

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

**Alert Digest No. 8 of 2010**

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# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator G Marshall

Senator L Pratt

Senator R Siewert

Senator the Hon J Troeth

## Terms of Reference

### Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



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

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

## **Bills reintroduced**

A number of bills introduced in the Senate in the previous Parliament have been reintroduced. The Committee has dealt with many of these bills in previous reports and digests, as indicated below.

A document which consolidates all of the previous *Alert Digest* and *Report* comments for each of the Bills referred to below is available online at: <http://www.aph.gov.au/senate/committee/scrutiny/index.htm>.

### **Airports Amendment Bill 2010**

See below in this *Alert Digest*

### **Alcohol Toll Reduction Bill 2010**

See *Digest No.1 of 2008*

### **Anti-Terrorism Laws Reform Bill 2010**

See *Report No.10 of 2009*

### **Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010**

See *Digest No.1 of 2010*

### **Australian Civilian Corps Bill 2010**

See below in this *Alert Digest*

### **Australian National Preventive Health Agency Bill 2010**

See *Report No.12 of 2009*

### **Autonomous Sanctions Bill 2010**

See *Digest No.6 of 2010*

### **Aviation Crimes and Policing Legislation Amendment Bill 2010**

See below in this *Alert Digest*

### **Banking Amendment (Delivering Essential Financial Services) Bill 2010** *formally Banking Amendment (Delivering Essential Financial Services for the Community) Bill 2010*

See *Digest No.7 of 2010*

**Building and Construction Industry (Restoring Workplace Rights) Bill 2010**

*See Digest No.8 of 2008*

**Carer Recognition Bill 2010**

*See Digest No.5 of 2010*

**Civil Dispute Resolution Bill 2010**

*See Digest No.7 of 2010*

**Commonwealth Commissioner for Children and Young People Bill 2010**

*See Digest No.6 of 2010*

**Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2010**

*See Digest No.4 of 2008*

**Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010**

*See Report No.4 of 2009 and also see below in this Alert Digest*

**Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2010**

*See Digest No.11 of 2008*

**Corporations Amendment (No.1) 2010**

*See below in this Alert Digest*

**Corporations Amendment (Sons of Gwalia) 2010**

*See Digest No.6 of 2010*

**Crimes Legislation Amendment Bill 2010**

*See below in this Alert Digest*

**Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2010**

*See Digest No.10 of 2008*

**Defence Legislation Amendment (Security of Defence Premises) Bill 2010**

*See below in this Alert Digest*



**Drink Container Recycling Bill 2010**

See *Digest No.2 of 2008*

**Environment Protection and Biodiversity Conservation Amendment (Prohibition of Support for Whaling) Bill 2010**

See *Digest No.2 of 2010*

**Environment Protection (Beverage Container Deposit and Recovery Scheme)**

See *Report No.6 of 2009*

**Fair Work Amendment (Paid Parental Leave) Bill 2010**

See *Digest No.6 of 2009*

**Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2010**

See *Digest No.14 of 2009*

**Family Assistance Legislation Amendment (Child Care Budget Measures) Bill 2010**

See *Digest No.6 of 2010*

**Financial Framework Legislation Amendment Bill 2010**

See below in this Alert Digest

**Fisheries Legislation Amendment Bill (No.2) 2010**

See *Digest No.6 of 2010*

**Food Safety (Trans Fats) Bill 2010**

See *Digest No.5 of 2009*

**Food Standards Amendment (Truth in Labelling – Palm Oil) Bill 2010**

See *Digest No.1 of 2010*

**Food Standards Australia New Zealand Amendment Bill 2010**

See *Report No.8 of 2010*

**Health Insurance Amendment (Pathology Requests) Bill 2010**

See *Digest No.2 of 2010*

**Higher Education Legislation Amendment (Student Services and Amenities) Bill 2010**

*See Digest No.12 of 2009*

**Higher Education Support Amendment (FEE-HELP Loan Fee) Bill 2010**

*See Digest No.2 of 2010*

**Human Rights (Parliamentary Scrutiny) Bill 2010**

*See Digest No.6 of 2010*

**Human Rights (Parliamentary Scrutiny)(Consequential Provisions) Bill 2010**

*See Digest No.6 of 2010*

**Income Tax Rates Amendment (Research and Development) Bill 2010**

*See Digest No.6 of 2010*

**International Tax Agreements Amendment Bill (No.2) 2010**

*See below in this Alert Digest*

**Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2010**

*See Digest No.1 of 2009*

**Marriage Equality Amendment Bill 2010**

*See Digest No.9 of 2009*

**National Broadcasting Legislation Amendment Bill 2010**

*See Reports Nos.2 and 5 of 2010*

**National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2010**

*See Digest No.6 of 2010*

**National Health and Hospitals Network Bill 2010**

*See below in this Alert Digest*

**National Integrity Commissioner Bill 2010**

*See below in this Alert Digest*

**National Measurement Amendment Bill 2010**

See below in this *Alert Digest*

**National Radioactive Waste Management Bill 2010**

See *Digest No.3 of 2010*

**National Security Legislation Amendment Bill 2010**

See *Report No.7 of 2010*

**Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010**

See *Report No.4 of 2010*

**Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Amendment Bill 2010**

See *Digest No.2 of 2010*

**Ombudsman Amendment (Education Ombudsman) Bill 2010**

See *Digest No.4 of 2010*

**Ozone Protection and Synthetic Greenhouse Gas Management Amendment Bill 2010**

See *Digest No.6 of 2010*

**Parliamentary Joint Committee on Law Enforcement Bill 2010**

See *Digest No.5 of 2010*

**Plebiscite for an Australian Republic Bill 2010**

See *Digest No.13 of 2008*

**Poker Machine (Reduced Losses-Interim Measures) Bill 2010**

See *Digest No.14 of 2009*

**Preventing the Misuse of Government Advertising Bill 2010**

See *Digest No.7 of 2010*

**Primary Industries (Excise) Levies Amendment Bill 2010**

See *Digest No.6 of 2010*

**Protection of the Sea Legislation Amendment Bill 2010**

*See Digest No.2 of 2010*

**Radiocommunications Amendment Bill 2010**

*See Digest No.7 of 2010*

**Renewable Energy Amendment (Feed-in-Tariff for Electricity) Bill 2010**

*See Digest No.13 of 2008*

**Responsible Takeaway Alcohol Hours Bill 2010**

*See Digest No.6 of 2010*

**Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010**

*See Digest No.10 of 2008*

**Safe Climate (Energy Efficient Non-Residential Buildings Scheme) Bill 2010**

*See Report No.13 of 2009*

**Service and Execution of Process Amendment (Interstate Fine Enforcement) Bill 2010**

*See Digest No.7 of 2010*

**Special Broadcasting Service Amendment (Prohibition of Disruptive Advertising) Bill 2010**

*See Digest No.12 of 2009*

**Stolen Generations Reparations Tribunal Bill 2010**

*See Digest No.11 of 2008*

**Superannuation Legislation Amendment Bill 2010**

*See below in this Alert Digest*

**Tax Laws Amendment (2010 Measures No.4) Bill 2010**

*See below in this Alert Digest*

**Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010**

*See Report No.1 of 2010*

**Tax Laws Amendment (Research and Development) Bill 2010**

*See Report No.8 of 2010*

**Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010**

See below in this Alert Digest

**Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010**

*See Report No.13 of 2009*

**Territories Law Reform Bill 2010**

*See Report No.6 of 2010*

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

*See Report No.6 of 2010*

**Tradex Scheme Amendment Bill 2010**

*See Digest No.7 of 2010*

**Veterans' Affairs and Other Legislation Amendment (Miscellaneous Measures) Bill 2010**

*See Digest No.1 of 2010*

**Water (Crisis Powers and Floodwater Diversion) Bill 2010**

*See Digest No.5 of 2010*

**Water Efficiency Labelling and Standards Amendment Bill 2010**

*See Digest No.7 of 2010*

## Airports Amendment Bill 2010

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 30 September 2010

Portfolio: Infrastructure and Transport

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### Background

This bill amends *the Airports Act 1996* to give effect to the legislative reforms announced in the White Paper *Flight Path to the Future* on 16 December 2009 by the Government.

The bill seeks to make the following amendments:

- amend the requirements for airport master plans and major development plans to support more effective airport planning and better alignment with State, Territory and local planning;
- in relation to the first five years of a master plan, require additional information such as a ground transport plan and detailed information on proposed developments to be used for purposes not related to airport services (e.g. commercial, community, office or retail purposes);
- restructure the triggers for major development plans including capturing proposed developments with a significant community impact;
- prohibit specified types of development which are incompatible with the operation of an airport site as an airport. However, an airport-lessee company will have the opportunity to demonstrate to the Minister that such a development could proceed through a major development process because of exceptional circumstances;
- integrate the airport environment strategy into the master plan requiring only one public comment period for the combined document recognising that an airport environment strategy is better articulated in the context of the airport's master plan. Transitional provisions are included to address how the expiry dates of environment strategies will be aligned with the expiry dates of master plans; and

- clarify ambiguous provisions and making housekeeping amendments to update certain provisions of the Airports Act.

### **Strict liability**

#### **Penalty**

#### **Burden of proof**

#### **Schedule 1, item 46**

Item 46 of Schedule 1 introduces a new section 89A into the Act, the effect of which is to make it an offence to carry out ‘an incompatible development’ without approval. Subsection 89A(3) indicates that strict liability applies to paragraph (2)(a) of section 89A, which states that a person commits an offence if ‘the person is subject to a requirement under subsection (1)’. Subsection (1) provides that a person must not carry out or cause or permit to be carried out an incompatible development without an appropriate approval. Although there are circumstances in which the Committee has accepted strict liability as being appropriate, it has consistently taken the view that adequate justification for its use be provided in explanatory memoranda. In this case the issue is not addressed.

Further, in relation to strict liability offences, the normal penalty (*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, p 27) is stated to be 300 units for a body corporate. Subsection 89A(2) sets the penalty for the offence at 400 penalty units, and no justification for this is provided in the explanatory memorandum.

Last, *Note 2* to subsection 89A(2) states that the defendant bears an evidential burden of proof in relation to the matters in paragraphs (1)(c) and (d). This is a drafting error as these paragraphs do not exist. The explanatory memorandum does not address the issue of the imposition of an evidential burden of proof.

The Committee therefore **seeks the Minister's advice** about the justification for the imposition of strict liability; the reasons for the level of penalty and particularly why it exceeds the amount recommended in the Guide; whether an evidential burden of proof applies and if so, why this approach has been taken, and whether the *Note* to subsection 89A(2) can be corrected.

*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.*

The Committee notes that this bill was 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.



## Australian Civilian Corps Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 30 September 2010

Portfolio: Foreign Affairs

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### Background

This bill establishes the Australian Civilian Corps, and creates a legal framework for the employment and management of Australian Civilian Corps employees.

### Wide discretionary administrative power

#### Clause 17

Subclause 17(1) of the bill allows the Director-General of AusAID to impose a number of sanctions for breach of the Code of Conduct (to be established by regulation). The sanctions include 'deductions from salary, by way of a fine'. This may be considered to make rights 'unduly dependent upon insufficiently defined administrative powers', in contravention of SO 24 (1)(a)(ii).

Subclause 17(2) does allow that the 'regulations may prescribe limitations on the power' to impose sanctions. At page 6 the explanatory memorandum gives as an example that a limitation on the amount that may be deducted from an employee's salary. This approach to sanctions for breach of the Code of Conduct reflects the approach taken in section 15 of the *Public Service Act 1999*. Nevertheless, the power to impose a fine is granted in very wide discretionary terms. The Committee therefore **seeks the Minister's advice** about whether some limits to its exercise should be prescribed in the primary legislation.

*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.*

**Availability of appropriate review**  
**Inappropriate delegation of legislative powers**  
**Subclauses 17(3) and 17(6)**

Subclause 17(6)(c) provides that procedures established under subclause 17(3) by the Director-General for determining whether the Code of Conduct has been breached must entitle an employee to a review of the decision as to whether there has been a breach and a decision to impose a sanction. This review is an ‘internal review’ as it is to be ‘conducted within AusAID’.

Two issues arise with respect to such a review. First, subclause 17(7) provides that the procedures established under subclause 17(3) ‘may provide for exceptions to the entitlement’ to review. A note to the subclause gives an example of the regulations providing that there be no entitlement to review in relation to frivolous or vexatious applications. Whereas the *Public Service Act 1999* also allows for exceptions to be made to an entitlement to seek review, under that legislation any exceptions are to be made by regulations. Exceptions are, therefore, subject to some parliamentary scrutiny.

In the case of exceptions to the entitlement to review in the context of breaches of the Australian Civilian Corps Code of Conduct, these are to be made by the Director-General and are (by subclause 17(1)) declared not to be a legislative instrument. For this reason, the power to provide for exceptions to the entitlement to review may be thought to make rights unduly dependent upon (potentially) non-reviewable decision (Standing Order 24 (1)(a)(iii)). The problem also gives rise to concerns that the power to make exceptions is inappropriately delegated as it is not subject to parliamentary scrutiny (Standing Order (1)(a)(iv)).

The Committee therefore **seeks the Minister's advice** about why exceptions to the entitlement to review are potentially not reviewable, or not subject to parliamentary scrutiny.

The second issue is the absence of any form of external merits review. Unlike the similar decisions made under the *Public Service Act*, there is no review to a body such as the Merit Protection Commissioner. Given the significance of these decisions for an Australian Civilian Corps employee’s rights and reputation, the Committee **seeks the Minister's advice** about why the opportunity for external merits review has not been 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 non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference; and/or*
- *delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

## **Incorporation of material by reference**

### **Subclause 20(3)**

Subclause 20(1) will allow the Director-General of AusAid to determine in writing the remuneration and other terms of employment for Australian Civilian Corps employees. Subclause 20(3) provides that such a determination may apply, adopt or incorporate any provisions of a:

- (a) fair work instrument; or
- (b) WR Act collective transitional instrument;  
as 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. However, given the nature of the provisions which can be incorporated (which are an award, an enterprise agreement, a workplace determination, a Fair Work Australia order or a National Employment Standard), the Committee makes no further comment.

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

## **Wide delegation**

### **Subclause 30(1)**

Subclause 30(1)(c) would allow the Minister to delegate in writing any or all of his proposed powers to 'a person who holds an office or appointment under an Act'. 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 simply describes the effect of the provision and does not provide any explanation or justification of it. The Committee **seeks the Minister's advice** on this matter so as to better assess whether the clause makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

*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.*

## **Australian National Preventive Health Agency Bill 2010**

Introduced into the House of Representatives on 10 September 2009 and reintroduced on 29 September 2010

Portfolio: Health and Ageing

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This bill establishes the Australian National Preventive Health Agency (ANPHA) to support the Australian Health Ministers' Conference (Ministerial Conference), and through the Ministerial Conference, the Council of Australian Governments (COAG) in addressing the increasingly complex challenges associated with preventing chronic disease. This will include supporting these councils in their efforts to work across portfolios, jurisdictions and sectors in support of nationally agreed preventive health policies.

The bill also establishes the Australian National Preventive Health Agency Advisory Council (the Advisory Council) which has the function of advising the CEO on preventive health matters, particularly those identified by the Ministerial Conference through the ANPHA's strategic and annual operational plans.

### **Explanatory memorandum – expanded explanation Subclauses 41(8) and 42(5)**

The Committee is pleased to note that, as agreed to by the Minister (and discussed in Report No. 12 of 2009), the explanatory memorandum to the reintroduced bill clarifies the effect of these sections.

## **Aviation Crimes and Policing Legislation Amendment Bill 2010**

Introduced into the Senate on 23 June 2010 and reintroduced on 29 September 2010

Portfolio: Home Affairs

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This bill amends the *Crimes (Aviation) Act 1991*, the *Commonwealth Places (Application of Laws) Act 1970* and the *Australian Federal Police Act 1979*.

The bill seeks to strengthen the existing legislative framework surrounding Australia's international and domestic aviation security regime by ensuring that aviation-related crimes carry appropriately severe penalties and by making sure that an appropriate range of offences are applicable.

The amendments in the bill support the 'All-In' model which was the outcome recommended by the Federal Audit of Police Capabilities conducted by Roger Beale AO in 2009 and the Government's response to the Federal Audit.

### **Severity of penalties**

#### **Various**

Schedule 1 of this bill introduces a number of new offences (such as assaulting a crew member) and recalibrates the penalties associated with existing offences in the *Crimes (Aviation) Act 1991*. The explanatory memorandum on pages 1-3 provides a justification for the changes based on the overall scheme of the legislation which include four different tiers of offences. The explanatory memorandum also places the changes in the context of penalties associated with similar offences in other State and Commonwealth legislation. Overall, the amendments reflect the view that offences under the *Crimes (Aviation) Act* are very serious and that changes to the existing penalties are required to reflect this. The explanatory memorandum states that the new penalties have been proposed in light of the

considerations spelt out in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

The Committee therefore **leaves to the Senate as a whole** the questions of whether the severity of the penalties and the introduction of the new offences are appropriate in the circumstances.

*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.*

## **Commission of Inquiry into the Building the Education Revolution Program Bill 2010**

Introduced into the House of Representatives on 18 October 2010

Introduced by: Mr Pyne

### **Background**

This bill seeks to establish a full judicial inquiry into the Government's Building the Education Revolution program, a \$16.2 billion initiative to build and upgrade infrastructure in schools. The Commission of inquiry would be required to report to both Houses of Parliament by November 2011 in relation to the terms of reference set out in clause 7 of the bill.

### **Poor explanatory memorandum**

#### **Various**

The bill is accompanied an explanatory memorandum, but the explanatory memorandum fails to explain the any of the key provisions of the legislation.

The Committee considers that an explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including by this Committee), greatly assists those whose rights may be affected by a bill to understand the legislative proposal, and an explanatory memorandum may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

If the bill proceeds to further stages of debate, the Committee **requests that the Private Member** provides a comprehensive explanatory memorandum.

*The Committee draws Senators' attention to this concern as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### **Trespass on personal rights and liberties**

#### **Clause 8**

Clause 8 of the bill requires the Commission to report its finding of facts and any recommendations it considers appropriate. Although the Commission may



exclude from its primary report (which is to be tabled in the Senate and House of Representatives) findings or conclusions which it believes may prejudice the safety or reputation of a person (subclause 8(4)(d)), might prejudice the fair trial (subclause 8(4)(a)), or might compromise the identity of a confidential source of information (subclause 8(4)(c)), the explanatory memorandum does not include any consideration as to whether this facility is adequate to protect personal rights which may be affected. For example, there is no consideration of the question of whether a person's right to procedural fairness is adequately protected.

If the bill proceeds to further stages of debate the Committee **requests the Private Member's advice** about these issues.

*Pending the Private Member'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.*

### **Abrogation of the privilege against self-incrimination Clauses 11 to 13**

Clause 11 of the bill provides the Commissioner with broad powers to require that evidence be given and documents produced. Clause 12 abrogates the privilege against self-incrimination although it appears that clause 13 provides for both use and derivative use immunity. The effect of this immunity is that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly to gather other evidence against the person.

However, whether this is the intended operation of clause 13 is not addressed in the explanatory memorandum. Although, the Committee has accepted that the privilege against self-incrimination is not absolute, the interest of having the Government properly informed will more likely be accepted as prevailing over the right of the individual to remain silent if there is a clear justification offered. Unfortunately, the explanatory memorandum does not seek to explain or justify the balance struck by clauses 12 and 13 in relation to the abrogation of the privilege against self-incrimination.

If the bill proceeds to further stages of debate the Committee **requests the Private Member's advice** about these issues.

*Pending the Private Member'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**

### **Clause 14**

Clause 14 deals with the arrest of a witness for failing to attend as a witness before the commission in accordance with a summons. Subclause 14(3) states that a warrant may be executed by a police officer and 'the person executing the warrant has power to break and enter any place, building or vessel in order to execute it'. Unlike a similar power granted under section 3ZB of Part 1AA of the *Crimes Act 1914*, the power to break and enter is not conditioned on the existence of a belief held, by the person executing the warrant, that there are reasonable grounds that the person is on the premises. It is also the case that there are no requirements that the force used be 'necessary and reasonable in the circumstances'. Nor are there any limits as to the time at which such a warrant may be executed. There is also no discussion of these matters in the explanatory memorandum.

Without adequate justification (in particular, without an explanation as to why the Crimes Act model has not been followed), the Committee is concerned that these powers unduly trespass on personal rights.

If the bill proceeds to further stages of debate the Committee **requests the Private Member's advice** about the justification for the proposed approach.

*Pending the Private Member'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**

### **Clause 15**

Clause 15 of the bill deals with search warrants. Subclauses (2) and (4) allow for the seizure of various materials. The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at page 91 indicates that generally speaking 'an upper limit of 60 days should attach to the retention of

seized items, with provision to extend this initial period were necessary'. The explanatory memorandum does not explain why a provision regulating (with specificity) the timeframe for the return of seized items could not be included in the bill, so as to minimise the encroachment of these powers on personal rights and liberties.

If the bill proceeds to further stages of debate the Committee **requests the Private Member's advice** about the justification for the proposed approach.

*Pending the Private Member'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.*

## **Necessity for offences**

### **Possible severe penalties**

#### **Part 3**

Part 3 of the bill details a number of offences. It is regrettable that the explanatory memorandum does not attempt to justify the necessity of the offences or the severity of the penalties imposed by reference to other offences in Commonwealth legislation. Further, given that the *Guide Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at page 28 cautions against the use of reasonable excuse defences, it is regrettable that the use of such provisions (see clauses 18 and 19) is also not addressed in the explanatory memorandum. Reasonable excuse provisions may be thought to introduce uncertainty into the law making it difficult for persons to know the limits of criminal liability, and to that extent may be considered to unduly trespass on their rights.

If the bill proceeds to further stages of debate the Committee **requests the Private Member's advice** about the justification for the proposed approach.

*Pending the Private Member'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.*

## **Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010**

Introduced into the House of Representatives on 12 March 2009 and reintroduced on 20 October 2010

Portfolio: Special Minister of State

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This bill contains provisions that will:

- reduce the disclosure threshold from ‘more than \$10,000’ (indexed to the Consumer Price Index annually) to \$1,000 (non-indexed);
- require people who make gifts at or above the threshold to candidates and members of groups during the election disclosure period to furnish a return within 8 weeks after polling day. Agents of candidates and groups have a similar timeframe to furnish a return in relation to gifts received during the disclosure period;
- require people who make gifts, agents of registered political parties, the financial controller of an associated entity, or people if they fall within the relevant provision, who have incurred political expenditure to furnish a return within 8 weeks after 31 December and 30 June each year;
- prevent ‘donation splitting’ by ensuring that for the purposes of the \$1,000 disclosure threshold, related political parties are treated as the one entity;
- make unlawful the receipt of a gift of foreign property by political parties, candidates and members of a Senate group. It will also be unlawful in some situations for associated entities and people incurring political expenditure to receive a gift of foreign property;
- extend the ban on anonymous gifts to encompass all anonymous gifts except where the gift is \$50 or less and received at a ‘general public activity’ or a ‘private event’ as defined;

- tie public election funding to reported and verified electoral expenditure. In other words, unendorsed candidates, registered political parties and unendorsed Senate groups, who receive at least four percent of formal first preference votes in an election, will receive the lesser amount of either:
  - i. the ‘electoral expenditure’ that was actually incurred in an election period; or
  - ii. the amount of \$2.31191 (indexed to CPI every 6 months) per formal first preference vote received;
- provide for the recovery of gifts of foreign property that are not returned, anonymous gifts that are not returned and undisclosed gifts; and
- introduce new offences and penalties related to the new measures and increase the penalties for existing offence provisions.

## **Commencement**

### **Clause 2**

Clause 2 provides that 'This Act commences on 1 July 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. The Committee understands that the proposed approach may be justifiable, but 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.*

## Corporations Amendment (No.1) Bill 2010

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 29 September 2010

Portfolio: Treasury

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### Background

This bill amends various acts to change the way people access information kept on company registers. The measures will:

- require persons seeking a copy of a register of members to apply to the company, stating the purpose for which they will use the register;
- provide that where a register is maintained on a computer that it should be able to be inspected on a computer; and
- provide for the regulations to prescribe the formats in which a copy of the register can be provided.

The bill also amends the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and *Telecommunications (Interception and Access) Act 1979* in relation to market offences and the Australian Securities and Investment Commission's (ASIC) powers to investigate offences. These measures:

- increase the magnitude of criminal penalties that can be imposed for breaches of the insider trading and the market manipulation provisions in Part 7.10 of the Corporations Act;
- enable an interception agency, such as the Australian Federal Police (AFP) to apply for telecommunications interception warrants in the course of a joint investigation into these offences; and
- enhance ASIC's search warrant power, to enable ASIC to apply for a search warrant under the ASIC Act without first having to issue a notice to produce the material.

The bill will also clarify the criminal liability under section 1041B of the Corporations Act in accordance with the requirements of the *Criminal Code Act 1995* (Criminal Code).

### **Trespass on personal rights and liberties**

#### **Items 1 to 3**

These items seek to amend the foundation on which ASIC can apply for the issue of a search warrant in relation to the production of books for the purposes of inspection and audit. The current search warrant power requires that before a search warrant can be issued, ASIC must first have formally sought the production of the books (subsection 35(1) of the *Australian Securities and Investments Commission Act 2001*). These amendments would remove the requirement to formally request the production of the books under Division 3 before a search warrant to locate them could be issued.

The explanatory memorandum does not explain the reasons for these provisions. The Committee is concerned to understand why new powers are needed, whether the proposed power is too broad, what safeguards are in place to ensure that their use would be for a proper purpose and proportionate to the circumstances, and whether they are consistent with other similar powers. The Committee therefore **seeks the Treasurer's advice** about these matters.

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

### **Increase in the level of penalties**

#### **Item 20**

Item 20 of Schedule 1 increases the maximum penalties for insider trading and other forms of market manipulation. The explanatory memorandum at page 13 notes the seriousness of these offences for the operation of Australian financial markets and also notes that it is important to ensure penalties for these offences is considered in the context of the benefit that can be gained from engaging in the prohibited conduct. In the circumstances the Committee

**leaves to the Senate as a whole** the question of whether the proposed increase in maximum penalties is appropriate.

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

## **Trespass on personal rights and liberties**

### **Item 21**

The effect of the insertion of the new subsection 5D(5C), by item 21 of Schedule 1, is to enable an interception agency to apply for telecommunication interception warrants in the course of investigations into insider trading and market manipulation offences. Clearly, this has the potential to trespass on personal rights and liberties. However, the explanatory memorandum at page 17 emphasises the seriousness of these offences and that they are often difficult to investigate by means other than monitoring telephone communications. In the circumstances the Committee **leaves to the Senate as a whole** the question of whether telecommunications interception is an appropriate way to gather evidence in relation to these offences.

*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.*

## **No or poor explanatory memorandum**

### **Various**

The Committee considers that an explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including by this Committee), greatly assists those whose rights may be affected by a bill to understand the legislative proposal, and an explanatory memorandum may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

The Committee is extremely concerned about the poor quality of the explanatory memorandum to this bill, in which a number of the items are not explained or are inadequately explained, and the index is incorrect in many ways. Particular care should be taken to ensure that explanatory memoranda which adopt a narrative style (rather than a more traditional structure in which



each item in a bill is referred to in numerical order) still adequately address and cross-reference each provision in a bill.

Examples of the Committee's concern about inadequate explanation are found in relation to items 1 to 3 of this bill. These items contain important amendments to provisions of the *Australian Securities and Investments Commission Act 2001* relating to search warrants, but there is no explanation of these provisions in the explanatory memorandum. The index states that paragraph 2.6 explains items 1 to 3, but 2.6 is in fact a very brief paragraph that relates to an amendment to section 1019G of the Corporations Act.

Indeed, the index to the explanatory memorandum has 15 entries and at least 10 of these contain significant errors. In the Committee's view particular care should also be taken to ensure the accuracy of the index in an explanatory memorandum that adopts a narrative style. Flaws in the index can significantly (or sometimes totally) undermine the usefulness of the whole explanatory memorandum. Examples of the incorrect indexing the Committee identified in this case are:

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## ***Index***

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### **Schedule 1 — Amendments**

<i>Bill reference</i>	<i>Paragraph number</i>	<i>Scrutiny comment</i>
Items 1 to 3	2.6	2.6 doesn't refer to items 1 to 3
Item 4	1.17	agree
Items 5 to 6 and 8	1.8 to 1.12	None of these paragraphs (or any other paragraph) seems to refer to item 5. 1.8 does not refer to any of these paragraphs.
Item 7	1.16	agree
Item 9	1.13	agree
Item 10	1.18 to 1.20	These paragraphs relate to subsection 177(1), but do not seem to address the effect of item 10, which appears to be a consequential provision.
Item 11	2.12	2.12 appears to relate to item 12, not item 11. No reference could be found for item 11.

Items 12 to 14	4.9 to 4.12	Paragraphs 4.9 to 4.12 do not exist. Other paragraphs do refer to items 13 and 14, but they have not been indexed. No reference could be found for item 12.
Item 15	2.14	Paragraph 2.14 does not relate to this item.
Items 16 to 17	2.12	2.12 appears to relate to item 12, not item 11. No reference could be found for items 16 and 17.
Item 18	1.22 and 4.13	1.22 is correct, but 4.13 does not exist.
Item 19	1.18 to 1.20	agree
Item 20	2.11 to 2.12	These paragraphs do not appear to relate to item 20. Paragraph 2.13 is cross-referenced to item 20, but also does not appear to relate to it. Paragraphs 3.11 and 3.12 do appear to detail the effect of item 20, but they are not indexed (perhaps this error was a typo).
Item 21	3.6 to 3.7	These paragraphs do not refer. Paragraphs 4.6 and 4.7 do refer, but they are not indexed.
Item 22	2.16	This paragraph does not refer to item 22, but 3.16 does refer, but it is not indexed.

In the Committee's view it remains essential that explanatory memoranda comprehensively explain the effect of each provision in a legislative proposal. The Committee therefore **requests that the Treasurer** corrects the explanatory memorandum to include comprehensive information about all provisions in the bill and ensures that this information is accurately referenced in the index. The Committee **also seeks the Treasurer's advice** as to providing appropriate training to staff members about the importance of explanatory memoranda, and the necessity for them to be comprehensive, accurate and contain a complete index .

*Pending the advice of the Treasurer, 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.*

## Crimes Legislation Amendment Bill 2010

Introduced into the Senate on 23 June 2010 and reintroduced on 29 September 2010

Portfolio: Home Affairs

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### Background

This bill seeks to improve the ability of the Australian Crime Commission (ACC) to deal with serious misconduct by staff and make a range of amendments to strengthen law enforcement agencies' powers to gather, examine and use evidence to investigate and prevent the commission of criminal offences. This Bill will amend the *Australian Crime Commission Act 2002* (ACC Act), the *Australian Federal Police Act 1979* (AFP Act), the *Crimes Act 1914* (Crimes Act) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

The bill will:

- align the dismissal powers of the Chief Executive Officer of the ACC to deal with serious misconduct and corruption with those of the Australian Federal Police (AFP) Commissioner;
- provide for more flexible arrangements for appointing ACC examiners;
- extend the application of certain search-related provisions in the Crimes Act that currently only apply to searches conducted under warrants in relation to premises so they also apply to searches conducted under a warrant in relation to a person;
- insert rules to govern when documents produced under Division 4B, Part IAA of the Crimes Act must be returned;
- streamline and extend provisions governing applications for, and determination of, orders in relation to things seized and documents produced under Part IAA of the Crimes Act;

- allow the AFP Commissioner to delegate responsibility for dealing with things seized and documents produced under Part IAA of the Crimes Act to Commonwealth officers legitimately in possession of such items.
- introduce a new standing power for the AFP to take fingerprints and photographs of arrested persons when taking them in to custody in relation to a Commonwealth offence, and
- amend the AFP Act to enable the Commissioner to authorise a payment in special circumstances that arise out of, or relate to, the person's engagement as an AFP appointee.

**Possible undue trespass on personal rights and liberties**  
**Item 2, clause 47A**

Part 1 of Schedule 1 of the bill introduces amendments to the *Australian Crime Commission Act 2002*. The effect of the amendments is to enable the CEO of the ACC to terminate a staff member for serious misconduct so as to avoid the operation of the *Fair Work Act* (including the unfair dismissal and notice of termination provisions). A dismissal of a staff member takes effect under the general power of dismissal in section 29 of the Public Service Act. However, the new subsections 47A(2)-(3) of the *Australian Crime Commission Act* combine to enable the CEO to make a declaration that has the effect of avoiding the operation of key parts of the Fair Work Act. Such a declaration can only be made if the CEO has terminated the employment of a staff member in circumstances where the CEO believes, on reasonable grounds, that their conduct amounts to serious misconduct or has or may have a damaging effect on the other staff members or the reputation of the ACC (see subsection 47A(1)). These amendments follow a recommendation by the PJC-ACC to strengthen powers of Commonwealth law enforcement agency's to dismiss employees 'believed on reasonable grounds to have engaged in serious misconduct or corruption' (see explanatory memorandum at page 6). The explanatory memorandum also indicates that the effect of the amendment is consistent with the power held by the Commissioner of the AFP to make a declaration in similar circumstances and having a similar effect.

These amendments, insofar as they avoid the central elements of the Fair Work Act, trespass on personal rights. However, the explanatory memorandum (a) does attempt to justify the amendments as a proportionate response to the problem posed by law enforcement officers who are reasonably believed to have engaged in serious misconduct or corruption

remaining within the organisation and potentially compromising the security and integrity of its operations and (b) notes the availability of judicial review under the AD(JR) Act of the making of the declaration under subsection 47A(2). In the circumstances the Committee **leaves to the Senate as a whole** the question of whether or not there is an undue trespass on personal rights.

*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 undue trespass on personal rights and liberties**

### **Item 5**

Part 2 of Schedule 1 of the bill, through item 5, allows the ACC to use lawfully intercepted information (pursuant to the *Telecommunications (Interception and Access) Act 1979*) to investigate of misconduct, to support a decision terminating a staff member's employment, and in making a declaration under the new subsection 47A(2). These provisions mirror similar powers enjoyed by the AFP Commissioner to use lawfully intercepted information for these purposes. The explanatory memorandum on page 12 justifies these amendments, stating: 'Due to the seriousness of the criminal activity being investigated by [the ACC], some misconduct could lead to potentially life threatening consequences. It is important that the ACC is in a position to be able to properly investigate any allegations of misbehaviour, including utilising intercepted information where appropriate.' In the circumstances the Committee **leaves to the Senate as a whole** the question of whether or not the provision trespasses unduly on personal rights and liberties.

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

## **Retrospective application**

### **Item 23(2)**

This is a transitional provision that provides that the amendment proposed in item 14 applies in relation to any thing seized 'whether before or after this Part commences.' The retrospective application of provisions is a matter of concern

to this Committee. However, the Committee notes the detailed justification provided in the explanatory memorandum at page 26, including that although the provision is retrospective in application it does not create retrospective criminal liability.

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

### **Possible undue trespass on personal rights and liberties Items 30 and 39**

Items 30 (which inserts a new paragraph 3ZQX(2)(aa) into the *Crimes Act*) and 39 of Schedule 3 (which inserts a replaces section 3ZQB of *Crimes Act*) have the effect of allowing the Australian Crime Commissioner to retain a thing seized where a magistrate has made an order (under the new subsection 3ZQB(3)), after being satisfied that there are reasonable grounds to suspect that if returned the thing is likely to be used in terrorist activities. Prior to these amendments a seized 'thing' could only be retained on this basis if seized pursuant to powers specifically dealing with terrorist acts. Under the proposed provisions, any thing which is seized under Part IAA of the *Crimes Act* may now be retained on this basis, that is, that a magistrate has made an order based on a reasonable suspicion that if returned the thing is likely to be used in terrorist activities. In the circumstances the Committee **leaves to the Senate as a whole** the question of whether or not the provision trespasses unduly on personal rights and liberties.

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

### **Possible undue trespass on personal rights and liberties Item 43**

Item 43 of Schedule 3 inserts a new paragraph 3ZJ(3)(ba) into the *Crimes Act*. The effect of this provision is to extend police powers relating to the taking of identification material (finger prints and photographic records). Currently such material may only be taken in limited circumstances, including: with written consent and if an authorised police officer believes on reasonable grounds that it is necessary to do so to establish the identity of the person,

identify the person as the person who has committed the offence or to provide evidence in relation to the offence. The amendment introduced by this item will empower the taking of identification material ‘purely as an adjunct to an arrest’ (see the explanatory memorandum at page 37) for offences punishable by 12 months imprisonment or more. The purpose of the amendment is ‘to provide police with a fast and practical way to establish the identity of arrested persons which will in turn assist police to prove matters relating to identity in court proceedings and maintain accurate records of arrest’ (see the explanatory memorandum at page 37).

This is a significant extension of coercive police powers. The existing powers are said to be inadequate as the absence of identification material may ‘be problematic if the person escapes from custody or if there is a question about who was arrested’ (see the explanatory memorandum at page 37). The explanatory memorandum at page 38 also emphasises that the normal provisions in the *Crimes Act* requiring the destruction of identification material, if a person is acquitted or no conviction recorded, continue to apply.

The Committee is concerned that the extent of the expansion of these powers has not been fully justified and therefore **seeks the Minister's advice** about whether the practical problems identified with the existing provisions could be dealt with through means which are less restrictive of the rights of an arrested person or whether additional safeguards can be implemented such as restricting the circumstances in which the power is authorised (for example to situations in which police have reasonable grounds to suspect that a false name has been given) or as to the use to which information collected routinely on the arrest of a person could be used.

*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.*

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.

## **Defence Legislation Amendment (Security of Defence Premises) Bill 2010**

Introduced into the Senate on 24 June 2010 and reintroduced into the House of Representatives on 29 September 2010

Portfolio: Treasury

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This bill inserts a new Part VIA, into the *Defence Act 1903* and makes associated amendments to the *Australian Federal Police Act 1979*.

The bill will enhance the security of Defence bases, facilities, assets, and personnel within Australia in response to the changing nature of security threats. These amendments include:

- clarifying that appropriately authorised members of the Defence Force may use reasonable and necessary force, including lethal force, to prevent the death of, or serious injury to a person in connection with an attack on Defence premises;
- establishing a statutory regime of search and seizure powers that will operate at Defence premises to reduce the risk of dangerous items entering Defence facilities, or material and classified information being unlawfully removed;
- updating and relocating the trespass offence and related arrest power in section 82 of the Act;
- supporting the enforcement of the trespass offence by authorising Defence to use overt optical surveillance devices to monitor the security of Defence premises and to disclose the information captured by these devices to law enforcement agencies and Commonwealth, State and Territory public prosecution authorities; and



- clarifying that this Part does not limit the exercise of powers of a defence security official, a member of the Defence Force or any other person, under this Act or any other law.

## **Undue trespass on personal rights and liberties**

### **Part IVA**

Item 1 of Schedule 1 introduces new Part IVA, relating to the security of defence premises, into the *Defence Act 1903*. Among other things, this new Part introduces a number of powers allowing for the consensual and non-consensual collection of information (such as identification information and whether or not a person has authority to enter defence premises) and searches (of persons and vehicles) at defence access control points or on defence premises.

The new Part IVA also provides for the seizure of things on defence premises or found as a result of a search if it is reasonably believed that the item constitutes a threat to the safety of persons on the premises or relates to a criminal offence that has or may be committed on the premises.

Clearly, these powers are coercive and have the potential to trespass on personal liberty and property rights. However, Division 6 of the new Part IVA specifies limitations and safeguards on the exercise of the powers conferred. In particular, it is noted that the powers to restrain and detain persons are only conferred for the purpose of placing the person into the custody of a civil police officer, including a protective service officer of the AFP at the earliest practicable time (section 72J). Section 72G provides that in exercising powers under this Part officials may only use such force as is considered reasonable and necessary.

In the Committee's view the general question of whether an appropriate balance has been struck in these provisions between (1) personal rights and liberties and (2) interests in maintaining the security of Defence bases and responding to security threats is a question which may appropriately be **left to the consideration of the Senate as a whole**.

However, the Committee has a number of particular concerns about the detail of the bill. Given the seriousness of many of the amendments, including authorising non-consensual searches and the use of lethal force in particular circumstances, the Committee **seeks the Minister's advice** as to whether

*defence premises* (as defined in clause 71A) includes land which may have a defence purpose, but which is also being used for another purpose (such as an immigration facility) and generally whether it is appropriate for the amendments to apply to all *defence premises*.

The Committee also **seeks the Minister's advice** as to whether consideration has been given to adequately warning persons entering defence premises that they may be subject to non-consensual searches if they enter the premises. Such a warning may offer a practical protection to personal rights without undermining the purposes sought to be achieved by the amendments.

Further, although clause 72J states that the powers given to restrain and detain under the amendments can only be exercised for the purpose of placing a person as soon as possible into the custody of the police or a protective service officer, the Committee is concerned that the bill does not deal with the adequacy of the training of defence security officials to ensure these 'police powers' are exercised safely and appropriately. The Committee therefore also **seeks the Minister's advice** about the adequacy of training and whether appropriate parameters for training requirements can be included in the bill.

*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.*

## **Undue trespass on personal rights and liberties**

### **Clause 71X**

Clause 71X empowers a security authorised member of the Defence Force (but not 'lesser' classes of defence security officers) to take action to protect persons from an attack on defence premises which is occurring or is imminent and the attack is likely to, or is intended to, result in the death of or serious injury to one or more persons on the defence premises.

This section must be read with subsection 72H(1) and (2), the effect of which is (1) to allow a security authorised member of the Defence Force to use up to lethal force, 'if the member believes that this is necessary to prevent death or serious injury to themselves or others in taking action to protect persons from an actual or imminent attack on defence premises'; and (2) to require the a person fleeing from a security authorised member of the Defence Force to

have first been called on to surrender (if practicable) and for the official to believe on reasonable grounds that the person cannot be apprehended in any other way.

The explanatory memorandum at page 18 states that this provision is modelled on the existing section 51T of the *Defence Act* which applies to the use of reasonable and necessary force by members of the Defence Force in assisting civilian authorities under Part IIIAAA. (Note: Subsection 72H(3) provides that the use of force by a ‘contracted defence security guard or a defence security screening employee must not involve anything that is likely to cause death or grievous bodily harm’.)

Again, the general question of whether an appropriate balance has been struck in this bill between personal rights and liberties and interests in maintaining the security of Defence bases and responding to security threats, is a matter which may appropriately be **left to the Senate as a whole**.

Nevertheless, the amendments do not contain any provisions which allow the Committee to assess, with confidence, the question of whether officials entitled to use lethal force will have received appropriate training and instruction. The new subsection 71C(4) gives the Minister the power to determine, by legislative instrument, the training and qualification requirements for security authorised members of the Defence Force. Given that these officials may use up to lethal force, the Committee is concerned that the important matter of the training and qualifications which are required is not dealt with in the primary legislation.

In addition, the explanatory memorandum explains the effect of the provisions allowing and limiting the use of deadly force and force occasioning grievous bodily harm, but does little more than state the terms of legislation and note that similar powers exist elsewhere in the *Defence Act*. Given the extraordinary nature of these powers the Committee **seeks the Minister's further advice** about the justification for the proposed approach, and particularly about the adequacy of training and whether appropriate parameters for training requirements can be included in the bill.

*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.*

## **Strict liability**

### **Clause 71W**

Section 71W makes it an offence for a person to hinder or obstruct a search under the Division if certain requirements are complied with (eg the production of an identity card). The offence is not expressed to be a strict liability offence but the explanatory memorandum claims that it is such an offence. No justification for this is given. The Committee notes that the offence of refusing to provide evidence pursuant to section 71V is not said, in the bill or the explanatory memorandum, to be a strict liability offence. The Committee **seeks the Minister's clarification** of whether, and if so, why it is intended that the offence proposed in section 71W is a strict liability 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.*

## **Possible undue trespass on personal rights and liberties**

### **Clause 72M**

Section 72M empowers a security authorised member of the Defence Force to use a dog if this is considered reasonably necessary to: (a) assist with the conduct of a search; (b) assist with the restraint or detention or removal of a person; (c) to assist with the arrest of a person for trespass; (d) to assist with the performance of a function or exercise of a power under Part IVA. The explanatory memorandum notes that this power will provide an improved capability to detect explosives and other hazardous materials. However, no justification of the need for dogs to be used for other functions is provided. Given the risk of injury to persons that the use of dogs may carry, the Committee **seeks the Minister's further advice** about the justification of the need to use dogs for functions other than to detect explosives and other hazardous materials.

*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.*

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.

## **Evidence Amendment (Journalists' Privilege) Bill 2010**

Introduced into the Senate on 29 September 2010

Portfolio: Senator Brandis

### **Background**

The bill seeks to amend the professional confidential privilege provisions in Part 3.10, Division 1A of the *Evidence Act 1995*, which provide for a privilege at the trial and pre-trial stages of civil and criminal proceedings for communications made in confidence to journalists, and for other communications made in confidence in certain circumstances.

*The Committee has no comment on this bill.*

## **Evidence Amendment (Journalists' Privilege) Bill 2010**

Introduced into the House of Representatives on 18 October 2010

Portfolio: Mr A Wilkie

### **Background**

The bill replaces the existing provisions in Division 1A of the *Evidence Act 1995* which will provide clear authority for a presumption that a journalist is not required to give evidence about the identity of the source of their information.

*The Committee has no comment on this bill.*

## **Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010**

Introduced into the House of Representatives on 20 October 2010

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill provides for the following measures:

- Special disability trusts provisions in the social security and veterans' entitlements legislation to widen the appeal of the provisions. The amendments relax the purpose and work capacity tests in relation to these trusts, and give trustees greater flexibility to meet costs relating to the beneficiary's health, wellbeing, recreation, independence and social inclusion.
- Eligibility to disability support pension will require ongoing residency in Australia.
- Adds further parcels of land to Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Amendment Act 1976* to enable the land to be granted to relevant Aboriginal Land Trusts.
- Amends the *Aboriginal and Torres Strait Islander Act 2005* to include a power for the Minister to make guidelines that would apply to the Indigenous Land Corporation when it performs its functions to support native title settlement.
- Amendments to ensure that students studying overseas full-time are treated for family tax benefit purposes in the same way as full-time students undertaking Australian study.
- Amendments to address two minor anomalies arising from the pension reform legislation enacted in 2009.
- Minor amendments to reinsert an unintentionally omitted reference in the social security confidentiality provisions, and make two technical corrections.



## Possible retrospective commencement

### Clause 2

The table in clause 2 provides that schedules 1 and 2 of the bill will commence on 1 January 2011. If this bill passes after 1 January 2011 then the provisions in schedules 1 and 2 will commence retrospectively. As a matter of practice, the Committee draws attention to any bill that could have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

Schedule 1 seeks to relax the purpose and work capacity tests in relation to special disability trusts and to increase flexibility for trustees in some areas. The schedule contains provisions with a beneficial effect, so a retroactive commencement is not of concern to the Committee.

However, the provisions of Schedule 2 seek to tighten the residence requirements for eligibility for the disability support pension. The substance of the policy is not of concern to the Committee, but the provisions are designed to be detrimental to some people and their possible retrospective commencement therefore attracts the Committee's attention.

The introduction of new arrangements in 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. Whereas 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 therefore **seeks the Minister's advice** about whether, if the bill is not passed this year, the provisions in Schedule 2 can commence 'the day after this Act receives the Royal Assent' rather than on 1 January 2011.

*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.*

**Retrospective application**  
**Schedule 1, item 11**

Item 11 of Schedule 1 of this bill is an application provision which provides that the relevant amendments will apply to all trusts, irrespective of whether they were created before, on or after commencement of the Schedule. As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. However, these amendments are designed to allow more families to benefits from concessions relating to disability trusts and the explanatory memorandum states at page 7 that ‘there will be no undue burden placed on trusts (or trustees) as all these changes are beneficial’.

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

## **Financial Framework Legislation Amendment Bill 2010**

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 30 September 2010

Portfolio: Finance and Deregulation

### **Background**

The bill will affect 31 Acts through amendments to 25 Acts and the repeal of six Acts.

The three main purposes of the proposed amendments to the bill include:

- repealing 20 redundant special appropriations, including six redundant Acts and a statutory Special Account, as well as other redundant legislation relating to the Commonwealth's financial framework.
- establishing improved governance arrangements for interjurisdictional agencies under the *Financial Management and Accountability Act 1997* and interjurisdictional Commonwealth authorities under the *Commonwealth Authorities and Companies Act 1997*, while also clarifying some minor anomalies in those Acts; and
- improving financial and governance arrangements for existing bodies, consistent with the *Governance Arrangements for Australian Government Bodies* policy, as published by the former Department of Finance and Administration, August 2005.

*The Committee has no comment on this bill.*

## **Higher Education Legislation Amendment (Student Services and Amenities) Bill 2010**

Introduced into the House of Representatives on 9 September 2009 and reintroduced on 29 September 2010

Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This Bill amends the *Higher Education Support Act 2003* to allow higher education providers to charge a compulsory student services and amenities fee. The fee will be capped at \$250 per student per annum (indexed to \$254 in 2011, and thereafter indexed annually).

The bill provides for the establishment of a new component of the Higher Education Loan Program (HELP): Services and Amenities-HELP (SA-HELP), which will provide eligible students with an option to access a loan for the fee through SA-HELP if they wish.

In addition, the bill will require higher education providers that receive funding for student places under the Commonwealth Grant Scheme, to comply with new benchmarks from 2011 onwards, for the provision of information on and access to basic student support services of a non-academic nature; and requirements to ensure the provision of student representation and advocacy.

### **Incorporating material in primary legislation**

#### **Item 5**

The Committee is pleased to note that the reintroduced version of the bill increases Parliamentary scrutiny by listing in the Bill categories of approved purposes for the expenditure of student services and amenities fees. This replaces the previous approach in which it was left to the Minister to specify approved purposes in delegated legislation.

## **Higher Education Support Amendment (2010 Budget Measures) Bill 2010**

Introduced into the House of Representatives on 20 October 2010  
Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

### **Background**

The bill amends the *Higher Education Support Act 2003* (HESA) to revise the maximum funding amounts in:

- section 30-5 for the Commonwealth Grant Scheme;
- section 41-45 for Other Grants; and
- section 46-40 for Commonwealth scholarships

to reflect supplementation for indexation increases and 2010-2011 Budget decisions.

*The Committee has no comment on this bill.*

## **International Tax Agreements Amendment Bill (No.2) 2010**

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 29 September 2010

Portfolio: Treasury

### **Background**

This bill amends the *International Tax Agreements Act 1953* to give the force of law in Australia to the second protocol to the tax treaty between Australia and the Republic of Singapore which will upgrade the exchange information provisions in that treaty to the internationally agreed tax standard.

*The Committee has no comment on this bill.*

## National Health and Hospitals Network Bill 2010

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 29 September 2010

Portfolio: Health and Ageing

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### Background

The bill provides a framework for the establishment of the Australian Commission for Safety and Quality in Health Care as a permanent, independent statutory authority under the *Commonwealth Authorities and Companies Act 1997*.

The establishment of this body forms part of the National Health and Hospitals Network Agreement between the Commonwealth and the States (with the exception of Western Australia) and Territories endorsed on 20 April 2010.

### Commencement

#### Clause 2

Clause 2 provides that 'This Act commences on 1 July 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. The Committee understands that the proposed approach may be justifiable, but 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.*

**Legislative instrument**  
**Possible insufficient scrutiny of legislative power**  
**Clause 9**

Clause 9 of the bill sets out the functions of the Commission. These functions include setting the of written standards, guidelines and indicators (see paragraphs 9(1)(e)-(g)). Compliance with these is voluntary and the explanatory memorandum claims at page 4 that the Commission does not have regulatory functions. Nevertheless, the Commission is to promote and monitor the implementation of such standards etc (see paragraphs 9(1)(h)-(k)). The Commission is also to ‘formulate model national schemes’ (paragraph 9(1)(l)) and ‘such functions...as are specified in a written instrument given by the Minister’ (paragraphs 9(1)(n)).

Subsections (3)-(7) of clause 9 declare all of these functions not to be legislative instruments, but it is not clear whether this is merely describing the effect of the *Legislative Instruments Act 2003* or is being done to avoid the usual operation of that Act. The explanatory memorandum does not address whether or not such instruments would usually fall within the definition of legislative instruments in section 5 of the *Legislative Instruments Act 2003*. Paragraph (b) of subsection 5(2) of the *LI Act*, states that an instrument will be taken to be of a legislative character if it has ‘the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right’.

Although compliance with the various standards etc referred to in clause 9 of the bill is voluntary - in the sense that Commission does not have regulatory enforcement powers - the Commission does have other standard regulatory functions, such as encouraging and monitoring compliance. Moreover, as the explanatory memorandum explains at page 7, compliance ‘may be made a term or condition of a grant or under a contract or other legally enforceable agreement’ and they ‘may also be applied or adopted by a State or Territory law or a law of the Commonwealth.’

It seems apparent, therefore, that these instruments arguably qualify as legislative instruments, given the indirect affect they may have on an affected persons interests or privileges (and perhaps even rights and obligations). In other contexts, courts have pointed to requirements to engage in consultative processes as one factor the points to the conclusion that a decision has a



legislative character. In this regard, it is noted clauses 10 and 11 of the bill impose a range of consultation requirements.

In these circumstances, it is unclear why these instruments should be exempted from the normal *LI Act* requirements, which promote accountability to the parliament. The fact that the Commission may in some circumstances dispense with the consultation requirements (see subclause 10(3)) increases the need for parliamentary oversight of the making of the standards. The Committee is concerned that there is insufficient scrutiny of this legislative power and therefore **seeks the Minister's advice** as to why it was decided to declare these instruments not to be legislative instruments.

*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.*

### **Incorporation of material by reference**

#### **Subclause 10(4)**

Subclause 10(4) of the bill states that standards, guidelines or indicators may apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing, as existing (a) at a particular time; or (b) 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. Paragraph (b) may therefore be thought to inappropriately delegate legislative power. Although legitimate reasons for the use of such a provision can be guessed at, it is unfortunate that the explanatory memorandum does not address this issue. The Committee **seeks the Minister's advice** about the justification for the 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.*

**Insufficiently defined administrative power****Clause 14**

Clause 14 of the bill enables the Commission to charge fees for things done in performing its functions under rules made, by legislative instrument, by the Minister. At page 8 the explanatory memorandum notes that this facility is intended to allow the Commission to charge fees for the provision of services to third parties but not to allow the Commission to charge for services provided to any government in the ordinary performance of its functions. This intention is not clearly reflected in the terms of clause 14 and the Committee's view is that it is preferable that the bill provide more guidance as to the nature of the circumstances in which it is appropriate for the Minister to make rules for the charging of fees. The Committee **seeks the Minister's advice** about whether clause 14 can be amended to address this concern.

*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.*

## National Integrity Commissioner Bill 2010

Introduced into the Senate on 22 June 2010 and reintroduced on 30 September 2010

Introduced by: Senator Bob Brown

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### Background

This private Senator's bill seeks to establish a National Integrity Commission, bringing together and co-locating the independent oversight functions for:

- the investigation and prevention of misconduct and corruption in all Commonwealth departments, agencies, federal parliamentarians and their staff;
- the investigation and prevention of corruption in the Australian Federal Police and the Australian Crimes Commission; and
- independent advice to Ministers and parliamentarians on conduct, ethics and matters of proprietary.

### Possible undue trespass on personal rights and liberties

#### Natural justice - right to a fair hearing

#### Clause 31

Clause 31 of this bill provides that the National Integrity commissioner must not disclose findings or opinions critical of an agency or a person in a report, unless an opportunity to be heard has been afforded. This requirement, to be afforded procedural fairness, is an express statement of what would otherwise be an implicit legal requirement (read into the legislation as a matter of statutory interpretation or as a common law requirement). However, subclause 31(2) states that a hearing is not required if the Commissioner is satisfied that a person (a) may have committed a criminal offence, contravened a civil penalty provision, could be subject to disciplinary proceedings or whose conduct could be grounds for the termination of their employment, and (b) that affording the statutory procedural fairness requirements may either compromise the investigation of a corruption issue or an action taken as a

result of such an investigation. In effect, in particular circumstances the statute attempts to exclude an obligation to give a person a fair hearing prior to the completion of a report. Subclause 33(3) specifically provides that a report may recommend that a person's employment be terminated.

This raises a question of whether this provision unduly trespasses on a personal right, given that a fair opportunity to be heard is thought to be a fundamental common law right (see eg, *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 [14-15]).

Unfortunately, the explanatory memorandum does not adequately justify the exclusion of a fair hearing, but merely repeats the terms of the bill (page 7). Although the Commission *may* decide to exclude from its report 'sensitive information' where it is desirable in the circumstances (subclause 33(4)), there is no requirement to do so in relation to critical findings or opinions which are contained in the report in relation to persons who have not been afforded a fair hearing. Although sensitive information which is excluded from the report must be included in a supplementary report (which sets out the information and the reasons for excluding it), only the primary report must be tabled in Parliament (see clause 157). Both the report and any supplementary report must be given to the Prime Minister, however, the Prime Minister is only under an obligation to table the report (at least in cases where a public hearing has been held).

Given the capacity of findings and opinions mentioned in subclause 31(2) to adversely affect a person's reputation (see *Ainsworth v Criminal Justice Commission (Qld)* (1992) 175 CLR 564) and the characterisation of the right to be heard as a fundamental common law right, the bill may, without further clarification, give rise to considerable interpretive difficulties in the courts. For example, it may be that a court could imply a right to be heard prior to the Prime Minister tabling a report in Parliament in relation to any critical findings or opinions that had not been disclosed pursuant to subclause 31(2) and which was not excluded from the report as 'sensitive' information.

The Committee accepts that the need to preserve the efficacy of any continuing or future investigations in relation to corruption is clearly a legitimate public interest, but remains concerned as to whether there are sufficient protections in place to protect an individual who is not afforded a right to be heard.

If the bill proceeds to further stages of debate, the Committee **requests the Private Senator's advice** as to the justification for the approach, whether additional protections can be included for an individual who is not afforded a right to be heard and whether consideration can be given to clarifying the intended operation of these provisions.

*Pending the Private Senator'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 undue trespass on personal rights and liberties**

### **Right to representation**

#### **Subclause 31(7)**

Paragraph (b) of subclause 31(7) provides that a person who has a right to be heard 'may, with the National Integrity Commissioner's approval, be represented by another person'. Given the nature of the interests and rights at stake and the potential complexity of the issues which may be raised, there may be circumstances where a fair hearing will be compromised if a person is refused permission to be represented.

If the bill proceeds to further stages of debate, the Committee **seeks the Private Senator's advice** as to why the ability of a person to be represented by another person (including a lawyer) should depend on receiving the Commissioner's approval.

*Pending the Private Senator'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.*

## **Abrogation of legal professional privilege**

### **Strict liability**

#### **Penalty**

#### **Clauses 46 to 48 clauses 64 to 66**

Subclause 43(5) of the bill states that for the purposes of sections 45 to 48, the powers to request or require a person to produce information/documents includes the power to request or require the production of materials that are

subject to legal professional privilege. Although sections 46 and 47 indicate a person may refuse or fail to provide information on the ground of legal professional privilege, there are a number of limitations and the National Integrity Commissioner may, after considering materials over which privilege has been claimed, determine whether to accept or reject the claim. In relation to the production of a document or thing, a person may refuse a request if 'a court has found the document or thing...to be subject to legal professional privilege'. If the Commissioner accepts the claim of privilege they must 'disregard' the material. However, it is unclear what exactly this might mean. Clause 48 makes it an offence for a person to fail to comply with a request under clause 43 to produce documents or give information and the Commissioner has decided to reject a claim that the information or document is subject to legal professional privilege. The offence is punishable by a fine of \$1000 or 6 months imprisonment. The offences are strict liability offences (subclause 48(3)). However, they are subject to a reasonable excuse defence (subclause 48(4)).

Similar issues arise in relation to clauses 64, 65 and 66.

The Committee has long taken the view that legal professional privilege is a fundamental principle of the common law, and will closely examine legislation which removes or diminishes this right. Unfortunately, the explanatory memorandum (at pages 9, 10 and 21), is silent on the issues of the extent to which the legislation is intended to modify the applicable common law principles, the justification for these modifications, and whether the penalties for offences relating to claims for legal professional privilege are justified. In relation to the offence provisions, it is noted that no explanation of the need for strict liability is provided (a matter which is of continuing concern to the Committee), nor is it explained why it is appropriate to use a reasonable excuse defence (*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, p 28 cautions against the use of such provisions as introducing uncertainty into the law). The absence of a detailed treatment of these issues in the explanatory memorandum undermines the capacity of the Committee to adequately consider these clauses in the bill.

If the bill proceeds to further stages of debate, the Committee **seeks the Private Senator's advice** about these matters.

*Pending the Private Senator'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.*

## **Protection against self-incrimination**

### **Clauses 49 and 67**

Clause 49 of the bill provides that the privilege against self-incrimination is abrogated in relation to requests to 'a person' for information, documents or things under clause 43. Failure to comply with such a request is an offence under clause 45, punishable by 2 years imprisonment. The privilege is not completely abrogated as it is subject to a 'use immunity' which means that self-incriminatory disclosures cannot be used against the person who makes the disclosure in criminal proceedings or other proceedings for the imposition or recovery of a penalty. However, this use immunity only applies if a person, prior to producing information or documents or things, claims that doing so may tend to incriminate or expose them to a penalty. The use immunity is stated as operating only as a 'direct' use immunity (ie applying in relation to court proceedings) and does not amount to a 'derivative' use immunity, which would prevent the use of the compelled information in the gathering of other evidence against the person. It is also the case that the use immunity will not be available in relation to a list of five proceedings (see paragraphs (c) to (g) of subclause 49(4)). The explanatory memorandum gives a general justification for the abrogation of the privilege as follows:

It is necessary to abrogate the privilege against self-incrimination to ensure that the National Integrity Commissioner can be given access to information, documents and things relevant to an investigation into a corruption issue. The inclusion of a use immunity in all but five limited cases provides a safeguard to persons that are required to answer questions or produce documents or information or things...that compliance with that request cannot be used against them in criminal proceedings or proceedings for the imposition or recover of a penalty...

The Committee has accepted that the privilege against self-incrimination is not absolute and the question of whether the competing interests are appropriately weighed will often be a matter best left to the Senate as a whole. However, the interest of having the Government properly informed will more likely be accepted as prevailing over the right of the individual to remain silent if there is a clear justification offered. Unfortunately, the explanatory memorandum does not:

- (1) Indicate why the use immunity is only available to persons who make a prior claim that compliance with s 43 may tend to incriminate or expose them to a penalty. This is of concern as the application of the use immunity may depend on a person's access to legal advice.
- (2) Explain why a derivative use immunity is not appropriate. In the past the Committee has expressed concerns about the absence of derivative use immunity, notwithstanding the inclusion of a direct use immunity.
- (3) Explain why each of the exceptions to the general use immunity is justified.

If the bill proceeds to further stages of debate, the Committee **seeks the Private Senator's further advice** on these questions to better assess whether these clauses unduly trespasses on personal rights and liberties.

*Pending the Private Senator'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 undue trespass on personal rights and liberties**

### **Clause 71**

Clause 71 gives an 'authorised officer' the authority to execute an arrest warrant (subclause 71(1)) and, if the officer believes on reasonable grounds that a person is on any premises, to break and enter into those premises (subclause 71(2)). 'Authorised officers' may also apply for search warrants (including ordinary and frisk searches of the person) and carry out such searches (see clauses 78-87). 'Authorised officer' is defined in clause 110 to be a person who has been authorised by the National Integrity Commissioner to be such an officer and is either a staff member of the National integrity Commission whom the Commissioner considers has suitable qualifications or experience, or a member of the Australian Federal Police.

Although it is possible to identify circumstances in which an appropriate person may not be a current member of the AFP (for example, if they were a former member or a member of a State or Territory police force) it gives rise to concern that 'police powers' such as the powers of arrest and the power to conduct personal searches may be conducted by persons other than sworn



police officers. At page 31 the explanatory memorandum notes that it is important that these powers be exercised by persons with the appropriate skills and character, but does not offer reasons as to why persons other than police officers may be required to exercise these powers, nor does it or the bill provide specificity about what constitutes 'suitable qualifications or experience'.

If the bill proceeds to further stages of debate, the Committee **seeks further advice from the Private Senator** about whether this power could be limited to police officers or more legislative guidance could be provided to about appropriate qualifications and experience for these officers.

*Pending the Private Senator'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.*

## **No explanation for new search warrant powers**

### **Clause 78**

Clause 78 authorises applications for warrants to search premises and persons. The Committee takes the view that any new powers to search persons require strong justification (and this view is outlined on page 107 of the *Guide*.) The Committee can understand that there may be reasons in which search warrants are considered justified, but expects that the reasons for proposed approach would be addressed in detail in the explanatory memorandum (see p 25).

If the bill proceeds to further stages of debate, the Committee **seeks further advice** on this issue to better assess whether this clause of the bill unduly trespasses on personal rights and liberties.

*Pending the Private Senator'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.*

## National Measurement Amendment Bill 2010

Introduced into the Senate on 23 June 2010 and reintroduced on 29 September 2010

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Portfolio: Innovation, Industry, Science and Research

### Background

This bill amends the *National Measurement Act 1960* to correct some unintended consequences from the translation of trade measurement provisions of State and Territory legislation into the Commonwealth legislation.

### Possible inappropriately delegated legislative powers

#### Item 29

Item 29 replaces a number of regulation-making provisions with a provision permitting the Chief Metrologist to make written determinations and the determinations are not legislative instruments (because they are administrative and so do not meet the definition in the *Legislative Instruments Act 2003*).

Although this could give rise to a concern that legislative powers are being inappropriately delegated, the justification for this item at pages 9 and 10 of the explanatory memorandum – including the highly technical nature of the content and the frequency with which they will need to be updated - is detailed and satisfactory.

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

## **Native Title Amendment Bill (No.1) 2010**

Introduced into the Senate on 30 September 2010

Portfolio: Attorney-General

### **Background**

The Bill establishes a new subdivision within the future acts regime of the Native Title Act.

The new subdivision in Schedule 1 provides a process to assist the timely construction of public housing, staff housing and a limited class of public facilities by or on behalf of the Crown, a local government body or other statutory authority of the Crown in any of its capacities, for Aboriginal people and Torres Strait Islanders in communities on Indigenous held land.

The new subdivision would operate for 10 years, following which action bodies would need to utilise other subdivisions in the future acts regime. This 10 year period is designed to match the 10 year funding period under current National Partnership Agreements between the Commonwealth and the States and Territories on remote Indigenous housing and remote service delivery.

*The Committee has no comment on this bill.*

## **Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010**

Introduced into the House of Representatives on 10 February 2010 and reintroduced on 29 September 2010

Portfolio: Resources and Energy

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This bill makes minor policy and technical amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

In particular the bill aims to:

- augment the functions of the National Offshore Petroleum Safety Authority (NOPSA) to include regulatory oversight of non-occupational health and safety (OHS) structural integrity for facilities, wells and well related equipment;
- clarify how titleholder provisions relating to making applications and requests and giving nominations and notices, and titleholder provisions establishing obligations will apply in relation to multiple titleholders;
- make certain offence provisions applying to titleholders, where the offence consists of a physical element (the doing of or failure to do an act), offences of strict liability;
- correct a technical error concerning the powers of the responsible State and Northern Territory Ministers to perform functions under Commonwealth regulations as members of the Joint Authority and as the Designated Authority;
- clarify that a titleholder's OHS responsibilities relate only to wells and well-related equipment and not to facilities more generally, and to

improve NOPSA's inspection and investigation powers in relation to suspected breaches of clauses 13A and 13B of Schedule 3 by titleholders, in relation to wells and well-related operations;

- make a technical correction to link subclause 57(4) of Schedule 3 to the correct provisions of Clause 61 of Schedule 3; and
- update listed OHS laws in Section 638 and provide transitional provisions.

## **Protecting Children from Junk Food Advertising (Broadcasting Amendment) Bill 2010**

Introduced into the Senate on 30 September 2010

Introduced by: Senator Bob Brown

### **Background**

This bill amends the *Broadcasting Services Act 1992* to restrict the broadcasting of advertisements for junk food on television during certain times and for related purposes.

### **Possible trespass on personal rights and liberties**

#### **General**

Although it may be argued that the bill restricts freedom of (commercial) speech, the Committee's view is that whether it introduces a proportionate measure to combat a significant social problem is a matter which is appropriately **left for the determination 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.*

### **Determination of important matters by regulation**

#### **Item 1, subclause 122A(2)**

The definition of 'unhealthy food' controls the scope of operation of the broadcasting prohibition. The definition is determined by criteria set out in regulations (see the new subsection 122A(2), inserted by item 1). The Committee prefers that important matters are included in primary legislation to increase the level of Parliamentary scrutiny of the proposal and to assist those whose rights may be affected by the provision. In this case the explanatory memorandum does not outline why it is not possible to specify these important criteria in the Act. Particularly given that the prohibition does have important legal consequences for broadcasting licensees, if the bill proceeds to further stages of debate the Committee **seeks the Private**

**Senator's advice** as to the justification for the proposed approach and whether criteria can be included in the primary legislation.

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

## **Sex and Age Discrimination Legislation Amendment Bill 2010**

Introduced into the House of Representatives on 30 September 2010

Portfolio: Attorney-General

### **Background**

This bill will amend the *Sex Discrimination Act 1984* to strengthen protections in the legislation and *Age Discrimination Act 2004* to establish an Age Discrimination Commissioner in the Australian Human Rights Commission.

The key amendments in the bill will:

- extend protections from discrimination on the grounds of family responsibilities to both women and men in all areas of work;
- provide greater protection from sexual harassment for students and workers;
- ensure that protections from sex discrimination apply equally to women and men; and
- establish breastfeeding as a separate ground of discrimination.

### **Trespass on personal rights and liberties**

#### **Item 9, subsection 4(1) and item 62, after subsection 40(4)**

Item 9 seeks to insert a definition of *official record of a person's sex* into the *Sex Discrimination Act 1984* (SDA) and item 62 will amend existing section 40 of the SDA to include an exemption to preserve the operation of State and Territory laws regarding the official record of a person's sex. The Committee is concerned that, because of the inconsistent treatment of cardinal records of a person's sex relating to gender reassignment by States and Territories these items have the effect that people in similar circumstances will be treated differently when the official status of a person's sex is important. The explanatory memorandum (at pages 5 and 15 respectively) does not address this issue. The Committee therefore seeks the **Attorney-General's advice** about these issues and the justification for the proposed approach.



*Pending the Attorney-General'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.*

## **Social Security Legislation Amendment (Connecting People with Jobs) Bill 2010**

Introduced into the House of Representatives on 21 October 2010  
Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill establishes a trail relocation assistance package to run over two years from 1 January 2011 aimed at connecting job seekers with employment opportunities elsewhere in Australia.

*The Committee has no comment on this bill.*

## Superannuation Legislation Amendment Bill 2010

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 29 September 2010

Portfolio: Treasury

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### Background

This bill amends various superannuation and taxation laws to implement a range of improvements to these laws.

Schedule 1 provides for amendments to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, and the *Income Tax Assessment Act 1997* to:

- facilitate state and territory authorities and public sector superannuation schemes paying unclaimed superannuation moneys to the Commissioner of Taxation (Commissioner); and
- enable the Commissioner to accept, and subsequently pay out, amounts transferred by state and territory authorities and public sector superannuation schemes.

Schedule 2 and clause 4 provide for transitional relief for income tax deductibility of total and permanent disability insurance premiums paid by superannuation funds by amending the *Income Tax (Transitional Provisions) Act 1997* and the *Income Tax Assessment Act 1997*.

Schedule 3 amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act 1993) to allow the trustee of a regulated superannuation fund to acquire an asset *in specie* from a related party of the fund, following the relationship breakdown of a member of the fund, without contravening the prohibition against related party acquisitions.

This Schedule also amends Subdivision D of Division 1 of Part 8 of the SIS Act 1993 to ensure equitable application of the transitional arrangements in

relation to in-house assets where an asset transfer occurs as the result of the relationship breakdown of a member of the fund.

Schedule 4 makes a number of minor amendments to improve the operation of the superannuation sections of the income tax legislation. These amendments include:

- allowing a deduction for eligible contributions to be claimed from successor superannuation funds after 1 July 2011;
- increasing the time-limit for deductible employer contributions made for former employees;
- clarifying the due date of the shortfall interest charge for the purposes of excess contributions tax;
- allowing the Commissioner of Taxation to exercise discretion for the purposes of excess contributions tax before an assessment is issued;
- providing a regulation making power to specify additional circumstances when a benefit from a public sector superannuation scheme will have an untaxed element; and
- streamlining references to the Immigration Secretary and Immigration Department.

### **Retrospective commencement Schedule 2 and clause 4**

Schedule 2 and clause 4 of this bill provide for transitional relief for income tax deductibility of total and permanent disability insurance premiums paid by superannuation funds. The changes operate with retroactive effect, but provide funds with *greater* scope to deduct premiums paid for insurance and thus are clearly beneficial. The explanatory memorandum does not expressly address the question of retrospective effect but the changes do not appear to cause any detriment to a taxpayer and the provision of transitional relief is designed to enable industry practices to be brought in line with strict compliance with the proper interpretation of the rules allowing deductions in relation to total and permanent disability insurance premiums given the government's recognition of a number of concerns raised by industry (see explanatory memorandum pp 20-21). Amendments to section 170 of the ITAA are made to ensure that taxpayers who have claimed deductions for past years in accordance with the

current law may seek an amendment of their assessments to take advantage of the broader deduction allowed under the transitional provisions (see explanatory memorandum p 28). The Committee usually expects that any retrospective commencement will be justified in the explanatory memorandum, but as the provision in this instance is beneficial, it has no further comment.

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

### **Retrospective commencement Schedule 1, item 21**

Item 21 of Schedule 1 is an application provision which states that changes to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, to be inserted by this Schedule, apply to transfers occurring before, on or after the commencement of this item. Although this provision does not appear to have the potential to detrimentally affect any person, the explanatory memorandum does not deal with the question. The Committee therefore **seeks the Treasurer's advice** as to whether or not there is any potential detriment to any person.

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

## **Tax Laws Amendment (2010 Measures No.4) Bill 2010**

Introduced into the House of Representatives on 23 June 2010 and reintroduced on 29 September 2010

Portfolio: Treasury

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This bill amends various taxation laws to implements a range of improvements to Australia's tax laws,

Schedule 1 amends the *A New Tax System (Goods and Services Tax) Act 1999* to ensure the third party payment adjustment provisions operate appropriately involving third party payments.

Schedule 2 amends the *Income Tax Assessment Act 1997* to provide a capital gains tax (CGT) roll-over for taxpayers who replace an entitlement to water with one or more different water entitlements.

Part 1 of Schedule 3 amends Division 230 of the *Income Tax Assessment Act 1997* and the consequential and transitional provisions inserted by the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* to make minor policy refinements and technical amendments and corrections to the provisions.

Part 2 of Schedule 3 extends the transitional arrangements relating to the application of the debt/equity rules made by the *New Business Tax System (Debt and Equity) Act 2001* to 1 July 2010 for Upper Tier 2 instruments issued before 1 July 2001.

Part 3 of Schedule 3 amends Division 775 (foreign currency gains and losses provisions) of the *Income Tax Assessment Act 1997* to extend the scope of a number of compliance cost saving measures, and to make technical amendments to ensure that the provisions operate as intended.

Schedule 4 amends the *Income Tax Assessment Act 1997* to make it easier for takeovers and mergers regulated by the *Corporations Act 2001* to qualify for the capital gains tax scrip for scrip roll-over.

Schedule 5 amends the *Income Tax Assessment Act 1936* to increase the threshold above which a taxpayer may claim the medical expenses tax offset and commence annually indexing the threshold to the consumer price index.

Schedule 6 amends the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients to make one entity a deductible gift recipient, extend the period of listing of one entity and change the name of another entity.

Schedule 7 to this Bill adds three new general deductible gift recipient categories into the *Income Tax Assessment Act 1997*.

## **Poor explanatory memorandum**

### **Various**

The Committee is concerned that many of the items in this bill are incorrectly indexed in the explanatory memorandum. The Committee considers that an effective explanatory memorandum is an essential aid to proper Parliamentary scrutiny (including by this Committee), greatly assists those whose rights may be affected by a bill to understand the legislative proposal, and an explanatory memorandum may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

In the Committee's view, especial care should be taken to ensure the accuracy of the index in an explanatory memorandum that adopts a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order). Flaws in the index can significantly (or sometimes totally) undermine the usefulness of the whole explanatory memorandum. Some examples of the incorrect indexing the Committee identified are at pages 43 (paragraph 2.86), 45 (paragraphs 2.91 to 2.93, 2.95 to 2.97), 81 (paragraph 4.39 – the cross-reference is correct, but it was omitted from the index) and 114 of the explanatory memorandum.

In the Committee's view it remains essential that explanatory memoranda comprehensively explain the effect of each provision in a legislative proposal and where a narrative style is adopted that the index is comprehensive and accurate. The Committee therefore **seeks the Treasurer's advice** about

whether the explanatory memorandum can be revised to ensure that it is comprehensive information and accurately indexed.

*Pending the advice of the Treasurer, 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.*

### **Retrospective application Schedule 3, item 132**

At page 65 the explanatory memorandum states that the purpose of this provision is to 'ensure that the definition of 'accounting principles' applies from the commencement of the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009*' As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. Unfortunately the explanatory memorandum does not address the likely impact of this provision, especially whether it will have a detrimental effect on any person. The Committee therefore **seeks the Treasurer's advice** as to the justification for the retrospective effect of this provision and whether it may cause detriment to any person.

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

### **Retrospective application Schedule 3, item 149**

This item is an application provision which states that 'The amendments made by this Part apply on and after 17 December 2003.' As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

The explanatory memorandum at page 81 simply repeats the effect of the provision without explaining the reason for it. Page 6 of the explanatory memorandum provides some background to the provisions, including the



timing of their commencement, and implies that they are beneficial. However, there is no direct explanation of the very significant retrospective commencement and whether there is likely to be a detrimental effect on any person. The Committee therefore **seeks the Treasurer's advice** as to the justification for the retrospective application and whether it may cause detriment to any person.

*Pending the advice of the Minister, 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.*

## **Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010**

Introduced into the House of Representatives on 24 June 2010 and reintroduced on 30 September 2010

Portfolio: Attorney-General

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This bill amends the *Telecommunications (Interception and Access) Act 1979*, the *Australian Security Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001* to enable greater cooperation, assistance and information sharing within Australia's law enforcement and national security communities.

### **Possible undue trespass on personal rights and liberties Schedule 3, item 5**

Item 5 of Schedule 3 of this bill inserts a new subsection 182A into the *Telecommunications (Interception and Access) Act 1979*. This provision regulates the circumstances in which 'missing person information', which may be lawfully intercepted pursuant to the new section 178A of the TIA Act (see item 3), may be disclosed. In general, the TIA Act makes disclosure of intercepted information an offence, however, the new subsection 182A provides new exceptions in relation to the disclosure of missing person information. The exceptions are: (a) if the disclosure is reasonably necessary for the purposes of finding the missing person and (b) if the disclosure is to the person who notified the authorities of the missing person and the missing person has either (i) consented to disclosure, (ii) is unable to consent and the disclosure is reasonably necessary to prevent a threat to the missing person's health, life or safety, or (iii) the missing person is dead.

The interception of missing person information and its potential disclosure under the new section 178A may, to an extent, encroach upon a missing person's privacy. However, the explanatory memorandum emphasises that circumstances in which missing persons information may be disclosed are

more limited than those applicable in relation to information obtained to investigate criminal conduct. In the circumstances the Committee **leaves to the consideration of the Senate as a whole** the question of whether or not there is any undue trespass on personal rights.

*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.*

## **Reversal of onus**

### **Note to schedule 3, item 5**

A *Note* to the new subsection 182(2A) indicates that a defendant bears an evidential burden in relation to the establishing the existence of the circumstances which would authorise the disclosure of material that would, but for those circumstances, constitute an offence. An evidential burden means that the defendant must adduce evidence that suggests a reasonable possibility that an exception to an offence is made out (which the prosecution must then refute beyond reasonable doubt).

This provision is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, insofar as the circumstances justifying the exception to the offence relate to matters which are peculiarly within the defendant's knowledge. Nevertheless, the Committee has not in the past always accepted that the fact a matter is 'within the defendant's knowledge' is a sufficient justification for reversing the onus of proof. Given that the explanatory memorandum does not address the question of why the defendant should bear the burden of proof, the Committee **seeks the Attorney-General's advice** on the justification for this approach.

*Pending the Attorney-General'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.*

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.

## **Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010**

Introduced into the House of Representatives on 15 September 2009 and reintroduced on 20 October 2010

Portfolio: Broadband, Communications and the Digital Economy

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

### **Background**

This bill amends the *Telecommunications Act 1997*, Parts XIB and XIC of the *Competition and Consumer Act 2010*, the *National Transmission Network Sale Act 1998*, the *Radiocommunications Act 1992* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. The bill introduces a package of legislative reforms aimed at enhancing competitive outcomes in the Australian telecommunications industry and strengthening consumer safeguards.

The bill has three primary parts:

- addressing the current structure of the telecommunications sector;
- streamlining the access and anti-competitive conduct regimes in Parts XIB and XIC of the *Competition and Consumer Act 2010*; and
- strengthening consumer safeguard measures, such as the Universal Service Obligation, the Customer Service Guarantee and Priority Assistance.

### **Legislative Instruments Act – possible exemption**

#### **Item 30, subsections 577A and 577B**

Item 30 introduces subsection 577A(7) which authorises the Minister to set out matters in writing that the ACCC is then required to consider in determining (under the proposed subsection 577A(6)) whether to accept undertakings given by Telstra concerning the structural separation of its operations. The proposed subsection 577A (23) states that these directions are

not legislative instruments. The explanatory memorandum at page 92 indicates that this is 'for the avoidance of doubt' given that Ministerial directions to any person are exempt from disallowance (see section 44 of the *Legislative Instruments Act*) and that the proposed direction operates 'like a direction to the ACCC to consider the specified matters.'

Although it is true that section 44 of the *Legislative Instruments Act* does operate to remove certain legislative instruments from the disallowance provisions, this does not change the *legislative* character of the instruments. The establishment of the criteria for determining limitations on the exercise of statutory powers is normally considered to be a legislative task (see eg *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 33).

The relevance of section 44 of the LIA is not that instruments are 'not legislative in character', but that specific legislative instruments are deemed 'not subject to disallowance'. Alternatively, section 7 of the LIA deals with instruments that are declared 'not to be legislative instruments' for the purposes of the LIA. The proposed provisions and the information in the explanatory memorandum at page 92 seem confused about these points. The same issue also arises in relation to item 31, subsections 577B(4), (5) and (9) (see pages 98 and 99 of the explanatory memorandum).

Given that these instruments change the criteria relevant for the exercise of a statutory discretion by requiring the ACCC to consider particular matters, the Committee would like to fully understand the operation of the proposed provisions and whether appropriate parliamentary scrutiny of any such legislative instruments will occur. The Committee therefore **seeks the Minister's advice** as to whether the intention is to declare these instruments not to be legislative for the purposes of section 7 of the LIA, or whether the position is that the instruments are legislative in character, but that it is asserted that they fall within the section 44 exemption from disallowance.

*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.*

### **Legislative Instruments Act – exemption**

#### **Item 30, subsections 577A(10)(b) and 577A(23)**

The proposed subsection 577A(23) also states that an instrument made pursuant to the proposed paragraph 577A(10)(b) is not a legislative instrument. The effect of an instrument under this paragraph is to set another day for the purposes of accepting undertakings from Telstra. The explanatory memorandum notes that this is a ‘substantive exemption from the LIA’. The justification given is that the exercise of the power will be of benefit to Telstra and providing for Parliamentary disallowance would introduce uncertainty for shareholders (see the explanatory memorandum at page 93). The Committee accepts this explanation, and given that proposed paragraph 577A(22) requires the publication of such an instrument the Committee makes no further comment in relation to this provision.

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

### **Legislative Instruments Act – exemptions**

#### **Item 30, clauses 577AA, 577CA and 577EA**

These provisions contain subclauses which allow the Minister specify, in writing, events for the purposes of the acceptance of undertakings in relation to:

- clause 577AA – structural separation;
- clause 577CA - hybrid fibre-coaxial networks; and
- clause 577EA - subscription television broadcasting licences

Subclause (5) in each of these provisions also allows the Minister to specify a period in which the occurrence of the events must take place.

Subclause (10) in each of these provisions declares that these instruments are not legislative instruments. The justification for these exemptions described in the explanatory memorandum (at page 96, see also pages 111 and 113) is that:

It is not appropriate that these instruments should be legislative instruments because Telstra will need clarity around the arrangements before Telstra proceeds with any subsequent steps, such as putting a resolution to shareholders.

The Committee notes this explanation, and **leaves to the Senate as a whole** the question of whether the approach reflects an appropriate balance between the purpose of the legislation and adequate parliamentary scrutiny.

*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.*

### **Legislative Instruments Act – exemptions**

#### **Item 30, clauses 577BB and 577BC**

These provisions contain clauses relating to migration plans and which allow the Minister to determine and specify things in writing in relation to a *migration plan* and *migration plan principles*.

Subclauses in both of these provisions declare that these instruments are not legislative instruments, and these are substantive exemptions from the operation of the *Legislative Instruments Act*. The justification for these exemptions described in the explanatory memorandum relate to clarity and the requirement of a 'high degree of certainty' before Telstra can take the action needed for its proposed 'structural separation undertaking' (page 104) and before finalising its migration plan (page 105).

The Committee notes this explanation, and **leaves to the Senate as a whole** the question of whether the approach reflects an appropriate balance between the purpose of the legislation and adequate parliamentary scrutiny.

*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.*

### **Legislative Instruments Act – exemption**

#### **Item 30, clauses 577J**

This provision relates to limits on the allocation of certain spectrum licences to Telstra. Subclauses 577J(3) and 577J(5) will allow the Minister to declare that Telstra is exempt from the requirements to have an undertaking under sections 577C (relating to hybrid fibre-coaxial networks) and E (subscription



television broadcasting licences) respectively. Subclause 577J(7) provides that a declaration under either of these provisions is not a legislative instrument, and this amounts to a substantive exemption from the operation of the Legislative Instruments Act.

The justification for these exemptions is that (at page 118 of the explanatory memorandum):

...Telstra will require a high degree of certainty about whether it is exempt from the requirement to divest its Foxtel and hybrid fibre-coaxial network if its structural separation undertaking is deemed to be sufficient to address its power in telecommunications markets.

The Committee notes this explanation, and **leaves to the Senate as a whole** the question of whether the approach reflects an appropriate balance between the purpose of the legislation and adequate parliamentary scrutiny.

*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.*

## **Procedural fairness**

### **Item 31, clause 76**

Item 31, proposed clause 76, requires Telstra to give the Minister a draft functional separation undertaking within 90 days. Subclause 76(3) allows the minister to specify a longer period. Subclause 76(6A) is intended to make it clear that the Minister is not required to observe the requirements of procedural fairness in relation to the making of an instrument under subclause 76(3). The justification for the exclusion of procedural fairness obligations is that this will 'reduce the opportunity for the use of legal proceedings to disrupt' the procedural steps set out in this provision.

The possibility that legal proceedings may disrupt efficient administration is not normally a sufficient reason for the exclusion of procedural fairness obligations, and no further explanation is provided. Given the importance accorded by the Committee (and the Courts) to procedural fairness, the Committee **seeks the Minister's advice** as to the nature of any detriment which may be suffered and whether the exclusion of procedural fairness is justified in the circumstances.

*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.*

## **Transport Safety Investigation Amendment (Incident Reports) Bill 2010**

Introduced into the Senate on 30 September 2010

Portfolio: Senator Xenophon

### **Background**

The bill aims to ensure that all incidents are accurately reported and properly investigated so that safety measures can be reviewed, training processes addressed, protocols reviewed both for that airline in particular but also across the industry.

*The Committee has no comment on this bill.*

## **Veterans' Affairs Legislation Amendment (Weekly Payments) Bill 2010**

Introduced into the House of Representatives on 21 October 2010

Portfolio: Veterans' Affairs

### **Background**

This bill will enable the Department of Veterans' Affairs to make weekly payments for a 'class of persons' who receive a periodic payment or payments from the Department and is aimed at assisting those who are homeless or at risk of homelessness.

*The Committee has no comment on this bill.*

## **Veterans' Entitlements Amendment (Claims for Travel Expenses) Bill 2010**

Introduced into the House of Representatives on 28 September 2010

Portfolio: Prime Minister

### **Background**

This bill seeks to extend from three months to 12 months, the period within which claims for certain travel expenses may be lodged. The amendments will also enable the Repatriation Commission to further extend this period in exceptional circumstances.

*The Committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Agricultural and Veterinary Chemicals Code Amendment Bill 2010**

*[Digest 5/10 and response in 6<sup>th</sup> report]*

On 23 June 2010 the House of Representatives agreed to 30 government amendments and subsequently passed the bill. On the 24 June 2010 a revised explanatory memorandum was tabled in the Senate and the bill was passed. None of the amendments fall within the terms of reference of the Committee.

### **Bankruptcy Legislation Amendment Bill 2009**

*[Digest 14/09 commented but no response required]*

On the 30 November 2009 the House of Representatives passed the bill without amendment and on 1 December 2009 tabled a replacement explanatory memorandum. On 24 June 2010 a supplementary explanatory memorandum was tabled in the Senate and six government amendments were agreed to. Subsequently on the same day the House of Representatives agreed to the Senate amendments. None of the amendments fall within the terms of reference of the Committee.

### **Broadcasting Legislation Amendment (Digital Television) Bill 2010**

*[Digest 5/10 and response in 6<sup>th</sup> report]*

On 13 May 2010 the House of Representatives passed the bill without amendment. On 24 June 2010 the a supplementary explanatory memorandum was tabled and 71 government amendments were agreed to. Subsequently on the same day the House of Representatives agreed to the Senate amendments. None of the amendments fall within the terms of reference of the Committee.

### **Building Energy Efficiency Disclosure Bill 2010**

*[Digest 5/10 and response in 6<sup>th</sup> report]*

On 22 June 2010 a supplementary explanatory memorandum was tabled, 10 government amendments agreed to and the bill was passed in the House of Representatives. On 24 June 2010 a revised explanatory memorandum was tabled in the Senate and the bill was passed. The Committee thanks the then Minister for incorporating new subclause 13(7A) in response to its comments.

**Corporations Amendment (Corporate Reporting Reform) Bill 2010**

*[Digest 6/10 still awaiting response]*

On 21 June 2010 a supplementary explanatory memorandum was tabled, four government amendments agreed to and the bill was passed in the House of Representatives. On 22 June 2010 a revised explanatory memorandum was tabled in the Senate and subsequently on 24 June 2010 the bill was passed. None of the amendments fall within the terms of reference of the Committee.

**Crimes Amendment (Royal Flying Doctor Service) Bill 2010**

*[Digest 6/10 commented but no response required]*

On 22 June 2010 a supplementary explanatory memorandum was tabled, two government amendments agreed to and the bill was passed in the House of Representatives. On 24 June 2010 a revised explanatory memorandum was tabled in the Senate and the bill was passed. None of the amendments fall within the terms of reference of the Committee.

**Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Bill 2010**

*[Digest 6/10 no comment]*

On the 16 June 2010 the House of Representatives passed the bill without amendment. On 24 June 2010 the Senate a supplementary explanatory memorandum was tabled and one government amendment and four opposition amendments were agreed to. Subsequently, on the same day the House of Representatives agreed to the Senate amendments. None of the amendments fall within the terms of reference of the Committee.

**Electoral and Referendum Amendment (Modernisation and Other Measures) Bill 2010**

*[Digest 6/10 no comment]*

On 16 June 2010 the House of Representatives passed the bill without amendment. On the 24 June 2010 three opposition amendments were agreed to. Subsequently, on the same day the House of Representatives agreed to the Senate amendments. None of the amendments fall within the terms of reference of the Committee.

### **Healthcare Identifiers Bill 2010**

#### **Healthcare Identifiers (Consequential Amendments) Bill 2010**

*[Digest 2/10 and response in 4<sup>th</sup> report – Healthcare Identifiers Bill]*

*[Digest 2/10 commented but no response required – Healthcare Identifiers (CA) Bill]*

On 11 March 2010 the House of Representatives passed the both bills without amendment. On 24 June 2010 the Senate a replacement explanatory memorandum and a supplementary explanatory memorandum relating to both bills and a further supplementary memorandum only relating to the Healthcare Identifiers Bills 2010 were tabled. On the same day 26 government amendments were agreed to relating to the Healthcare Identifiers Bill 2010 and two government amendments were agreed to relating to the Healthcare Identifiers (Consequential Amendments) Bill 2010. Subsequently on the same day the House of Representatives agreed to the Senate amendments to both bills. None of the amendments fall within the terms of reference of the Committee.

### **Renewable Energy (Electricity) Amendment Bill 2010**

*[Digest 6/10 still awaiting response]*

On 27 May 2010 the House of Representatives passed the bill without amendment. On 23 June 2010 the Senate agreed to 11 government amendments, three opposition amendments, four Australian Greens amendments and three Independent (Xenophon) amendments. The bill was subsequently passed on the same day. On 24 June 2010 the House of Representatives agreed to the Senate amendments. None of the amendments fall within the terms of reference of the Committee.

### **Tax Laws Amendment (2010 Measures No.3 Bill 2010**

*[Digest 6/10 still awaiting response]*

On 23 June a supplementary explanatory memorandum was tabled, 20 government amendments were agreed to and the bill was passed in the House of Representatives. On 24 June 2010 a revised explanatory memorandum was tabled and the bill passed in the Senate. None of the amendments fall within the terms of reference of the Committee.



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

*[Digest 5/10 commented but no response required]*

On 24 June 2010 the House of Representatives passed the bill without amendment and the Senate agreed to 32 government amendments. Subsequently on the same day the House of Representatives agreed to the Senate amendments. None of the amendments fall within the terms of reference of the Committee.

**Trade Practices Amendment (Infrastructure Access) Bill 2009**

*[Digest 14/09 commented but no response required]*

On 1 December 2010 the House of Representatives passed the bill without amendment. On 24 June 2010 the Senate agreed to 15 government amendments. Subsequently on the same day the House of Representatives agreed to the Senate amendments. None of the amendments fall within the terms of reference of the Committee.

## 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
Commission of Inquiry into the Building the Education Revolution Program Bill 2010	Clause 18	Failure of witness to attend or produce documents	6 months imprisonment
	Clause 19	Failure to give evidence	6 months imprisonment
	Clause 21	False or misleading evidence	5 years
Commonwealth Electoral Amendment (Political Donations and Other Measures Bill 2010	Section 315	Failing to furnish a complete return	120 penalty units
Defence Legislation Amendment (Security of Defence Premises) Bill 2010	Clause 71V	Failure to provide evidence of identity	20 penalty units

## 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 42<sup>nd</sup> Parliament.

### **Bills introduced with standing appropriation clauses – 43<sup>rd</sup> Parliament**

\* Indicates new entries

*	<b>Australian National Preventive Health Agency Bill 2009</b> — clause 50 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
*	<b>Financial Framework Legislation Amendment Bill 2010</b> — Schedule 2, item 49, section 45, and Schedule 6, item 18, section 46 (SPECIAL ACCOUNTS: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )