandum explains at page 13 that the Australian Government Solicitor advised that this clause be included 'to safeguard against rulings that the legislation is invalid on constitutional grounds'. In these circumstances, any possible trespass on personal rights and liberties is guarded against.

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

Delegation of legislative power
Incorporation by reference
Schedule 1, items 62 and 63

Schedule 1, item 62 inserts a new s 130AC into the legislation. Section 130AC(2) enables the ACMA to determine, by legislative instrument, technical standards under section 130AC(1) by reference to other instruments even if that instrument is not yet made. It is not necessary that the other instrument have any legal force or effect. The explanatory memorandum does not explain the reasons for this delegation of legislative power or the justification for incorporating material by reference.

Schedule 1, item 63 inserts a new section 130BB into the legislation. This provision allows the ACMA, by legislative instrument, to determine technical standards in relation to domestic reception equipment (paragraph (1)). Proposed subsection 130BB(2) makes it an offence for a person to supply equipment which does not comply with such standards and subsection 130BB(3) makes non-compliance a civil penalty (though no penalty is specified).

The Committee notes that the content of the offence and civil penalty will be provided for in a legislative instrument. The legislative instrument may also adopt standards set out in other instruments or writing in force from time to time.

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

The explanatory memorandum does not comment on the justification for this delegation of the content of an offence. The Committee therefore **seeks the Minister's advice** as to the justification for the proposed approach, including that the content of the offence and civil penalty will be provided in a legislative instrument and the ability to adopt standards set out in other instruments or writing in force from time to time.

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.

Delegation of legislative power

Schedule 1, item 130ZFA

Under proposed new section 130ZFA the ACMA can, by legislative instrument, determine what 'adequate reception' is to mean for the purposes of a complaints scheme about 'adequate reception'. The explanatory memorandum does not explain the necessity for this delegation of legislative power and the Committee **seeks the Minister's advice** about the justification for this approach.

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.

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Building Energy Efficiency Disclosure Bill 2010

Introduced into the House of Representatives on 18 March 2010
Portfolio: Climate Change, Energy Efficiency and Water

Background

This bill provides for the establishment of a new national scheme for the disclosure of commercial office building energy efficiency.

Phasing in a national scheme for the disclosure of commercial building energy efficiency was agreed to by the Council of Australian Governments on 2 July 2009 under the National Strategy on Energy Efficiency. The parameters of an initial scheme for office buildings were subsequently agreed to by the Ministerial Council on Energy on 2 November 2009, including that the scheme be enacted through Commonwealth legislation.

The scheme will require the disclosure of information about the energy efficiency of large commercial office buildings at the point of sale, lease and sublease. The information to be disclosed will be in the form of a building energy efficiency certificate (BEEC). A BEEC will have three components: an energy efficiency star rating for the office building; information about the energy efficiency of the office lighting; and generic guidance on how the energy efficiency of the office may be improved.

BEECs will be accessible to potential purchasers and lessees via an online registry. The applicable energy efficiency star rating must be disclosed in any advertisement for the sale, lease or sublease of an office.

Delegation of legislative power

Part 2, item 10

This Bill provides for the establishment of a national scheme for the disclosure of commercial office building energy efficiency. Section 10 would enable the Minister, by legislative instrument, to determine which buildings will be covered by the scheme and in relation to which non-disclosure may attract civil penalties. The explanatory memorandum, however, at page 73 sets out the expectation that the legislative instrument will specify that the building must have a net lettable area greater than 2000 square metres' and notes that

technical issues associated with how the scheme might be applied to specific buildings justifies the flexibility provided by defining ‘disclosure affected buildings’ through a legislative instrument.

Given the technical nature of the proposed definition and the fact that there will still be an element of Parliamentary scrutiny through the legislative instrument process the Committee accepts that the delegation of legislative powers is in these circumstances appropriate.

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

Broad delegation of power

Part 2, proposed subsection 13(7)

Proposed subsection 13(7) introduces a broad discretionary power enabling the Secretary to recognise a person or body as an issuing authority for the purposes of issuing a building energy efficiency certificate. No criteria for recognition are specified. However, at page 79 the explanatory memorandum states that in practice the Secretary would recognise the NSW Government department responsible for the administration of the National Australian Built Environment Rating System for Energy as an issuing authority. The explanatory memorandum (also at page 79) states that the recognition of any further issuing authorities would be based on consultation and ‘rigorous analysis’.

Given the important role an issuing authority will have under the proposed legislation, the Committee **seeks the Minister’s advice** about the criteria on which an analysis of a possible issuing authority would be conducted and whether the criteria can be included in the primary legislation.

Pending the Minister's response, the Committee draws Senators’ attention to the provisions, as they 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.

Broad discretion

Part 2, proposed subsections 17(5) and 18(12)

Proposed subsections 17(5) and 18(12) confer discretionary powers on the Secretary to vary or revoke an exemption granted to a person who would be otherwise subject to an energy efficiency disclosure obligation. These powers are not structured by express criteria set out in the Bill. The powers are, however, subject to internal review and merits review by the Administrative Appeals Tribunal (see proposed sections 67 to 69).

The Committee's preference is that the explanatory memorandum contains an outline of the conferral of discretionary powers. However, the Committee accepts that it is often appropriate to provide the ability to vary or revoke an exemption and notes that any decision to do so is reviewable.

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

Evidential burden

Part 2, item 19; Part 4, proposed subsections 35(5) and 39(5); Part 5, proposed subsections 50(4) and 57(3)

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt, but the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum. This is especially the case where the standard of proof is 'legal' (on the balance of probabilities) rather than 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out). In both circumstances, if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

The Committee usually considers that the explanatory memorandum to the bill should address the reasons for placing the burden on the defendant and to explain whether the approach is consistent with the 2007 *Guide to framing Commonwealth Offences and Civil Penalties and enforcement powers*.

For the defences available in these provisions an evidential burden is placed on the defendant and no explanation of the justification for this approach is given. However, in all of these instances it appears to the Committee that the facts would be peculiarly within the knowledge of the defendant. [See proposed section 19: reasons for copying, using or disclosing information; subsection 35(5): identity card lost or destroyed; subsections 39(5) and 50: not capable of complying with a requirement to answer questions or produce documents; and subsection 57(3): mistake of fact in civil penalty proceedings.]

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

Incorporation by reference

Part 2, item 21

Section 21 provides that the Secretary may, by legislative instrument, determine the assessment methods and standards for the determination of energy efficiency ratings, and that he or she may do so by reference to matter contained in any other instrument or writing as in force at a particular time or from time to time.

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

The explanatory memorandum indicates that for the foreseeable future, the intention is that the standards adopted by the National Australian Built Environment Rating System for Energy efficiency would be utilised. The explanatory memorandum at page 86 justifies the adoption of these methods and standards in the legislative instrument as there will be expected 'minor technical refinements', and because so doing enables the scheme to recognise other appropriate methods and standards in the future. In light of the assurance

in the explanatory memorandum that any ‘decision to recognise other methods and standards will be based on rigorous analysis, and will be subject to further industry and government consultation’, the Committee is satisfied that the reason for incorporation by reference is clearly outlined in the explanatory memorandum.

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

Strict liability

Part 4, Division 1, items 35 and 50

Section 35 imposes an offence for a person who fails to surrender their identity card after ceasing to be an auditor. The offence is an offence of strict liability. The explanatory memorandum notes that such offences are regulated by section 6.1 of the Criminal Code and that the defence of mistake of fact remains available. Although there is no real attempt in the explanatory memorandum to justify the application of strict liability, the penalty is only 1 penalty unit. A similar problem appears in relation to section 50 which also imposes a strict liability offence and imposes a more severe penalty (50 units). The Committee may wish to seek a fuller justification as to the need for strict liability in relation to these offences.

As a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

In this case there is no explanation of the application of strict liability to these offences in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** about the justification for this approach.

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

Privilege against self-incrimination

Division 2

Division 2 confers on auditors powers to enter and inspect a building. Such powers can only be exercised if consent is given or a warrant granted. Section 39 empowers an auditor to ask questions and seek the production of documents, however, not so as to abrogate the privilege against self-incrimination. The explanatory memorandum at page 95 states that by expressly mentioning the privilege against self-incrimination 'there was no intention to abrogate client legal privilege and hence it was not specifically mentioned'. Provisions conferring the ability to require the provision of information in this type of situation are of particular interest to the Committee because of their capacity to significantly trespass upon personal rights and liberties. The Committee is pleased to note that there is no abrogation of either the privilege against self-incrimination or client legal privilege.

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

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Carer Recognition Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill introduces a bill to increase recognition and awareness of informal carers and acknowledge the valuable contribution they make to society. The bill seeks to:

- establish a broad and encompassing definition of *carer*;
- establish the Statement for Australia's Carers, which states key principles on how carers should be treated and considered;
- establish that all public service agencies should have an awareness and understanding of the Statement for Australia's Carers and develop internal human resources policies, in so far as they may significantly affect an employee's caring role, with due regard to the Statement for Australia's Carers;
- establish that public service care agencies should take action to reflect the principles in the Statement for Australia's Carers in developing, implementing, providing or evaluating care supports, consult with carers and involve them in the development or evaluation of care supports, and report on compliance with the obligations established; and
- establish that associated providers should have an awareness and understanding of the Statement for Australia's Carers and take action to reflect the principles in the Statement for Australia's Carers in developing, implementing, providing or evaluating care supports.

It is not intended that the bill establish carers' rights or create enforceable obligations binding carers, entities affected by this legislation, or the Commonwealth.

Availability of review of decisions
Schedule 1, subsection 10(2)

This Bill has the object of increasing ‘recognition and awareness of carers and to acknowledge the valuable contribution they make to society’. The Bill seeks to achieve this outcome through the imposition of obligations on public service agencies, ‘public service care agencies’ and others with whom a ‘public service care agency’ enters into some sort of funding arrangement for the purposes associated with the development, implementation, provision or evaluation of care supports.

Although the legislation imposes ‘obligations’ on public service agencies and associated care providers (sections 7-9), the Act does not create legally enforceable rights or duties. Subsection 10(2) states that failure to comply with the Act does not affect the validity of any decision and is not a ground on which such a decision may be challenged.

This provision is likely to remove any realistic prospect of applying for the main types of remedies available in judicial review proceedings. Nonetheless, this is consistent with the purposes of the legislation and the scheme is premised on the lack of enforceable legal rights or obligations.

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

Defence Legislation Amendment Bill (No.1) 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Defence

Background

This bill will address five separate measures by amending the following:

Defence Act 1903 to:

- establish the Defence Honours and Awards Appeals Tribunal by legislation by inserting a new Part VIIC in the *Defence Act 1903* to establish the Defence Honours and Awards Appeals Tribunal. The amendments include the functions of the tribunal, what decisions are reviewable and who may apply for review, referral of Defence honours and awards issues for inquiry and advice and the constitution of the new Tribunal and appointment of members.
- ensure that there is procedural fairness in the termination and discharge process where a Defence member has tested positive for a prohibited substance.
- make it absolutely clear that section 58B determinations made under the *Defence Act* are subject to tabling and disallowance and able to operate with certainty and transparency.

The *Defence (Home Ownership Assistance) Scheme Act 2008* to ensure that it covers all Reserve members, regardless of the way they became a Reserve member.

Defence Force Discipline Act 1982 to enable the appointment of Chief Petty Officers and Flight Sergeants as discipline officers, to clarify the jurisdiction of discipline officers and to align the punishments available to be imposed in respect of certain ranks.

Excluding merits review

Schedule 1, Part 1, item 110V

This item outlines the scope of a *reviewable decision* for the purposes of the Defence Honours and Awards Appeals Tribunal. Subsection 110V(2) excludes decisions made before 3 September 1939 or decisions that relate to

service rendered before 3 September 1939. It seems to the Committee to be likely that this date has been selected for a specific reason, but there is no justification for the approach outlined in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** in relation to the why decisions or service prior to 3 September 1939 have been excluded from review and whether there may be a detrimental effect to any person.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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.

Privilege against self-incrimination Schedule 1, Part 1, item 110XC

Item 110XC of Schedule 1 enables the Defence Honours and Awards Appeals Tribunal to summons a person to attend and give evidence or produce documents in relation to its proceedings. Failure to comply with a summons is an offence unless the person has a reasonable excuse. Sub-item 110XC(4) provides that a reasonable excuse includes, but is not limited to, refusing to comply on the basis that giving evidence or producing a document would tend to incriminate the person. The explanatory memorandum explains (at page 7) that 'a person would also have a reasonable excuse if giving the evidence, or producing the document, would tend to render the person liable to a civil penalty or if the evidence or document was subject to legal professional privilege'.

Provisions conferring the ability to require the provision of information are of particular interest to the Committee because of their capacity to significantly trespass upon personal rights and liberties. The Committee is pleased to note that there is no abrogation of the privilege against self-incrimination

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

**Henry VIII clause
Schedule 1, Part 2, item 5**

Item 5, Schedule 1 of Part 2 of this Bill provides for the Governor-General to make regulations relating to the transition from the old Tribunal to the new Tribunal. Proposed sub-item 5(2) states ‘the provisions of this part have effect subject to any such regulations’. This appears to be a so-called Henry VIII clause, as it would enable the provisions of the legislation to be modified by regulations. The explanatory memorandum does not refer to the reasons for this approach. However, given that the powers only enable the making of a confined and temporally limited set of regulations (ie ‘dealing with matters of a transitional, saving or application nature relating to the transition from the old Tribunal to the new Tribunal’), the Committee has, in the past, accepted that this type of provision is regularly included in legislation to deal with unexpected or minor transitional matters arising after the legislation is passed.

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

**Delegations of power
Schedule 2, Part 1, items 4, 6 and 8**

These items respectively allow the Chiefs of the Army, Navy and Air Force to delegate powers relating to the investigation and discipline of personnel in relation to positive substance test results. The powers include inviting a person to give reasons why they should not be discharged and reducing a person's rank. The delegation of power can be to a person who holds the rank of Lieutenant-Colonel, Commander, Wing Commander or higher or to an APS Executive Level 1 or higher.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case the explanatory memorandum restates the content of these items (see pages 11 to 13), but does not provide a justification for the approach. The Committee therefore **seeks the Minister's advice** in relation to the need for the wide delegation.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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.

Environment Protection and Biodiversity Conservation Amendment (Public Health and Safety) Bill 2010

Introduced into the House of Representatives on 15 March 2010

Portfolio: Mr Hartsuyker

Background

This private Member's bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to:

- introduce public health and safety as one of the matters which the Minister must take into account when deciding whether or not to approve an action under the Act;
- give the issue of public health and safety prominence among matters which must be taken into account; and
- provide the Minister with an opportunity to expedite decisions when there is a serious threat to public health and safety.

The Committee has no comment on this bill.

Immigration (Education) Amendment Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Immigration and Citizenship

Background

This bill amends the *Immigration (Education) Act 1971* (the Act) to implement the new Adult Migrant English Program (AMEP) Business Model. The AMEP is the program through which English language tuition is delivered under the Act. In particular, the bill amends the Act to:

- remove annual administration fees for English courses;
- provide that New Zealand citizens who hold a special category visa may no longer be provided with English courses under the Act;
- extend the period for registering in an English course from three months to six months after a person's arrival in Australia;
- introduce a five-year timeframe to complete an English course, with an extension for clients with compassionate and compelling circumstances;
- simplify provisions relating to eligibility for English courses, including ensuring all clients provided with English courses in Australia are subject to the same eligibility restrictions;
- allow the Secretary to extend registration, commencement and completion timeframes for English courses retrospectively; and
- update the legislation to reflect current delivery arrangements.

Delayed commencement

Clause 2

Clause 2 provides that 'This Act commences on 1 January 2011.' Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

If the bill is passed during this sitting period then commencement of the bill will be delayed by longer than six months. In this case no information about the rationale of the commencement provision is included in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** about the reason for the proposed commencement date.

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

Incorporation of material by reference

Schedule 1, item 13

The purpose of the section is to allow the Minister, by legislative instrument, to 'specify procedures or standards for the purposes of the definition of *functional English*'. This will include the ability for a legislative instrument to incorporate matter 'contained in any other instrument or writing' as in force 'at a particular time' or 'from time to time'.

Justification provided in explanatory memorandum at pages 9 and 10 is that this will allow:

...the meaning of "functional English" to be further clarified by linking the term to a particular standard of English language ability (which it is intended will be an internationally recognised standard).

...

Although it is possible that the definition of the internationally recognised standard may change from time to time, this standard is widely used in second language learning and any changes to the standard would be implemented across the language learning sector. Linking the standard of "functional

English" to an internationally recognised standard provides transparency and certainty as to the standard that providers of approved English courses must use to assess a person's English.

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. In this case, the Committee is satisfied that the reason for incorporation by reference is clearly outlined in the explanatory memorandum.

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

Imported Food Control Amendment (Bovine Meat) Bill 2010

Introduced into the House of Representatives on 15 March 2010
Portfolio: Mr Oakeshott

Background

This bill amends the *Imported Food Control Act 1992* to ensure the protection of consumers against the risk of exposure to bovine spongiform encephalopathy (BSE) from imported bovine meat.

The amendments in the bill are:

- that new food labelling standard will require the packaging of any imported bovine product to clearly display to the consumer the country of origin of the meat and the last recorded case of BSE in that country; and
- that a food control certificate can not be issued for any imported bovine meat product or any imported food product that includes bovine meat unless that meat has originated from a country that has a cattle identification and tracing system for bovine meat products that are to be exported to Australia.

The Committee has no comment on this bill.

Insurance Contracts Amendment Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Treasury

Background

This bill arose out of recommendations made by a review of the *Insurance Contracts Act 1984* (the IC Act). This review was conducted by a Panel comprising Mr Alan Cameron AM and Ms Nancy Milne (the Review Panel). The Review Panel's main conclusion was that the IC Act was generally working satisfactorily to the benefit of insurers and insureds. However, the Review Panel found that some changes would be beneficial, given the passage of time since the Act was originally enacted, developments in the insurance market since that time and judicial interpretation of IC Act provisions.

The Review Panel made detailed recommendations for changes to the IC Act to address issues that had been identified as arising from the above factors. This bill gives effect to a number of the Review Panel's recommendations and amends the IC Act in Schedules 1 to 6 of the Bill.

Broadly, the amendments will:

- make some changes to the scope and application of the IC Act;
- remove the exemption for the IC Act from the Electronic Communications Act;
- provide the Australian Securities and Investments Commission a statutory right to intervene in matters arising under the IC Act and the Medical Indemnity (Prudential Supervision and Product Standards) Act 2003;
- make some changes relating to disclosure and misrepresentations;
- amend the IC Act in relation to the remedies of insurers in relation to bundled contracts of life insurance; and
- extends the IC Act in relation to third party beneficiaries.

Possible retrospective effect
Schedule 5, item 1
Schedule 6, items 25 and 36

Item 1, Part 1 of Schedule 5 inserts section 27A into the *Insurance Contracts Act 1984*, so as to amend the way in which remedies for life insurers in cases of misrepresentation or non-disclosure by insureds prior to entry into the contract are dealt with. Item 2 states that these amendments apply ‘to a contract of life insurance whether originally entered into before or after the commencement of this item’. The amendments therefore appear to have retrospective affect. The same difficulty arises in respect of the amendments inserted by (i) Schedule 6, Part 5, item 25 and (ii) some of the amendments in Schedule 6, Part 6, item 36.

In relation to each of these provisions the explanatory memorandum merely repeats the effect of items and does not consider whether any person may be adversely affected by what appears to be the retrospective operation of these provisions.

The Committee’s attention is attracted by retrospective commencement or the retrospective effect of provisions. If a Bill will have a retrospective commencement or a retrospective effect the Committee looks to the explanatory memorandum to outline the justification for this approach and whether they may have a detrimental effect on any person. The Committee therefore **seeks the Treasurer’s advice** as to whether the provisions are intended to operate retrospectively and whether this may have a detrimental affect on any person.

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

Ministers of State Amendment Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Special Minister of State

Background

This bill amends the *Ministers of State Act 1952* to increase the limit on the annual sum that can be appropriated from the Consolidated Revenue Fund, in 2009-10 and beyond, to pay the salaries of Ministers of State and provides that future increases to this limit may be made by regulation. The increase to the limit is necessary to ensure there are sufficient funds available to pay ministerial salaries at current levels (and for future financial years), and to meet any additional expenditure, such as payment of additional salary for acting arrangements.

Inappropriate delegation of legislative power

Schedule 1, item 7

This Bill increases the maximum amount which may be appropriated for Ministerial salaries and allows for this amount to be increased in the future by regulation. The appropriation of money from Commonwealth revenue is accepted to be a legislative function, thus raising the question of whether this is an appropriate delegation of legislative authority. The amendment is premised on the assumption that Parliament may validly (pursuant to section 66 of the *Constitution*) ‘provide’ for an increase in the maximum annual amount by empowering the Governor-General to regulations.

The explanatory memorandum justifies this delegation of legislative power by pointing out that on average a legislative amendment to this provision has been required every two years (since 1952) and argues that the matter may be more efficiently dealt with by regulation, given that any increase to the amount payable will be subject to disallowance and parliamentary scrutiny.

The Committee draws this provision to the attention of Senators and **leaves to the consideration of the Senate as a whole** the question of whether this is an inappropriate delegation of legislative power.

National Security Legislation Amendment Bill 2010

Introduced into the House of Representatives on 18 March 2010

Portfolio: Attorney-General

Background

This bill implements amendments to Australia's national security legislation. A process of public consultation took place and concluded in October 2009.

Many of the proposed reforms in this bill will implement the response to several independent and bipartisan parliamentary committee reviews of Australian national security and counter-terrorism legislation, which was tabled in Parliament on 23 December 2008. These reviews are:

- Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (November 2008)
- Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the Parliamentary Joint Committee on Intelligence and Security (September 2007)
- Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (December 2006), and
- Review of Seditious Laws in Australia by the Australian Law Reform Commission (July 2006).

The bill will primarily amend the *Criminal Code Act 1995*, the *Crimes Act 1914*, the *Charter of the United Nations Act 1945*, the *National Security Information (Criminal and Civil Proceedings) Act 2004*, and the *Inspector-General of Intelligence and Security Act 1986*.

Delegation of legislative power

Schedule 1, Part 1, item 15

Part 1 of Schedule 1 contains amendments relating to treason and sedition offences. The new treasons offence, inserted by item 15, depends upon the enemy being specified by Proclamation. The proposed new subsection 80.1AA(2) of the Criminal Code enables a Proclamation declaring an enemy

to be an enemy at war with the Commonwealth to take effect from a day before the day on which it is registered under the *Legislative Instruments Act 2003*. (Such a Proclamation may not, however, take effect before the day it is made (subsection 80.1AA(2)).

The Committee acknowledges the fine considerations it is sometimes necessary to balance to maintain both the security of the community and the protection of personal rights and liberties. Therefore, whether or not this provision inappropriately delegates legislative power, by allowing part of the content of an offence to be set out in a Proclamation, is a question that the Committee **leaves to the consideration of the Senate as a whole**.

In relation to the process that will be applicable to a Proclamation (which is covered by the *Legislative Instruments Act 2003*) the Committee notes that the normal rule that legislative instruments do not become enforceable until registered does not apply. The explanatory memorandum at page 8 states that:

In a national security emergency situation, where a decision is made to declare an enemy to be an enemy at war with the Commonwealth by a Proclamation...it may be desirable for the Proclamation to take effect immediately. This means that the act of assisting an enemy specified in a Proclamation could become an offence...from the time that the Proclamation is made, rather than the time that the Proclamation is registered, which can be several days after the Proclamation has been made.

The Committee understands the arguments outlined in the explanatory memorandum, but given the serious nature of this offence the Committee **seeks the Attorney-General's advice** about the justification for this approach and whether the legislation may provide for other mechanisms by which the public may be adequately notified of a Proclamation declaring an enemy to be an enemy at war with the Commonwealth, especially in the period after the Proclamation is made and before its registration under the *Legislative Instruments Act 2003* is finalised.

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

Reversal of onus of proof

Schedule 1, Part 1, proposed subsection 80.1AA(6)

The new subsection 80.1AA(6) makes it a defence of an offence of treason that the conduct is engaged in for the purposes of the provision of aid or humanitarian assistance. The explanatory memorandum does not state why it is appropriate that the defendant bear the onus of proof in relation to this aspect of the criminal offence. The *Guide to Framing Commonwealth Offences* indicates that any reversal needs to be well justified. The Committee therefore **seeks the Attorney-General's advice** about the justification for placing the evidentiary onus on the defendant in relation to this element of the offence.

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

Freedom of speech

Schedule 1, Part 2, item 35

Item 35, Part 2 of Schedule 1, introduces new offences of 'urging violence against groups' and 'members of groups' which are distinguished by national or ethnic origin. Although these offences obviously encroach upon freedom of speech, a right which is often said to be recognised as fundamental by the common law and which also is protected constitutionally in relation to speech which is thought to amount to 'political communication', the question of whether this is a proportionate and justified response, in light of the objectives of the amendments, is a question that the Committee **leaves to the consideration of the Senate as a whole.**

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

Possible insufficient parliamentary scrutiny Schedule 2, item 3

Schedule 2, item 3 has the effect of increasing the period of effect of a regulation which lists a terrorist organisation from 2 to 3 years. Item 4 provides that this extended period applies to a listing of an organisation under the old provision where that listing was immediately in force before the commencement of the new law. The explanatory memorandum does not explain why it is necessary that the extended period should apply in relation to organisations listed under the old law. By extending the time period beyond 2 years this amendment has the effect of removing the parliamentary oversight at the time that it would have been expected when the regulation was originally adopted.

As there are significant offences connected to the activities of listed terrorist organisations, the Committee **seeks the Attorney-General's advice** about the justification for applying this amendment to listings made before the commencement of this item.

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.

Trespass on personal rights and liberties Schedule 3

Part 1C of the Crimes Act sets out the investigation powers of law enforcement officers when a person has been arrested for a Commonwealth offence. As the explanatory memorandum states (at page 20), Part 1C was amended in 2004 by the Anti-Terrorism Act 2004 and:

...the purpose of the amendments was to provide for a longer investigation period for investigations of terrorism offences and provide for additional types of time which were excluded from the investigation period.

Deficiencies in the provisions in Part 1C were considered as part of the Clarke Inquiry into the Case of Dr Mohamed Haneef (November 2008) and Schedule 3 will amend Part 1C in response to the findings of the Clarke Report (see explanatory memorandum page 20).

It is an inherent aspect of many of these provisions that they trespass on personal rights and liberties. The Committee acknowledges, however, that these amendments are intended to 'clarify and improve the practical operation' (explanatory memorandum page 1) of the existing law in 'direct response to the issues raised in the Clarke inquiry' (Minister's second reading speech). The Committee draws these provisions to the attention of the Senate and notes that they trespass on personal rights and liberties, but leaves the question of whether they do so unduly to the **consideration of the Senate as a whole**.

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.

Trespass on personal rights and liberties

Schedule 4, item 4

Item 4 of Schedule 4 inserts a new section 3UEA into the *Crimes Act 1914*. The new provision will enable a police officer to enter premises (and conduct related searches and to seize relevant things) without a warrant if the police officer suspects, on reasonable grounds, that it is necessary in order to prevent something on the premises from being used in connection with a terrorism offence and that there is a serious and imminent threat to a person's life, health or safety. Under the proposed subsection 3UEA(7) the occupier of the premises must be notified that entry has taken place if they are not there. However, there is no requirement that senior executive authorisation be required nor that the exercises of these powers be supervised by general reporting requirements to the Parliament.

The Committee again acknowledges the fine considerations it is sometimes necessary to balance to maintain both the security of the community and the protection of personal rights and liberties. However, given the scope and importance of the proposed powers, the Committee is concerned to ensure that an appropriate balance is struck. The Committee therefore **seeks the Attorney-General's advice** about the whether the emergency situations envisaged are inconsistent with alternative forms of accountability such as requiring senior executive authorisation or that the exercises of these powers be supervised by general reporting requirements to the Parliament.

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

Trespass on personal rights and liberties Schedule 8, items 36, 37, 79 and 80

These items relate to the ability of the Attorney-General to issue a certificate that constitutes conclusive evidence that disclosure of particular information in a proceeding is likely to prejudice national security. The proposed provisions will amend the Attorney-General's existing ability to issue a conclusive certificate contained in section 27 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*. The explanatory memorandum states at page 68 that the proposed amendments are 'consequential to the proposed repeal and replacement of the definition of 'federal criminal proceedings' within section 14 (Item 11)'. A court will retain its existing ability to determine whether the material the subject of the conclusive certificate is able to be disclosed (section 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).

Items 79 and 80 contain consequential amendments proposed to the existing power granted to the Attorney-General under section 38H of the *National Security Information (Criminal and Civil Proceedings) Act 2004* to give a certificate preventing a person from calling a witness in a proceeding who will disclose national security information by his or her mere presence. The explanatory memorandum states at page 75 that these amendments are consequential 'as a result of proposed amendments to section 38D which will extend the notification obligations to parties' legal representatives as well as to the parties themselves (item 67)'.

It is again an inherent aspect of these provisions that they trespass on personal rights and liberties. However, the Committee notes that the purpose of the amendments is to make consequential changes to existing provisions. The Committee draws these provisions to the attention of the Senate and notes that they trespass on personal rights and liberties, but leaves the question of whether they do so unduly to the **consideration of the Senate as a whole**.

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.

Inappropriately delegate legislative power Schedule 8, items 103 and 107

Items 103 and 107 of Schedule 8 insert two new offences into part 5 of the *National Security Information Act*: the proposed sections 45A and 46FA. These offences will make it an offence to contravene the NSI regulations (made under sections 23 and 38C) in civil and criminal proceedings.

The explanatory memorandum justifies a penalty of 6 months imprisonment—despite the fact that substantial components of the offences are contained in the Regulations—by reference to the serious consequences which may be consequent on failures to comply with requirements relating to the storage, handling and destruction of national security information in civil and criminal proceedings. The explanatory memorandum adds (at page 79) ‘without a sufficient penalty the offence will not act as a sufficient deterrent against failing to comply with the requirements of the Regulations.’

Nevertheless, the explanatory memorandum (at pages 63 and 72) does not explain why it is necessary to delegate legislative power in relation to the storage, handling and destruction of national security information. Given that failure to comply with the Regulations is an offence which carries with it a penalty of imprisonment the Committee **seeks the Attorney-General's advice** about the justification for the proposed approach.

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

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee so they may be taken into account during that inquiry.

Parliamentary Joint Committee on Law Enforcement Bill 2010

Introduced into the House of Representatives on 18 March 2010

Portfolio: Attorney-General

Background

This bill establishes the Parliamentary Joint Committee on Law Enforcement (PJC-LE). The bill sets out the functions and administrative arrangements for the PJC-LE. The PJC-LE will be established by renaming and extending the functions of the current Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC).

The PJC-LE will be responsible for providing broad Parliamentary oversight of the Australian Federal Police (AFP) and the Australian Crime Commission (ACC). The bill will create a clear obligation for the CEO of the ACC and the Commissioner of the AFP to comply with a request for information from the PJC-LE unless the request relates to sensitive information. The PJC-LE will also examine trends and changes in criminal activities, and inquire into any question in connection with its functions that is referred to the PJC-LE by either House of Parliament.

As the PJC-LE will replace the current PJC-ACC, the provisions relating to the PJC-ACC in Part III of the *Australian Crime Commission Act 2002* (ACC Act) will be repealed and replaced by the provisions in this bill. The consequential amendments and the transitional arrangements are included in Schedule 10 of the National Security Legislation Amendment Bill 2010.

The Committee has no comment on this bill.

Social Security and Indigenous Legislation Amendment (Budget and Other Measures) Bill 2010

Introduced into the House of Representatives on 18 March 2010

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

The bill provides for the following amendments to be made:

Carer allowance

- From 1 July 2010, only one assessment tool will be used for both carer payment and carer allowance being paid to a person caring for a child aged under 16; and
- In certain circumstance a person remain qualified for carer allowance to be paid three months after a child has turned 16.

Income management regime

- Makes minor improvements to the income management provisions in the social security law, on administrative matters such as appropriation, debt recovery and financial transactions.

Aboriginal and Torres Strait Islander Land Account

- Provides for a minimum guaranteed annual payment of \$45 million from 1 July 2010, which will be indexed for later years according to the Consumer Price Index; and
- Makes additional payments to the Indigenous Land Corporation where the actual capital value of the Aboriginal and Torres Strait Islander Land Account exceeds the real capital value of the account; and
- Introduces an independent review of the effectiveness of the funding arrangements after three years.

The Committee has no comment on this bill.

Tax Laws Amendment (2010 GST Administration Measures No.2) Bill 2010

Introduced into the House of Representatives on 18 March 2010

Portfolio: Treasury

Background

These amendments to the bill arose from the recommendations of the Board of Taxation in its review of the legal framework for the administration of the GST.

Schedule 1 amends:

- the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and the *Taxation Administration Act 1953* (TAA 1953) to allow entities to self assess their eligibility to form, change and dissolve a goods and services tax (GST) group or GST joint venture and to do so at any time during a tax period; and
- the TAA 1953 and the GST Act to allow members of a GST group and participants in a GST joint venture to enter into an indirect tax sharing agreement with a representative member or a joint venture operator respectively in relation to their indirect tax law liabilities.
- Schedule 2 amends the *Taxation Administration Act 1953*, the *A New Tax System (Goods and Services Tax) Act 1999*, the *Excise Act 1901* and the *Income Tax Assessment Act 1997* to include indirect tax rulings and excise advice in the general rulings regime.
- Schedule 3 amends the *A New Tax System (Goods and Services Tax) Act 1999* to simplify the requirements for a document to be a tax invoice.

The Committee has no comment on this bill.

Tax Laws Amendment (2010 Measures No.2) Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Treasury

Background

This bill amends various taxation laws.

Schedule 1 amends the non-commercial loan rules in Division 7A of the *Income Tax Assessment Act 1936* to prevent a shareholder of a private company (or an associate of the shareholder) accessing tax-free dividends from the provision of company assets, for less than their market value.

Other technical amendments have also been made to non-commercial loan rules to ensure that they operate in accordance with their original policy intent and cannot be circumvented by the use of a closely held corporate limited partnership or interposed entities.

Schedule 2 amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to extend the existing arrangements for tax file number (TFN) withholding to cover closely held trusts, including family trusts. The information collected by the Australian Taxation Office (ATO) under these amendments will facilitate data-matching and allow the ATO to check whether the assessable income of beneficiaries of these trusts correctly includes their share of the net income of the trust.

Schedule 3 amends the *Income Tax Assessment Act 1997* to exempt from income tax the Higher Education Contribution Scheme-Higher Education Loan Programme benefit (HECS-HELP benefit). The benefit gives eligible recipients a reduction in their compulsory HECS debt repayment and/or their HELP debt repayment or, in some cases where a repayment is not required due to low income, a direct reduction in their HELP debt.

Schedule 4 amends the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients (DGRs) to include two new entities, and extend the period for which another DGR may collect deductible gifts.

Schedule 5 amends the *Income Tax Assessment Act 1997* to make the Global Carbon Capture and Storage Institute Limited income tax exempt for a four-year period.

Schedule 6 amends various taxation laws to repeal over 100 unlimited amendment periods. As result, a number of provisions which provide the Commissioner of Taxation with an indefinite time to amend taxpayers' assessments are replaced with provisions that have certain finite periods.

Legislation by press release

Division 7A

Retrospective commencement

Schedule 1, item 35; Schedule 3, item 4; Schedule 5, item 1

This Bill contains measures in relation to the 'non-commercial loan rules' in Division 7A of the *Income Tax Assessment Act 1936*. The amendments apply from 1 July 2009. The explanatory memorandum notes (page 3) that the measures were announced by Media Release on 12 May 2009 (Budget night).

The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the Executive. While the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process, a similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

The Committee has regularly been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced. In this case the legislation has been introduced 10 months after these measures were announced.

The Bill also contains a number of other measures which are to take effect prior to commencement. However these all appear to be beneficial as they relate to: (i) an exemption from income tax of a benefit received; (ii) the addition of entities who qualify as 'deductible gift recipients'; and (iii) making a particular entity income tax exempt for a period of four years.

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

Retrospective commencement

Item 2 and Schedule 5, Part 1, item 1

Delayed commencement

Item 2 and Schedule 5, Division 2, Part 2

Schedule 5 amends the *Income Tax Assessment Act 1997* to make the Global Carbon Capture and Storage Institute Limited income tax exempt for a four-year period from 1 July 2009 until 30 June 2013. The exemption will commence retrospectively, however, it will have a beneficial effect.

Although the exemption will cease to have effect from July 2013, item 2 provides that the sun-setting of the provision (removal of the provision from the statute) will not take place until 1 January 2018, which in effect means that its commencement is delayed from 1 July 2013 until 30 December 2017.

Although this will have no detrimental effect, it is not clear to the Committee why the provision is being retained for a long period of time after it becomes inoperative. The Committee would have appreciated some commentary about the proposed approach in the explanatory memorandum.

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

Tax Laws Amendment (Transfer of Provisions) Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Treasury

Background

This bill rewrites provisions from the *Income Tax Assessment Act 1936* into the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*. This is a significant step towards achieving a single income tax assessment Act for Australia.

The rewritten provisions are:

- Part VI (collection and recovery provisions);
- Schedule 2C (commercial debt forgiveness);
- Schedule 2E (luxury car leases);
- Schedule 2G (farm management deposits); and
- Schedule 2J (general insurance).

The rewritten provisions generally make no policy changes. However, they include the drafting changes needed to conform to the legislative approach used in the *Income Tax Assessment Act 1997*, to simplify expression, and to remove any ambiguity.

The Committee has no comment on this bill.

Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010

Introduced into the House of Representatives on 18 March 2010
Portfolio: Broadband, Communications and the Digital Economy

Background

The bill amends the *Telecommunications Act 1997* to provide a legislative framework for the installation of optical fibre and fibre-ready telecommunications infrastructure in new developments in Australia from 1 July 2010.

Determination of important matters by regulation Various

There are a number of provisions in the bill that delegate significant legislative power in relation to this scheme. For example, proposed section 372B will allow the Minister, by legislative instrument, to specify conditions in relation to, or grant exemptions from, the requirement to install optical fibre lines to building lots.

The explanatory memorandum states at page 34 that:

The ability for the Minister to specify in a legislative instrument conditions that must be satisfied...is intended to enable the specification of the characteristics, features, performance requirements, methods of installation or other matters relating to the optical fibre infrastructure to be installed in a project area, in both general terms (eg necessary outcomes) and, if required, to a high degree of specificity.

On its face each of the provisions delegating legislative power appears appropriate, especially given the highly technical nature of the subject matter. However, the number of provisions which delegating legislative power mean that collectively significant portions of the scheme are left to be determined in future delegated legislation. The Minister's Second Reading Speech appears to acknowledge this as the purpose of the bill is described as being 'to provide a legislative framework for the scheme'.

In its *Seventy-Seventh Report* and *40th Parliament Report* the Regulations and Ordinances Committee set out criteria for determining whether matters should be more appropriately included in a bill rather than in delegated legislation. These include whether the delegated legislation amounts to a fundamental change in the law which alters rights, obligations and liabilities or if the delegated legislation would be a lengthy and complex document.

The Committee notes the highly technical nature of many aspects of the scheme and the description of the bill as 'framework legislation', but is concerned to ensure that as much information as possible is available in the primary legislation. Therefore, the Committee **seeks the Minister's advice** about whether more details of the scheme, such as the 'necessary outcomes' sought from the scheme (referred to on page 34 of the explanatory memorandum in relation to proposed section 372B) can be included in the primary legislation.

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

Territories Law Reform Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Home Affairs

Background

This bill amends a range of Commonwealth legislation to improve Norfolk Island's governance arrangements and strengthen the accountability of the Norfolk Island Government. The bill provides for the reform of the electoral system of Norfolk Island and establishes a new financial management framework. The bill also amends administrative law legislation to strengthen the transparency and accountability of the Norfolk Island Government and public sector.

The bill also implements changes to the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1995* to provide a vesting mechanism for powers and functions under Western Australian laws applied in the Territories.

Insufficiently defined administrative power Schedule 1, item 39

Item 39 of Schedule 1 of this Bill confers a broad discretionary power on the Administrator of Norfolk Island to dismiss a member of the Legislative Assembly from office if the member has engaged, or is engaging, in (a) seriously unlawful conduct or (b) grossly improper conduct. The explanatory memorandum does not explain the need for this power, nor why it is not possible to specify with more precision the nature of the unlawful or improper conduct which may lead to its exercise. The Committee **seeks the Minister's advice** about whether more legislative guidance about the intended scope and operation of the provision can be provided.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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.

Henry VIII Schedule 1, item 53

Item 53 of Schedule 1 amends subsection 67(2) of the *Norfolk Island Act* so as to effect a relatively minor change in the circumstances in which regulations which repeal or alter an item in Schedule 2 or 3 of the Act take effect. Technically, section 67 is a Henry VIII clause as the Schedules to the Act can be changed by the Regulations. The Committee notes, however, that a change can only take place once the Norfolk Island Legislative Assembly has agreed to the content of the regulations (see pages 17 and 18 of the explanatory memorandum).

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

Determination of important matters by regulation Schedule 1, Part 2, items 82 and 83

Item 83 of the Schedule 1 amendments provides for the making of regulations in relation to the determination of the method and manner in which votes are to be cast and counted in elections for the Norfolk Island Legislative assembly and related matters. The explanatory memorandum states that these amendments allow ‘flexibility in determining an electoral system’ and that they allow scope for matters related to this issue to be considered at a later time. The need for ‘flexibility’ is not explained in the explanatory memorandum.

Given the importance of the electoral laws to the integrity of any system of government, the Committee is concerned that these are matters more appropriately dealt with in primary legislation. The Committee therefore **seeks the Minister’s advice** about the justification for the proposed approach.

Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Determination of important matters by regulation
Schedule 1, Part 4, item 130

This item will insert subsection 25(2) into the *Norfolk Island Act 1979*. It states that regulations may provide that applications may be made to the Administrative Appeals Tribunal for review of decisions made in the exercise of powers conferred by a Norfolk Island enactment. The explanatory memorandum (at page 39) describes the effect of the proposed provision, but does not explain why the ability to access administrative review is discretionary. The Committee **seeks the Minister's advice** about the justification for the approach and whether AAT jurisdiction can be conferred in the primary legislation.

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

Therapeutic Goods Amendment (2010 Measures No.1) Bill 2010

Introduced into the House of Representatives on 17 March 2010
Portfolio: Health and Ageing

Background

This bill makes a series of amendments to the *Therapeutic Goods Act 1989* (the Act). These include:

- a system for approving the supply of medical devices that are not on the Australian Register of Therapeutic Goods (the Register) to act as substitutes for devices that are on the Register but are unavailable or in short supply;
- a provision to allow listing on the Register of export-only variations of registered or listed medicines;
- amendments to provisions relating to permissible ingredients for inclusion in medicines;
- amendments relating to the information that may be considered by the Minister when reviewing initial decisions under the Act; and
- other minor amendments.

Incorporating material by reference

Schedule 2, item 3, proposed subsection 26BB(7)

The explanatory memorandum states at page 6 that subsection 26BB(1) empowers the Minister by legislative instrument, to make a determination specifying ingredients (paragraph (a)) and restrictions in relation to those ingredients being contained in medicines (paragraph (b)). Subsection (6) also empowers the Minister to make a determination specifying ingredients that must not be specified under paragraph (1)(a).

The effect of subsection 26BB(7) is that a determination made under section 26BB may refer to other instruments or documents 'as in force or existing from time to time.'

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. In this case, no explanation for the need for these determinations to incorporate material by reference to other instruments or documents is outlined in the explanatory memorandum. Therefore, the Committee **seeks the Minister's advice** about the justification for this approach.

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.

Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Treasury

Background

This bill amends the *Trade Practices Act 1974* (TP Act) to complete the initial text of the Australian Consumer Law (ACL), to make related amendments to the TP Act, the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the *Corporations Act 2001* (Corporations Act) and to make consequential amendments to other Commonwealth Acts.

The bill will deliver the agreements of the Council of Australian Government (COAG) made on July 2008 and October 2008, to create a single national consumer law for Australia, including a national product safety law. The Trade Practices Amendment (Australian Consumer Law) Bill 2009 (first ACL Bill) will implement the first tranche of these reforms.

The first ACL Bill creates a new Part XI of the TP Act, which makes provision for the application, administration and amendment of the ACL. The text of the ACL is contained in Schedule 2 of the TP Act. The first ACL Bill will also implement the new national unfair contract terms law.

This bill will complete the initial text of the ACL by:

- incorporating the fair trading and consumer protection provisions of the TP Act into the ACL, including unfair contract terms and provisions implementing enhanced enforcement powers, penalties and redress options;
- creating a national legislative scheme for consumer product safety, to replace the existing Commonwealth, State and Territory regulatory schemes;
- creating a national legislative scheme for statutory consumer guarantees, to replace the existing Commonwealth and State and Territory legislation concerning implied conditions and warranties in consumer transactions; and

- augmenting the fair trading and consumer protection provisions of the TP Act with changes drawn from existing provisions of the consumer laws of the States and Territories, as agreed by the Ministerial Council on Consumer Affairs (MCCA) at its meeting on 4 December 2009.

The bill also creates an infringement notice regime that will apply to specified provisions of the ACL. The infringement notice regime will be a law of the Commonwealth but may be used as the basis for provisions in the application Act of a State or Territory to complement enforcement of the ACL in that jurisdiction. The infringement notice provisions are not included in the ACL as some States have their own State-wide infringement notice schemes.

In addition, the bill implements other measures:

- changing the name of the TP Act to the *Competition and Consumer Act 2010* (CC Act) and making necessary consequential changes to the TP Act and other Acts;
- amending the consumer protection provisions of the ASIC Act and Corporations Act, where relevant, to maintain consistency with the ACL;
- providing for Commonwealth-specific enforcement and administrative provisions, to enable Commonwealth agencies and judicial bodies to enforce the ACL as a law of the Commonwealth; and
- making changes to the enforcement powers for Part IVB of the TP Act, which implements key elements of the Australian Government's response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry *Opportunity not opportunism: improving conduct in Australian franchising*.

General Comment

In its scrutiny of this bill, the Committee has taken into consideration that its purpose is primarily consolidating and nationalising well-tested provisions from existing consumer protection legislation (as described in pages 3 and 4 of the EM).

Rebuttable presumption
Schedule 1, section 70

This item establishes a rebuttable presumption that in specified circumstances an agreement is presumed to be an unsolicited consumer agreement. The Committee notes that the presumption is relevant only in the context of civil proceedings and that the explanatory memorandum contains a thorough outline of the effect of the provision and justification for its use.

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

Privilege against self-incrimination
Schedule 2, item 133E

Proposed item 133E removes the privilege against self-incrimination in relation to disclosure notices relating to the safety of goods or services by providing that a person is not excused from responding to a disclosure notice on the ground that it might tend to incriminate the person or expose them to a penalty. However, the information given is not admissible in evidence against the individual.

The explanatory memorandum at pages 404 and 405 comprehensively explains both the effect and the justification for the approach and given the serious safety issues involved and the fact that information provided is not admissible against the person, the Committee is satisfied that any trespass on personal rights and liberties is not undue.

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

Explanatory Memorandum errors
Chapter 16; Schedule 2, proposed sections 133E and 137F

There appear to be some minor errors in the cross-referencing of the explanatory memorandum. The Committee **draws these to the Treasurer's attention** and notes that if there is an opportunity to correct them it will assist readers to readily access the explanatory memorandum information relevant to these provisions. The errors identified are:

- **Chapter 16** - references in the chapter to Part 5-2 should be to Part 5-3 (emphasis added);
- **Schedule 2, item 133E** – this section about self incrimination is discussed in the explanatory memorandum at paragraph 19.47, but there is no cross-reference to the item number; and
- **Schedule 2, item 137F** – the explanatory memorandum at pages 389 and 390 mistakenly refer to section 137K instead of 137F (emphasis added).

Water (Crisis Powers and Floodwater Diversion) Bill 2010

Introduced into the Senate on 18 March 2010

Portfolio: Senators Xenophon and Hanson-Young

Background

This private Senators' bill seeks to introduce measures where, in periods of extreme crisis, the Murray-Darling Basin Authority is given the power to manage the water resources of the Basin as a single system.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Aviation Transport Security Amendment (2009 Measures No.1) Bill 2009

On 18 March 2010 an addendum to the explanatory memorandum relating to the bill was tabled in the Senate. The addendum provides an explanation of the commencement by Proclamation for item 2 of the commencement table.

This matter was raised with the Minister by the Committee last year and the Minister undertook to include an explanation in the explanatory memorandum (see *Alert Digest No 9 of 2009* and *Reports 10 and 12 of 2009* for details).

The Committee acknowledges the Minister's action and thanks him for finalising this matter.

Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

On 18 March 2010 a supplementary explanatory memorandum was tabled in the Senate. On the same day two government amendments were agreed to in the Senate and subsequently in the House of Representatives. The amendments implement the recommendation of the Legal and Constitutional Affairs Legislation Committee report into the Bill to require the consent of the Attorney-General to take proceedings against a person under 18.

Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009

On 16 March 2010 a supplementary explanatory memorandum was tabled in the Senate. The Senate then agreed to four government amendments to the bill which the House of Representatives subsequently agreed to on the same day.

Independent National Security Legislation Monitor Bill 2010

On 17 March 2010 the House of Representatives tabled a revised explanatory memorandum to the bill, the content of which does not fall within the Committee's terms of reference.

Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009 and Midwife Profession Indemnity (Run-Off Cover Support Payment) Bill 2009

On 16 March 2010 a replacement explanatory memorandum for the two bills and a supplementary explanatory memorandum for the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009 were tabled in the Senate.

Social Security and Other Legislation Amendment (Income Support for Students) Bill 2009 [No.2]

On 17 March 2010 a supplementary explanatory memorandum was tabled in the Senate. The Senate then agreed to 14 government amendments to the bill which the House of Representatives subsequently agreed to on the same day.

Although the legislation has already been passed by both Houses of Parliament the Committee's comments about some of these amendments are drawn to the attention of Senators for information.

**Delegation of legislative authority
Standing appropriation
Amendment 12**

This amendment will insert new Chapter 2BA into the Act to provide for a 2.5-year \$20 million scheme for higher education assistance for rural and regional students. The bill provides some limited advice about possible aspects of the scheme, but the actual content of the scheme is to be established by legislative instrument. The Committee is concerned about the level of legislative scrutiny for this scheme and about the justification for it being established by legislative instrument rather than being included in primary legislation.

The allocation of \$20 million for the scheme outlined in the amendment also amounts to increased expenditure under the *Social Security (Administration) Act 1999* standing appropriation.

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 appropriated or a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to the Parliament.

It is clear from page 5 of the supplementary explanatory memorandum that the purpose of the \$20 million expenditure is to establish a 2.5-year scheme. However, the amendment also provides at 1061ZZFW(3) that the Minister may vary the scheme by legislative instrument, except to reduce the amount of the expenditure or to delay the start of the scheme.

Textile, Clothing and Footwear Strategic Investment Program Amendment (Building Innovative Capability) Bill 2009

On 18 March 2010 the Senate agreed to two amendments to the bill and on the same day the House of Representatives also agreed to these amendments. Neither of the amendments falls within the Committee's terms of reference.

**Therapeutic Goods Amendment (2009 Measures No.3) Bill 2009
Therapeutic Goods (Charges) Amendment Bill 2009**

On 17 March 2010 the House of Representatives tabled a correction to the explanatory memorandum, the content of which does not fall within the Committee's terms of reference.

Trade Practices Amendment (Australian Consumer Law) Bill 2009

On 16 March 2010 a supplementary explanatory memorandum relating to the government amendments and corrections to the explanatory memorandum to the bill were tabled. On 17 March 2010, the Senate agreed to 67 government amendments to the bill and the House of Representatives also agreed to these. None of the amendments 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.

Bill/Act	Section/Subsection	Offence	Penalty
Building Energy Efficiency Disclosure Bill 2010	39(3)	Failure to comply with an auditor's requirement to answer questions or produce documents relating to assessment methods and standards used by an accredited assessor	30 penalty units
	50	Failure to comply with a s.49 notice from the Secretary to provide information or documents relating to whether a civil penalty has been complied with	30 penalty units

Defence Legislation Amendment Bill 2010	110XC	Failure to comply with a summons to attend before the Defence Honours and Awards Tribunal to give evidence or produce documents	6 months or 30 penalty units
--	-------	---	---------------------------------

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

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

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

Building Energy Efficiency Disclosure Bill 2010

This bill provides for the establishment of a new national scheme for the disclosure of commercial office building energy efficiency agreed to by the Council of Australian Governments on 2 July 2009 under the National Strategy on Energy Efficiency. The parameters of an initial scheme for office buildings were subsequently agreed to by the Ministerial Council on Energy on 2 November 2009, including that the scheme be enacted through Commonwealth legislation.

Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010

This bill will deliver the agreements of the Council of Australian Government (COAG) made on July 2008 and October 2008, to create a single national consumer law for Australia, including a national product safety law. The Trade Practices Amendment (Australian Consumer Law) Bill 2009 (first ACL Bill) will implement the first tranche of these reforms.

SCRUTINY OF STANDING APPROPRIATIONS

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

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

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

Bills introduced with standing appropriation clauses – 42nd Parliament

* Indicates new entries

P Indicates bills passed by the Senate

N Indicates bills negated by the Senate

P	Asian Development Bank (Additional Subscription) Bill 2009 — clause 6
N	Australian Business Investment Partnership Bill 2009 — clauses 13 and 14
	Australian National Preventive Health Agency Bill 2009 — clause 50 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
P	Automotive Transformation Scheme Bill 2009 — clause 10
P	Car Dealership Financing Guarantee Appropriation Bill 2009 — clause 5
N	Carbon Pollution Reduction Scheme Bill 2009 — subclauses 103B(5), 139(4) and 291(4)
N	Carbon Pollution Reduction Scheme Bill 2009 [No. 2] — subclauses 103B(5), 139(4) and 291(4)

	Carbon Pollution Reduction Scheme Bill 2010 — subclauses 103B(5), 139(4) and 291(4)
P	COAG Reform Fund Bill 2008 — clause 5 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
P	Commonwealth Securities and Investment Legislation Amendment Bill 2008 — Schedule 1, item 10, subsection 5BA(7)
	ComSuper Bill 2010 — clause 21 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
P	Defence Home Ownership Assistance Scheme Bill 2008 — clause 84
P	Dental Benefits Bill 2008 — clause 65
P	Education Legislation Amendment Bill 2008 — Schedule 1, item 6, section 14B
P	Fair Work Bill 2008 — subclause 559(4)
P	Family Assistance Legislation Amendment (Child Care) Bill 2010 — Schedule 6, item 1
P	Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008 — Schedule 1, item 29
P	Federal Financial Relations Bill 2009 — clause 22
P	Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009 — Schedule 4, subitem 2(3)
P	Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008 — Schedule 1, item 49, section 54A, and Schedule 2, item 23, section 70E (SPECIAL ACCOUNTS: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
P	Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008 – – Schedule 1, item 79, section 94B (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
	Governance of Australian Government Superannuation Schemes Bill 2010 – – paragraphs 33(1)(b), 33(2)(b), and 34(3)(a), and subsection 34(4)

P	Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 — Schedule 5, item 141, section 65A
P	Guarantee of State and Territory Borrowing Appropriation Bill 2009 — clause 5
P	Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008 — clause 5
P	International Monetary Agreements Amendment (Financial Assistance) Bill 2009 — Schedule 1, item 4, subsection 8CA(4)
P	Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009 — subclause 43(2), clause 70, and subclause 78(2)
P	Nation-building Funds Bill 2008 — clauses 13, 61, 68, 75, 82, 132, 181, 188, 215 and 255 (SPECIAL ACCOUNTS: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
P	National Consumer Credit Protection Bill 2009 — Schedule 1, subclause 115(2)
	Occupational Health and Safety and Other Legislation Amendment Bill 2009 — Schedule 3, Part 2, subitem 10(5)
P	Protection of the Sea Legislation Amendment Bill 2008 — Schedule 1, item 20, section 46N
P	Safe Work Australia Bill 2008 — clause 64 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>) [bill laid aside by House of Representatives on 4 December 2008]
P	Safe Work Australia Bill 2008 [No. 2] — clause 64 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
P	Schools Assistance Bill 2008 — clause 167
P	Textile, Clothing and Footwear Strategic Investment Program Amendment (Building Innovative Capability) Bill 2009 — Schedule 1, item 32, section 37ZO
P	Uranium Royalty (Northern Territory) Bill 2008 — clause 18

P	Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008 — Schedule 1, item 1
P	Wheat Export Marketing Bill 2008 — clause 58 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)

Other relevant appropriation clauses in bills

N	Household Stimulus Package Bill 2009 — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).
P	Household Stimulus Package Bill (No. 2) 2009 — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).
P	Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008 — Schedule 4, subitem 1(4): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).
P	Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008 — Schedule 2, subitems 1(4) and 2(4), and Schedule 4, subitem 1(4): special appropriation clauses – for a finite period of time (i.e. for circumstances arising in a particular financial year).