

**SENATE STANDING COMMITTEE FOR
THE SCRUTINY OF BILLS**

**Committee's comments in previous *Alert Digests*
and *Reports* on bills which have been
reintroduced in the 43rd Parliament**

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.

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 National Preventive Health Agency Bill 2010

See *Report No.12 of 2009*

Autonomous Sanctions Bill 2010

See *Digest No.6 of 2010*

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 Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2010
See Digest No.11 of 2008

Corporations Amendment (Sons of Gwalia) 2010
See Digest No.6 of 2010

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2010
See Digest No.10 of 2008

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

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*

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

See *Digest No.12 of 2009*

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*

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 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

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

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

Alcohol Toll Reduction Bill 2007

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

By Senator Fielding

Background

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

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

Explanatory memorandum

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

The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of explanatory memoranda. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and explanatory material, *Preparing Private Senator's Bills, Explanatory*

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Memoranda and Second Reading Speeches: A Guide for Senators. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may assist Senators and Members in preparing explanatory memoranda.

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

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

Anti-Terrorism Laws Reform Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. Senator Ludlam responded to the Committee's comments in a letter dated 7 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the Senate on 23 June 2009

By Senator Ludlam

Background

This bill seeks to amend and, in some cases, repeal provisions of the *Criminal Code Act 1995*, the *Crimes Act 1914* and the *Australian Security Intelligence Organisation Act 1979*.

In particular, the bill amends:

- the *Criminal Code Act 1995* to amend the definitions relating to terrorism offences, provisions relating to the proscription of 'terrorist organisations', offences relating to interaction with 'terrorist organisations', offences relating to 'reckless possession of a thing', and to repeal the offence of sedition;
- the *Crimes Act 1914* in relation to detention of terrorism suspects (including changes to the periods of detention of persons suspected of terrorism offences) and bail conditions of such persons; and
- the *Australian Security Intelligence Organisation Act 1979* in relation to the questioning of terrorism suspects and the detention of terrorism suspects.

The bill also repeals the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Trespass unduly on rights and liberties

Schedule 1, item 5

Principle 1(a)(i) of the Committee's terms of reference requires it to examine whether a proposed provision trespasses unduly on rights and liberties, which involves a balancing of rights. Item 5 of Schedule 1 provides for the repeal of section 101.4 of the *Criminal Code Act 1995* which contains an offence for possessing things connected with terrorist acts. The second reading speech for the bill states that the current provision is deficient because it lacks '(p)arameters for what may be included with[in] the scope of 'thing''.

The Committee considers that repeal of section 104.1 may go further than necessary in response to the stated need. For example, there could be inclusion of a non-exhaustive list of 'things' (see Parliamentary Library, *Bills Digest No 62, 2005-06*, Anti-Terrorism Bill 2005, at pages 6-7) or intention to use the thing as an element of the offence. The Committee **seeks the Senator's advice** as to whether amendment of section 101.4, rather than repeal, might be sufficient to balance rights and liberties in the circumstances.

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

Relevant extract from the response from the Senator

Thank you for your letter of 13 August 2009 regarding the Anti-Terrorism Laws Reform Bill 2009, outlining the Committee's concerns with repealing section 101.4 of the *Criminal Code Act 1995* and the drafting of a new paragraph at section 102.1(2AB)(a) of the *Criminal Code Act 1995*.

With regard to the Committee's concern that repealing section 101.4 of the *Criminal Code Act 1995* may be considered to 'trespass unduly on personal rights and liberties' I respectfully disagree. Rather I would suggest that the existing undefined offence of 'reckless possession of a thing' trespasses unduly on personal rights and liberties because the offence has no parameters. The Committee's proposal to include a non-exhaustive list of 'things' is unsatisfactory as the very nature of a non-exhaustive list fails to adequately define the offence. If the Committee is able to provide further details of how

repealing section 104.1 would trespass on personal rights and liberties I am happy to reconsider this provision.

The Committee thanks the Senator for this response, and is of the view that any further consideration of this issue would be best **left for the Senate as a whole**.

Drafting note

Schedule 1, item 8, new paragraph 102.1(2AB)(a)

Item 8 of Schedule 1 repeals subsection 102.1(2) of the *Criminal Code Act 1995* and substitutes new subsections 102.1(1AA), (2), (2AA), (2AB), (2AC), (2AD) and (2AE). These subsections give effect to a recommendation in the Sheller Report (cited in the second reading speech) that the proscription of an organisation as a terrorist organisation should meet the requirements of administrative law.

Proposed new paragraph 102.1(2AB)(a) provides for notification to an organisation, ‘if it is practical to do so’, that a regulation has been made listing it as a terrorist organisation. Proposed new paragraph 102.1(2AB)(b) provides for the publication of information about the listing. Proposed new subsection 102.1(2AC) provides that, if a regulation is made that lists an organisation, and a foreign country has requested the listing, that information must be included in the published notice.

Practical and other considerations (including national security) may influence actions associated with notification and listing pursuant to proposed new subsections 102.1(2), 102.1(2AB) and 102.1(2AC). Therefore, as a drafting matter, the Committee considers that the words ‘if it is practical to do so’ in proposed new paragraph 102.1(2AB)(a) might be moved to the start of the subsection, following the word ‘must.’ The Committee **seeks the Senator’s advice** on whether the subsection might be amended to allow the Minister more discretion in notification and listing.

Relevant extract from the response from the Senator

The Committee has also proposed to move the words ‘if practical to do so’ at paragraph 102.1(2AB)(a) to the start of the subsection. The words ‘if practical to do so’ have been included to acknowledge the specific difficulty associated with notifying organisations that might not have easily identifiable contact points. I do not wish to amend the bill as suggested to cover other aspects of that subsection, precisely because of the increased discretion it will give the Minister in notification and listing.

The Committee thanks the Senator for this response but, again, expresses the view that any further consideration of this issue would be best **left for the Senate as a whole**.

Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2009

Introduced into the Senate on 26 November 2009

By Senator Bob Brown

Background

This bill amends the *Australian Capital Territory (Self-Government) Act 1988* to abolish the power of the Federal Government to override or amend legislation made by the Australian Capital Territory.

The Committee has no comment on this bill.

Australian National Preventive Health Agency Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 of 2009*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 23 October 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 12 of 2009

Introduced into the House of Representatives on 10 September 2009
Portfolio: Health and Ageing

Background

This bill establishes the Australian National Preventive Health Agency (ANPHA) as a statutory authority under the *Financial Management and Accountability Act 1997*, and specifies its functions, governance and structure. The ANPHA will support the Australian Health Ministers' Conference and, through it, the Council of Australian Governments (COAG) in addressing the challenges associated with preventing chronic disease. The ANPHA will be established under the auspices of the National Partnership Agreement on Preventive Health, a COAG initiative announced in November 2008, and will commence operations on 1 January 2010.

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

Legislative Instruments Act—exemption Subclauses 41(8) and 42(5)

Clause 41 provides for meetings of the Advisory Council, with subclause 41(2) providing that the CEO may determine, in writing, matters relating to the operation of the Advisory Council. Subclause 41(8) provides that such a determination is not a legislative instrument.

Similarly, subclause 42(1) provides for the establishment of committees by the CEO, by instrument, to assist the CEO in the performance of his or her functions or the Advisory Council in the performance of its function. Subclause 42(5) provides that such an instrument is not a legislative instrument. The explanatory memorandum does not provide any explanation as to why these provisions are not subject to the *Legislative Instruments Act 2003*.

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory of the law (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the Legislative Instruments Act. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying its need.

Therefore, the Committee **seeks the Minister's advice** as to the reasons for the proposed exemptions and **requests that the explanatory memorandum be amended** to include the appropriate explanations.

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.

Relevant extract from the response from the Minister

The Committee reported that the explanatory memorandum does not provide any explanation as to why these provisions are not subject to the *Legislative Instruments Act 2003*. Subclauses 41(8) and 42(5) are merely declaratory of the law and included for the avoidance of doubt. They do not refer to a policy intention to exempt an instrument which is legislative in character from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

In accordance with the Committee's request to amend the explanatory memorandum to include the appropriate explanations, I will table a correction to the explanatory memorandum to clarify that subclauses 41(8) and 42(5), as well as subclauses 43(4) and 46(4), have been included for the sake of clarity

only, to assist the reader, and do not amount to an exemption from the *Legislative Instruments Act 2003*.

The Committee thanks the Minister for this response, and is pleased to note her undertaking to amend the explanatory memorandum to clarify that the provisions are merely declaratory of the law.

Standing (special) appropriation

Clause 50

Clause 50 establishes the ANPHA Special Account that is a special account for the purposes of the *Financial Management and Accountability Act 1997* (FMA Act) (see subclause 50(2)). Section 21 of the FMA Act provides that the Consolidated Revenue Fund is appropriated for the purposes of a special account. Clause 50 therefore establishes a standing appropriation.

In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see some limitation placed on the amount of funds that may be so appropriated and a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to the Parliament. The Committee notes that the bill specifies the purposes for which money in the Special Account may be expended (clause 52). However, while the explanatory memorandum refers to the FMA Act (at pages 21 and 22), the reason for the standing appropriation has not been provided. The Committee **seeks the Minister's advice** on the reason for the standing appropriation, whether any limitation could be placed on the amounts to be appropriated, and how parliamentary scrutiny of expenditure under the appropriation will be secured. The Committee also **requests that the explanatory memorandum be amended** to include this information.

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

Relevant extract from the response from the Minister

The Committee also sought advice on the reason for the standing appropriation, whether any limitation could be placed on the amounts to be appropriated, and how parliamentary scrutiny of expenditure under the appropriation will be secured.

Part 7, Division 1 of the Bill provides that the Australian National Preventive Health Agency (the Agency) will have a Special Account. As noted on page 3 of the explanatory memorandum to the Bill, the purpose for which the Special Account has been set up is to provide the Agency with the capability to manage pooled funds, as other organisations such as the State and Territory Governments, industry, non-governmental organisations and the community sector may wish to contribute financially to the Agency's operations.

The States and Territories have indicated a willingness to contribute to the Agency's operations in the future if appropriate provisions are made so that their funds could be transparently managed.

Paragraph 11(1)(h) of the Bill outlines that one of the functions of the Chief Executive Officer of the Agency is to encourage initiatives relating to preventive health matters through partnerships with industry, non-governmental organisations and the community sector. In forming partnerships, these bodies may want to contribute financially to joint projects, but as noted above, would require appropriate safeguards to ensure that the funds contributed would only be available for their agreed purpose.

It is not possible to place boundaries on the credits to the Special Account under clause 51 as contributions from other organisations may be one-off in nature, time limited or vary significantly from year to year.

The amounts to be credited and debited to the Special Account will be subject to parliamentary scrutiny through the Senate Standing Committee on Community Affairs, and disclosed annually in the Health and Ageing Portfolio Budget Statement, the Australian National Preventive Health

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Agency Annual Report, the Consolidated Financial Statements and Budget Paper No. 4: Agency Resourcing.

In accordance with the Committee's request that the explanatory memorandum be amended to include this information, I will table a correction to the explanatory memorandum at the earliest opportunity.

I appreciate the opportunity to address the Committee's comments on the Bill.

The Committee thanks the Minister for this comprehensive response, and for her undertaking to table a correction to the explanatory memorandum to include information in relation to parliamentary scrutiny of the Special Account established by the bill.

Autonomous Sanctions Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Foreign Affairs

Background

This bill provides a framework for the implementation in Australia of autonomous sanctions. The bill seeks to increase the range of measures Australia can implement, which is intended to match the scope and extent of measures implemented by like-minded countries. The bill will also assist the administration of, and compliance with, sanctions measures by removing distinctions between the scope and extent of autonomous sanctions and UN sanction enforcement laws.

Incorporation by reference

Proposed clause 10

The regulation making power in clause 10 of the bill allows, in subclause 10(3), for material to be incorporated by reference to other instruments as they are in force or existence from time to time. The explanatory memorandum explains why these regulations may cover central features of the scheme—such as which persons or entities are proscribed and what activities are restricted—by reference to the need for ‘flexibility to apply new, or amend existing, autonomous sanctions measures in response to international developments which change rapidly’. This justification, however, does not identify the necessity for the regulations to incorporate other instruments by reference. 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. The Committee therefore **seeks the Minister's advice** as to the justification for including this aspect of the regulation making power.

Pending the advice of the Minister, 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.

Henry VIII

Proposed clause 12

A ‘Henry VIII’ clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to ‘Henry VIII’ clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

Clause 12 is a Henry VIII clause insofar as it ensures that regulations made under the bill (once enacted) will have effect despite a contrary provision in another Act. As the explanatory memorandum does not explain the necessity for this delegation of legislative power to the Governor-General under clause 10 of the bill, the Committee **seeks the Minister's advice** as to the justification for this approach.

Pending the advice of the Minister, 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.

Inappropriate delegation of legislative power

Proposed clause 13

Clause 13 of the bill is an interpretive provision, the effect of which is to require that a future Act of Parliament can only be taken as amending or repealing or otherwise altering a provision of Part 2 of this bill (once enacted) or of the regulations made under it, if the Act provides for this outcome expressly. This overrides the normal assumption that future legislation may impliedly repeal earlier legislation, and does so even with respect to regulations made under this Act. Although such an interpretive rule may be considered as appropriate in relation to legislation which is considered to be of special or quasi-constitutional importance, the explanatory memorandum does not explain why it is appropriate in this case. The Committee therefore **seeks the Minister's advice** as to why this rule is appropriate, especially in relation to matters determined in delegated legislation.

Pending the advice of the Minister, 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.

Trespass on personal rights and liberties

Proposed subclause 14(5)

Subclause 14(5) of the bill would relieve the Attorney-General of the normal rule in civil cases that a person seeking an interim injunction give an undertaking in relation to damages. Although special considerations can arise in the context of public law cases (in which the Attorney-General is seeking to enforce the law) the explanatory memorandum does not address this issue. The Committee is concerned to ensure that there is no undue trespass on personal rights and liberties as a result of this provision and therefore **seeks the Minister's advice** as to the justification for the provision and extent of any detriment persons may suffer as a result of it.

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.

Determination of important matters by delegated legislation

Proposed clause 16

Clause 16 seeks to introduce offences for contraventions of a 'sanction law' and defines part of the offences by reference to what is, by a legislative instrument, specified as a 'sanction law' (pursuant to proposed clause 6). Offences committed by an individual can attract a penalty of imprisonment of 10 years or a fine of 2,500 penalty units. Given the seriousness and nature of the offences provided for under clause 16, the Committee **seeks the Minister's advice** as to whether it would be possible to prescribe mechanisms for ensuring that potentially affected persons receive appropriate notice that a particular law has, under clause 6, been specified as a 'sanction law'.

Pending the advice of the Attorney-General, 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

Proposed clause 16

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

If a body corporate contravenes a sanction law under proposed subsections 16(5) and 16(6) the offence is one of strict liability (subclause 16(8)) attracting fines of 3 times the value of the transaction or 10,000 penalty units (subsection 16(9)). Subsection 16(7) provides that an offence did not occur if the body corporate took all reasonable precautions and exercised due diligence to avoid the contravention. The explanatory memorandum notes the effect of these provisions, but does not explicitly discuss the justification for the application of strict liability to bodies corporate. The Committee therefore **seeks the Minister's advice** as to the reasons for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

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.

Privilege against self-incrimination

Proposed clause 22

Clause 22 abrogates the privilege against self-incrimination in relation to a requirement that an individual give information or a document under clause 19. The clause 19 requirement to give information is limited to information sought for the purpose of determining whether a sanction law has been or is being complied with.

Although the bill makes clear that it will operate subject to a 'use' immunity, there is no express inclusion of 'derivative use' immunity. This means that

although information required to be given cannot be used against the person who makes the disclosure in court proceedings, it may be used indirectly to gather other evidence against the person. Although the privilege against self-incrimination should not be thought of as absolute, the Committee considers that any derogation of the privilege should be fully justified in the explanatory memorandum.

In this case the explanatory memorandum does not justify its abrogation nor provide reasons as to why the ‘derivative use’ immunity is not appropriate in these circumstances. The Committee therefore **seeks the Minister's advice** as to the justification for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Attorney-General, 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 inappropriate delegation of legislative power **Proposed clause 24**

Subclause 24(2) sets out those to whom the CEO of a designated Commonwealth entity may disclose information. However, paragraph (f) of the subclause allows disclosure to any person or entity specified in a legislative instrument made by the Minister under subclause 24(3). The explanatory memorandum does not indicate why this is necessary nor in what sort of circumstances further entities or persons may need to be identified for this purpose. 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. The Committee therefore **seeks the Minister's advice** as to the justification for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Minister, 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

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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.

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

Introduced into the Senate on 15 June 2010

Portfolio: Senator Bob Brown

Background

This bill amends the *Banking Act 1959* in four ways. The bill:

- requires banks to offer basic transaction accounts that are free from account keeping fees and penalty fees for the actions of third parties, and that limit other fees to a level sufficient to recover the cost to the bank of the penalised conduct;
- provides that transactions at a bank's own-branded ATMs are to be free of charge, and caps charges for the use of a bank's ATMs by customers of another authorised deposit-taking institution (ADI) at the cost of service provision;
- requires ADIs to offer a mortgage product (a 'fixed interest gap mortgage') with an interest rate fixed at a negotiated margin above the institution's cost of funds; and
- caps mortgage exit fees at a level sufficient only to recover the cost to the lender of the early termination, and requires that exit fees are mentioned in advertising and included in mortgage contracts in a uniform way to ensure customers are aware of them when deciding whether to sign the contract.

The Committee has no comment on this bill.

Building and Construction Industry (Restoring Workplace Rights) Bill 2008

Introduced into the Senate on 28 August 2008

By Senator Siewert

Background

This bill seeks to repeal the *Building and Construction Industry Improvement Act 2005* and the *Building and Construction Industry Improvement (Consequential and Transitional) Act 2005*.

The Committee has no comment on this bill.

Carer Recognition Bill 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

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

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

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

Availability of review of decisions

Schedule 1, subsection 10(2)

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

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

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

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

Civil Dispute Resolution Bill 2010

Introduced into the House of Representatives on 16 June 2010

Portfolio: Attorney-General

Background

This bill encourages the resolution of civil disputes outside of the courts and seeks to improve access to justice by focusing parties and their lawyers on the early resolution of disputes.

The Committee has no comment on this bill.

Commonwealth Commissioner for Children and Young People Bill 2010

Introduced into the Senate on 12 May 2010

Portfolio: Senator Hanson-Young

Background

This private Senator's bill seeks to establish an independent statutory office of Commonwealth Commissioner for Children and Young People, to advocate at a national level for the needs, rights and views of people below the age of eighteen.

The Committee has no comment on this bill.

Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008

Introduced into the Senate on 14 May 2008

By Senator Brown

Background

This bill amends and repeals provisions in the *Commonwealth Electoral Act 1918* relating to group voting tickets to allow for preferential above-the-line-voting in Senate elections. The bill removes from the parties or groups contesting Senate elections the decision of how preferences are to be allocated and provides the voter with the right to choose the preference flow of their vote.

The Committee has no comment on this bill.

Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008

Introduced into the Senate on 25 September 2008

By Senator Ludlam

Background

This bill seeks to repeal the *Commonwealth Radioactive Waste Management Act 2005*; and makes a consequential amendment to the *Administrative Decisions (Judicial Review) Act 1977*.

Explanatory memorandum

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

In this case, the Committee observes that the operative parts of the bill merely propose the repeal of the *Commonwealth Radioactive Waste Management Act 2005*. Further, the second reading speech provides a very full explanation of the intent and effect of the proposed amendments.

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

Corporations Amendment (Sons of Gwalia) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Financial Services, Superannuation and Corporate Law

Background

This bill amends the rights of persons bringing claims for damages in relation to shareholdings under the *Corporations Act 2001*. The amendments contained in the Bill give effect to a decision of the Government to reverse the effect of the High Court's decision in *Sons of Gwalia Ltd v Margaretic* and to make other amendments to streamline external administrations. The bill contains three key measures:

- provides that all claims in relation to the buying, selling, holding or otherwise dealing with shares are to be ranked equally and after all other creditors' claims;
- removes the right of persons bringing claims regarding shareholdings to vote as creditors in a voluntary administration or a winding up unless they receive permission from the Court. They will also not be entitled to receive reports to creditors unless they make a request in writing to the external administrator; and
- eliminates any restriction on the capacity of a shareholder to recover damages against a company based on how they acquired the shares or whether they still hold the shares.

The Committee has no comment on this bill.

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2]

Introduced into the Senate on 17 September 2008

By Senator Ludlam

Background

This bill amends the *Defence Act 1903* to ensure that, as far as is constitutionally and practically possible, Australian Defence Force personnel are not sent overseas to engage in warlike actions without the approval of both Houses of the Parliament.

The Committee has no comment on this bill.

Drink Container Recycling Bill 2008

Introduced into the Senate on 13 March 2008

By Senator Fielding

Background

This bill establishes a national deposit scheme to encourage the recycling of drink containers to protect the environment. The bill:

- requires a producer or distributor of a beverage or an industry or other group to develop, and have approved by the Minister, a beverage container stewardship plan;
- specifies the content of the stewardship plan and the consultation process that must be undertaken in developing the plan;
- specifies the matters that the Minister may take into account when deciding whether to approve a stewardship plan;
- provides for review of a stewardship plan at five yearly intervals; and
- provides for the payment of a deposit when purchasing a beverage container and for the refund of such deposits when the beverage container is taken to a redemption facility.

Explanatory memorandum

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

The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of explanatory memoranda. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and

explanatory material, *Preparing Private Senator's Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may assist Senators and Members in preparing explanatory memoranda.

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

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

Lack of merits review

Subclause 13(1)

Subclause 13(1) gives the Minister a discretion to approve a stewardship plan relating to the way in which a producer or distributor of beverages intends to ensure that containers will be effectively recycled. However, there is no provision in the bill for the exercise of that discretion to be subject to merits review under the *Administrative Appeals Tribunal Act 1975*.

The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee **seeks the Senator's advice** about the reasons for not providing for merits review of a decision by the Minister under subclause 13(1).

Pending the Senator's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

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

Introduced into the Senate on 4 February 2010

By Senators Siewert and Abetz

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to create a new offence relating to support for whaling.

Trespass unduly on rights and liberties Schedule 1, item 1, proposed new section 229E

The proposed section seeks to make it an offence if a person 'provides any service, support or resources to an organisation engaged in whaling'.

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4 deals with *Framing an offence*, and in particular Part 4.3 outlines matters which should be considered relating to the specificity of an offence and to separating the physical elements of an offence into paragraphs.

Item 1 seeks to make it an offence if a person 'provides any service, support or resources to an organisation engaged in whaling.' The explanatory memorandum states that the intention of the proposed section 'is to make unlawful the provision of any assistance to a whaling venture...'.

The Committee prefers that proposed offences are specific so that the parameters of the prohibited conduct are as clear as possible, but notes that the provision reflects the policy intent to capture any assistance given to whaling.

Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2009*. Senator Ludlam responded to the Committee's comments in a letter received on 16 June 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2009

Introduced into the Senate on 14 May 2009
By Senator Ludlam

Background

This bill provides for the environmentally sustainable use of resources and best practice in waste management by establishing a national Beverage Container Deposit and Recovery Scheme. The scheme would include an environmental levy for beverage containers.

Among other things, the bill:

- sets out the functions of the relevant Department in administering the scheme;
- sets a beverage container environmental levy at 10 cents and also allows a higher amount to be prescribed by regulation;
- requires the levy to be paid within 14 days after the end of the month in which the beverage container was sold to enable the funds to be received by the Department before refunds are reimbursed to authorised depots and transfer stations;
- provides penalties for non-payment of the levy;

- requires all beverage containers to be labelled as refundable;
- requires an authorised collection depot or transfer station to pay a refund of the levy to a person returning a used beverage container;
- requires the Department to review the amount of the refund value at least once every five years; and
- enables the Department to grant exemptions to pay the levy in certain circumstances.

Imposing a levy by regulation

Clause 12

The second reading speech and explanatory memorandum explain that the bill establishes a scheme, administered by the relevant Department, to collect a beverage container levy and authorise collection depots and transfer stations. The bill provides for regulations to give effect to the scheme (clause 40). Clause 12 provides that the environmental deposit on each container is 10 cents or a higher amount if prescribed by the regulations. The Committee notes that this could result in imposing a levy by regulation, with no upper limit being set in the bill.

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

The vice to be avoided is delegating an unfettered power to impose fees. In this instance, the Committee notes that the explanatory memorandum provides no explanation as to why the rate of the levy would need to be set by regulation. Similarly, the explanatory memorandum gives no explanation of

why the primary legislation does not provide some limits on the exercise of the power, such as specifying a maximum amount above which the levy cannot be set by regulation, or a formula for calculating the amount of the levy. Therefore, the Committee **seeks the Senator's advice** in respect of these matters.

The Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Senator

Thank you for your letter of 3 June 2009 regarding the Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009 outlining the Committee's concerns with the setting of a deposit refund amount.

In the consultation and drafting process of this Bill, I was most cognisant of the fact that the Senate cannot impose a levy. After seeking clarification from a variety of sources, it is my understanding that a deposit is neither a levy nor a fee. A deposit is refunded to the consumer.

That being the case, I would like to indicate to the Committee that I will happily move an amendment to this Bill to provide an upper limit to the deposit when it is debated in the Senate.

The Committee thanks the Senator for this response, which addresses its concerns, and is pleased to note his undertaking to move an amendment to set an upper limit on the deposit.

Fair Work Amendment (Paid Parental Leave) Bill 2009

Introduced into the Senate on 13 May 2009

By Senator Hanson-Young

Background

This bill would amend the *Fair Work Act 2009* to provide for a system of paid parental leave for all eligible Australian parents who take time off work upon the birth or adoption of a child. The bill provides for 26 weeks of government-funded paid leave at or around the birth or adoption of a child, at the level of the federal minimum wage (or, if a person's earnings are less than this, at their average wage), with a guaranteed income and a right to return to work at the end of the period of leave.

Delegation of legislative power

Schedule 1, item 2, new subsection 79F(1)

Proposed new subsection 79F(1), to be inserted by item 2 of Schedule 1, would give the Minister and the Treasurer the power to determine, by legislative instrument, a scheme to provide parental leave benefits, including financial benefits (proposed new paragraph 79F(2)(a)), to individuals who are individual contractors or self-employed.

The policy development of a paid parental leave benefits scheme for individual contractors and the self-employed, and the resulting regulatory framework to give effect to that policy, is an integral part of a paid parental leave scheme as a whole. It is not a matter that is suitable for delegation to individual Ministers for regulation by legislative instrument. In addition, the appropriation of funds for the payment of financial benefits cannot be done through legislative instrument.

The Committee therefore considers that this is an inappropriate delegation of legislative power. However, since the provision of paid parental leave is a policy issue, the Committee **leaves to the Senate as a whole** any consideration of this matter.

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

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009

Introduced into the Senate on 29 October 2009

By Senator Siewert

Background

This bill aims to ensure that the Northern Territory Intervention is consistent with Australia's human rights obligations by restoring the operation of the *Racial Discrimination Act 1975* (Cth) and relevant Northern Territory anti-discrimination laws to:

- the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*;
- the *Northern Territory National Emergency Response Act 2007*; and
- the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*.

Specifically, the bill will ensure that:

- the provisions of the *Racial Discrimination Act 1975* prevail over the provisions of the above-mentioned Acts;
- the above Acts do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 1975*;
- the provisions of those Acts and any acts done under relevant provisions in the Acts are intended to qualify as 'special measures'; and
- any acts done, decisions made or discretions exercised under the Acts are consistent with the intended beneficial purpose of the relevant Act.

Trespass unduly on rights and liberties
Schedule 1

The bill raises the issue of whether the Northern Territory Intervention Acts trespass on personal rights and liberties. When these Acts were considered (as bills) in 2007, the Committee noted that the explanatory memorandum pointed out that ‘special measures’ (under Article 1.4 of the International Convention on the Elimination of all Forms of Racial Discrimination) are those measures which are ‘taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups...requiring such protection as may be necessary in order to ensure such groups...equal enjoyment or exercise of human rights and fundamental freedoms’ (see *Alert Digest No. 9 of 2007*).

In 2007, the Committee considered that the relevant provisions might be considered to trespass on personal rights and liberties but left to the Senate as a whole the question of whether they did so *unduly*. Given that this bill seeks to *remove* any intrusion on rights and liberties imposed by the 2007 Acts, the Committee again considers it appropriate to **leave consideration of such issues to the Senate as a whole**.

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

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

Introduced into the House of Representatives on 26 May 2010

Portfolio: Early Childhood Education, Childcare and Youth

Background

This Bill amends the *A New Tax System (Family Assistance) Act 1999* to set the annual child care rebate limit at \$7,500 for four income years starting from 1 July 2010, with the first indexation of this amount occurring on 1 July 2014.

Retrospective application

Items 2 and 4

The bill contains measures announced in the Budget on 11 May that will take effect for the income year ending on 30 June 2010. Even if the legislation has been passed by that date it has a retrospective effect because it applies to the income year commencing on 1 July 2009.

However, the Committee has regularly been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced. In this case the Committee notes that the legislation has been introduced very soon after the measures were announced in the Budget and that the measure for the 2009-10 income year is the same as for the 2008-09 income year so although its application is retrospective will have no detrimental effect.

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

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

Fisheries Legislation Amendment Bill (No.2) 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill will amend the *Fisheries Management Act 1991*, the *Fisheries Administration Act 1991* and the *Fishing Levy Act 1991* to facilitate the implementation of co-management, regulatory simplification, the rationalisation of management advisory committees and allow the Australian Fisheries Management Authority to provide services to other agencies.

The Committee has no comment on this bill.

Food Safety (Trans Fats) Bill 2009

Introduced into the Senate on 16 March 2009

By Senator Siewert

Background

This bill prohibits, within the bounds of Commonwealth constitutional competence, the addition of synthetic trans fatty acids to food. Specifically, the bill prohibits constitutional corporations and individuals in particular circumstances from manufacturing, distributing, offering for sale, selling or otherwise trading in food containing synthetic trans fatty acids.

The bill would replace the current regulatory regime, while providing scope for the states and territories to adopt their own regulatory response in recognition of their responsibility for food standards.

Delayed commencement

Clause 2

Clause 2 of the bill states that it will commence on 1 January 2010. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less, however, where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation.

In this instance, the Committee notes that the explanatory memorandum explains that the delay in commencement is to allow industry sufficient time to find suitable substitutes for synthetic trans fatty acids.

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

National schemes of legislation – insufficient parliamentary scrutiny Clause 6

Clause 6 of the bill provides that state and territory legislation regulating the content of synthetic fatty acids may prevail over the bill to the extent of any inconsistency. The Committee notes that the explanatory memorandum explains this reversal of the usual Constitutional rule (section 109) by reference to the right of states and territories to enact complementary or alternative regulatory regimes. The Committee has in the past been concerned to ensure that there is sufficient parliamentary scrutiny of national schemes of legislation but, in this case, leaves **to the Senate as a whole** any consideration of the matter.

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

Food Standards Amendment (Truth in Labelling— Palm Oil) Bill 2009

Introduced into the Senate on 23 November 2009

By Senators Xenophon, Bob Brown and Joyce

Background

This bill amends the *Food Standards Australia New Zealand Act 1991* to provide consumers with accurate labelling information about palm oil in food.

In particular, the bill requires Food Standards Australia New Zealand to develop and approve labelling standards for food producers, manufacturers and distributors of foods containing palm oil.

The Committee has no comment on this bill.

Food Standards Australia New Zealand Amendment Bill 2010

Introduced into the House of Representatives on 13 May 2010

Portfolio: Health and Ageing

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2010*. The Parliamentary Secretary responded to the Committee's comments in a letter dated 23 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2010

Background

The bill implements a reform agreed to by the Council of Australian Governments on 3 July 2008, that calls for the recognition, for domestically grown produce, by Food Standards Australia New Zealand, of the Australian Pesticides and Veterinary Medicines Authority's residue risk assessment and the promulgation of the resulting maximum residue limits in the Australia New Zealand Food Standards Code. The implementation of this reform requires the amendment of the *Food Standards Australia New Zealand Act 1991*, and consequential amendments to the *Agricultural and Veterinary Chemicals (Administration) Act 1992* and the *Agricultural and Veterinary Chemicals Code Act 1994*.

The bill also amends the annual reporting requirements for the Authority and corrects some minor inconsistencies inadvertently made to the Act in 2007.

Legislative instrument – commencement

Schedule 1, item 20

The proposed new s 82(8) of the *Food Standards Australian New Zealand Act 1991* states that a variation made to the Maximum Residue Limits Standard takes effect on the day a copy of the variation is published in the Gazette despite subsections 12(1) and (2) of the *LIA*. The Committee accepts that there are circumstances in which this approach is appropriate, but considers that the explanatory memorandum should explain why the general rule set out in the

LIA should be overridden. In this case the explanatory memorandum does not address the issue. The Committee therefore **seeks the Minister's advice** about the reasons for the why this is necessary and whether this approach will be to the detriment of any person.

Relevant extract from the response from the Minister

Legislative instrument - commencement
Schedule I, item 20

Subsection 82(8) of the *Food Standards Australia New Zealand Act 1991*, states that a variation made to the Maximum Residue Limits Standard takes effect on the day a copy of the variation is published in the Gazette despite subsections 12(1) and (2) of the *Legislative Instruments Act 2003* (LLA). The Committee has requested advice about the reasons for overriding the general rule set out in the LLA, and whether this approach is to the detriment of any person.

The current mechanism for incorporating variations to the Australia and New Zealand Food Standards Code into State and Territory law is established under an intergovernmental agreement. Clause 19 of the Food Regulation Agreement states that:

The States and Territories will take such legislative or other steps as are necessary to adopt or incorporate as food standards in force under the food legislation of the State or Territory, the food standards (including variations to those standards) that are from time to time:

...

(b) published in the Commonwealth of Australia Gazette.

The provision in the amended s 82(8) is consistent with the process taken for all other variations to the Code. As the approach is consistent with that taken for the Code as a whole, the provision is not expected be to the detriment of any person.

Committee Response

The Committee thanks the Minister for this response.

Extract from Alert Digest No. 6 of 2010

Explanatory memorandum – no explanation

Items 29, 30, 32, 33, 36, 38 and 39

There is no explanation in the explanatory memoranda for these items. The Committee recognises the manner in which information in explanatory memorandums can assist in the interpretation of bills, and ultimately, Acts and **seeks the Minister's advice** about whether material about these items can be included in the explanatory memorandum.

Relevant extract from the response from the Minister

Explanatory memorandum - no explanation

Items 29, 30, 32, 33, 36, 38 and 39

Explanation on the above points were prepared, but were erroneously omitted from the explanatory memorandum tabled in the House of Representatives due to a printing error. A revised explanatory memorandum is included at Attachment A, and will be tabled in the House of Representatives prior to debate on the Bill.

Committee Response

The Committee thanks the Minister for this response.

Higher Education Legislation Amendment (Student Services and Amenities) Bill 2009

Introduced into the House of Representatives on 9 September 2009

Portfolio: Education

Background

This bill amends the *Higher Education Support Act 2003* to:

- provide for a fee to be imposed by higher education providers for a compulsory student services and amenities fee (to be capped at \$250 per student per annum and indexed annually);
- provide 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 student services and amenities fee through SA-HELP; and
- require higher education providers that receive funding for student places under the Commonwealth Grant Scheme, to comply with new benchmarks from 2010 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.

The bill also makes a minor consequential amendment to the *Income Tax Assessment Act 1936*.

The Committee has no comment on this bill.

Human Rights (Parliamentary Scrutiny) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Attorney-General

Background

This bill, together with the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010, implements the legislative elements of Australia's Human Rights Framework announced by the Government in April 2010. The Human Rights Framework outlines a range of measures to further protect and promote human rights in Australia. It reflects the key recommendations of the National Human Rights Consultation Committee which undertook extensive public consultation on the promotion and protection of human rights in Australia.

The Committee has no comment on this bill.

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

Introduced into the House of Representatives on 2 June 2010

Portfolio: Attorney-General

Background

The bill contains consequential amendments that arise as a consequence of the Human Rights (Parliamentary Scrutiny) Bill 2010 and other matters. The two Bills implement the legislative elements of Australia's Human Rights Framework announced by the Government in April 2010. The Human Rights Framework outlines a range of measures to further protect and promote human rights in Australia.

The key amendments in Schedule 1 to the bill are:

- amend the *Administrative Appeals Tribunal Act 1975* to include the President of the Australian Human Rights Commission, as established by subsection 8(1) of the *Australian Human Rights Commission Act 1986*, as an ex officio member of the Administrative Review Council;
- amend the AAT Act to increase the quorum of the ARC from four to five members; and
- amend the *Legislative Instruments Act 2003* to require an explanatory statement in respect of a disallowable legislative instrument to contain a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2010*.

The Committee has no comment on this bill.

Income Tax Rates Amendment (Research and Development) Bill 2010

Introduced into the House of Representatives on 13 May 2010

Portfolio: Treasury

Background

This bill supports the introduction of a new research and development tax incentive to replace the existing R & D Tax Concession for all income years starting on or after 1 July 2010.

The bill amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997*, the *Income Tax Rates Act 1986*, the *Taxation Administration Act 1953* and the *Industry, Research and Development Act 1986*.

Possible inappropriate delegation of legislative power Schedule 2, Part 1, items 1 and 32A

Schedule 2, Part 1, item 1 includes the new section 29A to be inserted in the *Industry Research and Development Act 1986*. This section deals with the registration of research service providers by the Board. Subsection 29A(2) provides that the Board must not register an entity unless satisfied that it meets criteria specified in regulations made for the purposes of this subsection.

The explanatory memorandum (at page 145) notes that ‘regulations will specify the criteria the entity must meet to satisfy the Board that it is capable of providing services to R&D entities in one or more specified fields of research’ and that specified fields of research will also be prescribed in the regulations. There is, however, no explanation as to why such criteria might not be specified in the primary legislation.

Similarly, section 32A provides for ‘decision-making principles’ to be made by legislative instrument. These principles play an important role in determining how the Board should exercise various powers. The explanatory memorandum, at page 153, does little more than repeat the terms of section 32A as to why the ‘decision-making principles’ cannot be set out in the primary legislation.

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. The Committee therefore **seeks the Treasurer's advice** as to the why the criteria referred to in item 1 and the 'decision-making principles' of section 32A cannot be set out in the primary legislation.

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

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

Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Home Affairs

Background

This bill amends the *Criminal Code Act 1995*, the *Crimes Act 1914*, the *Privacy Act 1988*, the *Australian Federal Police Act 1979*, the *Director of Public Prosecutions Act 1983*, the *Judiciary Act 1903*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Federal Court of Australia Act 1976*, the *International Criminal Court Act 2002*, the *International Transfer of Prisoners Act 1997*, the *International War Crimes Tribunals Act 1995*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Telecommunications (Interception and Access) Act 1979*, and the *Transfer of Prisoners Act 1983*.

The bill implements the identity crime offences recommended by the Model Criminal Law Officers' Committee (MCLOC) which identified deficiencies in the current law applicable to identity crime. The bill also contains a range of other amendments to clarify and improve the operation of justice legislation in the Commonwealth.

In particular, the bill:

- inserts into the Criminal Code the three offences recommended by the MCLOC which are directed at dealing in identification information, possessing identification information, and possession of equipment to make identification documentation;
- corrects a drafting error in subsection 477.1(5) of the Criminal Code, and repeals section 55D of the *Judiciary Act 1903*;
- amends the definition of 'enforcement body' in the Privacy Act to include the Victorian Office of Police Integrity;

- allows for the delegation of powers and functions to certain persons and provides legal immunity to the Director or a member of staff carrying out functions and duties under the *Director of Public Prosecutions Act 1983*;
- streamlines the processes for alcohol and other drug testing under the *Australian Federal Police Act 1979* and expands the range of conduct for which the Commissioner may make awards;
- improves the operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and establishes a more consistent approach to the restrictions placed on the disclosure of sensitive AUSTRAC information; and
- reframes the administration of justice offences in Part III of the *Crimes Act 1914* to bring them into line with the Criminal Code.

The bill also contains application provisions.

The Committee has no comment on this bill.

Marriage Equality Amendment Bill 2009

Introduced into the Senate on 24 June 2009

By Senator Hanson-Young

Background

This bill amends the *Marriage Act 1961* to remove all discrimination on the basis of sexuality and gender identity; and to permit marriage regardless of sex, sexuality and gender equality. The bill also provides for the recognition of same-sex marriages entered into under the laws of another country.

The Committee has no comment on this bill.

National Broadcasting Legislation Amendment Bill 2009

'Comments from Report 2 of 2010'

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2009*. The Minister for Broadband, Communications and the Digital Economy responded to the Committee's comments in a letter received on 3 February 2010.

Extract from Alert Digest No.14 of 2009

Introduced into the House of Representatives on 29 October 2009
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Australian Broadcasting Corporation Act 1983* (ABC Act) and the *Special Broadcasting Service Corporation Act 1991* to implement a new merit-based appointment process for the ABC and SBS Boards. The bill also reinstates the position of staff-elected Director to the ABC Board.

In particular, the bill:

- provides for the assessment of applicants' claims to be undertaken by an independent Nomination Panel established at arms length from the government;
- requires vacancies to be widely advertised, at a minimum in national and/or state and territory newspapers, and on the website of the Department of Broadband, Communications and the Digital Economy;
- provides for the assessment of candidates to be made against a core set of selection criteria, supplemented where necessary by additional criteria as determined by the Minister; and
- requires a report containing a short-list of recommended candidates to be provided to either the Minister or Prime Minister by the Nomination Panel.

Trespass unduly on rights and liberties

Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)

Proposed new subsection 12(5A) of the ABC Act, to be inserted by item 12 of Schedule 1, provides that certain persons are not eligible for appointment as the Chairperson or a Director of the ABC Board. These persons are: members or former members of the Commonwealth Parliament (paragraph 12(5A)(a)); members or former members of state or territory parliaments (paragraph 12(5A)(b)); or a person who is or was a senior political staff member (paragraph 12(5A)(c)). Proposed new subsection 17(2A) of the SBS Act, to be inserted by item 24 of Schedule 1, duplicates this disqualification for non-executive Directors of the SBS Board.

The term ‘senior political staff member’ is defined as a person included in a class of persons specified by legislative instrument (proposed new subsection 3(3) of the ABC Act, to be inserted by item 3 of Schedule 1). The explanatory memorandum gives examples (at page 3) of the positions expected to be included in the legislative instrument: Chief of Staff, Special Adviser, Principal Adviser, Senior Adviser, Media Adviser and Adviser. The concept is not intended to extend to more junior positions such as Electorate Officer or Departmental Liaison Officer.

Legislation regularly stipulates the knowledge, skills and experience needed for Commonwealth positions and disqualification from office is generally based on criminal record, bankruptcy or similar lack of fitness for office. Unusually, proposed new subsections 12(5A) and 17(2A) base the disqualification from office on a person’s previous public employment. The explanatory memorandum states (at pages 6 and 15) that the exclusion of former politicians and senior staffers from consideration for ABC and SBS Board positions is intended to strengthen the independence and impartiality of the Boards (consistent with Board duties) and to overcome past perceptions of political bias.

While cognisant of the clear intent of the bill, the Committee notes that discrimination based on political opinion is contrary to human rights (see, for example, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights); and freedom of expression is a recognised human right (see Article 19 of the International Covenant on Civil and Political Rights). Further, political opinion is not necessarily a selection criterion for senior political staff positions.

Such disqualification is based on bias – actual, perceived or vicarious – and the disqualification of all those covered by the provisions is for life. Importantly, it would apply to people who occupied the relevant positions prior to the commencement of the legislation. The Committee **seeks the Minister’s advice** as to the rationale for why this is considered appropriate, as well as the particular reasons why appointment to the ABC and SBS Boards is considered ‘different’ or ‘special’ to other appointments. The Committee also **seeks the Minister’s advice** as to why the term ‘senior political staff member’ will be defined by legislative instrument rather than being defined in the bill itself (which would provide certainty as to the precise positions intended to be covered).

Relevant extract from the response from the Minister

Trespass unduly on rights and liabilities

Schedule J, items 12 and 24, new subsections 12(5A) and 17(2A)

The national broadcasters - the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) - play an important role in Australian life, and it is imperative that they perform their functions in an independent and impartial manner. To this end, the Bill establishes a statutory merit-based and transparent selection process for the appointment of non-executive directors to the ABC and SBS Boards.

To complement the new merit-based selection process, the Bill would also exclude current and former politicians and senior political staff from appointment to the ABC and SBS Boards (see Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)). These measures are intended to strengthen the independence and integrity of the ABC and SBS Boards, which is consistent with the statutory duties of the Boards (see s 8 of the *Australian Broadcasting Corporation Act 1983* and s 10 of the *Special Broadcasting Service Act 1991*).

I do not agree that the exclusion of politicians and senior political staff from appointment to the Boards of the national broadcasters unduly trespasses on the rights and liberties of those affected by the rule. Rather, the new exclusion rule is a response to longstanding public concerns that ABC and, to a lesser extent, SBS Board appointments have been politically motivated. Such concerns have the potential to undermine public confidence, not only in the process whereby appointments are made to the Boards, but also in the management of the national broadcasters.

The ability of the national broadcasters to shape and influence public opinion is significant. It is essential, therefore, to ensure that the Boards of the national broadcasters fulfil their statutory Charters in a manner that is impartial and independent from the Government of the

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day. To this end, the new exclusion rule, along with the statutory appointment process, will ensure that appointments to the Boards of the national broadcasters are merit-based.

Further, it should be noted that the exclusion rule would only apply to a limited class of persons irrespective of their political persuasion or opinion, and would in no way curtail any person's freedom to express an opinion or view.

The term 'senior political staff member' is intended to cover a class of persons ineligible for appointment to the ABC and SBS Boards. It is anticipated that such a class of persons would include those who serve, or have served, politicians as Chiefs of Staff, Special Advisers, Principal Advisers, Senior Advisers, Media Advisers and Advisers. The roles and responsibilities attaching to these positions, as well as the position titles themselves, have changed over time and it is likely that they will continue to evolve and adapt. Defining the term 'senior political staff member' via legislative instrument provides the flexibility necessary to ensure that the definition remains relevant and up-to-date should job titles and responsibilities change or become redundant, or where new positions are created, without the need to amend primary legislation.

The Committee thanks the Minister for this response and draws it to the attention of the Senate. The Committee also seeks further clarification about these items. The Committee acknowledges the intention of the policy, but is not satisfied that the approach strikes a reasonable balance between the competing interests of strengthening the independence of these statutory appointments and protecting people's rights. The Committee **seeks the Minister's further advice** about whether consideration has been given to removing the retrospective application of the requirement so that it will only apply to those people who undertake or remain in 'senior political staff member' positions after commencement of the bill; and whether consideration has been given to limiting the period of exclusion (so that a person would be eligible to apply if they had not been in a proscribed position for a specified period of time). The Committee notes that clause 7 of the *Lobbying Code of Conduct* establishes exclusion periods of 18 months for former Ministers or Parliamentary Secretaries and 12 months for other specified employment (including persons employed in the Offices of Ministers or Parliamentary Secretaries under the *Members of Parliament (Staff) Act 1984* at adviser level and above).

Retrospective application

Schedule 1, subitem 17(2); Schedule 2, item 7

The application provision contained in item 7 of Schedule 2 provides that subsection 13A(6) of the ABC Act, which is inserted by item 4 of Schedule 2, applies in relation to persons elected as the staff-elected Director before or after the commencement of item 7. This means that the time limit imposed in proposed new subsection 13A(6) – namely, that a person who has been elected at two elections is not eligible for election again – can apply to persons elected before commencement of the legislation. The explanatory memorandum states (at page 21) that '(t)his means that if a person who served as staff-elected Director before 15 June 2006 becomes a staff-elected Director in future, their previous period in office is taken into account for the purpose of subsection 13A(6)'.

This can be compared with subitem 17(2) of Schedule 1 which provides that '(s)ubject to subitem (3), the amendment made by item 8 [of Schedule 1] applies in relation to appointments made before, on or after the commencement of that item'. Item 8 of Schedule 1 inserts proposed new subsection 12(2A) into the ABC Act which limits to ten years the total period for which the Chairperson or other non-executive Director may hold office. However, subitem 17(3) is a transitional provision which applies to the person holding the position of ABC Chairperson immediately before commencement of the bill. In effect, the transitional provision allows any time that the person served on the Board as a Director only to be disregarded for the purposes of the ten-year rule inserted by new subsection 12(2A). The explanatory memorandum explains (at page 13) that '(t)his is to ensure the incumbent Chairperson is not disadvantaged by legislative changes that are not intended to change the basis of the original appointment'.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee is mindful that transitional provisions must provide commencement dates for provisions to take effect. Further, the issue of including or disregarding previous Board service clearly involves a policy decision. The Committee nevertheless remains concerned that the retrospective effect of the application provisions may adversely affect certain individuals and **seeks the Minister's advice** as to the rationale for the approaches taken in subitem 17(2) of Schedule 1 and item 7 of Schedule 2.

Relevant extract from the response from the Minister

Retrospective application

Schedule 1, sub item 17(2); item 7

The positions of staff-elected director and Chair are different from other directors and, consequently, require application and transitional arrangements that are appropriate to the circumstances peculiar to those positions. The application provision applicable to the staff elected director (see item 7 of Schedule 2) ensures that a candidate can serve no more than two terms, or ten years, in that position in total. This is consistent with the approach taken with the non-elected non-executive directors on the ABC Board. The application provision in item 7 would also facilitate a measured renewal of Board membership and its strategic direction.

The provisions in items 17(3) and 30(3) of Schedule 1 apply to the incumbent ABC and SBS Chairpersons respectively. The effect of these provisions is to disregard, for the purposes of the ten year term rule in items 8 and 26, time served as directors only on the relevant Boards (i.e. time served not as the Chairperson). These arrangements ensure that the current ABC and SBS Chairpersons are not prevented, by virtue of the amendments in the Bill, from serving a maximum of ten years as Chairs of the Boards. Further, the provisions with respect to the incumbent Chairpersons would also promote stability, continuity and consistency of direction for the national broadcasters in the short to medium term.

The Committee thanks the Minister for this response, which satisfies its concerns.

'Comments from Report No.5 of 2010'

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2009*. The Minister for Broadband, Communications and the Digital Economy responded further to the Committee's comments in a letter received on 21 April 2010.

Extract from Alert Digest No.14 of 2009

Introduced into the House of Representatives on 29 October 2009
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Australian Broadcasting Corporation Act 1983* (ABC Act) and the *Special Broadcasting Service Corporation Act 1991* to implement a new merit-based appointment process for the ABC and SBS Boards. The bill also reinstates the position of staff-elected Director to the ABC Board.

In particular, the bill:

- provides for the assessment of applicants' claims to be undertaken by an independent Nomination Panel established at arms length from the government;
- requires vacancies to be widely advertised, at a minimum in national and/or state and territory newspapers, and on the website of the Department of Broadband, Communications and the Digital Economy;
- provides for the assessment of candidates to be made against a core set of selection criteria, supplemented where necessary by additional criteria as determined by the Minister; and
- requires a report containing a short-list of recommended candidates to be provided to either the Minister or Prime Minister by the Nomination Panel.

Trespass unduly on rights and liberties

Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)

Proposed new subsection 12(5A) of the ABC Act, to be inserted by item 12 of Schedule 1, provides that certain persons are not eligible for appointment as the Chairperson or a Director of the ABC Board. These persons are: members or former members of the Commonwealth Parliament (paragraph 12(5A)(a)); members or former members of state or territory parliaments (paragraph 12(5A)(b)); or a person who is or was a senior political staff

member (paragraph 12(5A)(c)). Proposed new subsection 17(2A) of the SBS Act, to be inserted by item 24 of Schedule 1, duplicates this disqualification for non-executive Directors of the SBS Board.

The term ‘senior political staff member’ is defined as a person included in a class of persons specified by legislative instrument (proposed new subsection 3(3) of the ABC Act, to be inserted by item 3 of Schedule 1). The explanatory memorandum gives examples (at page 3) of the positions expected to be included in the legislative instrument: Chief of Staff, Special Adviser, Principal Adviser, Senior Adviser, Media Adviser and Adviser. The concept is not intended to extend to more junior positions such as Electorate Officer or Departmental Liaison Officer.

Legislation regularly stipulates the knowledge, skills and experience needed for Commonwealth positions and disqualification from office is generally based on criminal record, bankruptcy or similar lack of fitness for office. Unusually, proposed new subsections 12(5A) and 17(2A) base the disqualification from office on a person’s previous public employment. The explanatory memorandum states (at pages 6 and 15) that the exclusion of former politicians and senior staffers from consideration for ABC and SBS Board positions is intended to strengthen the independence and impartiality of the Boards (consistent with Board duties) and to overcome past perceptions of political bias.

While cognisant of the clear intent of the bill, the Committee notes that discrimination based on political opinion is contrary to human rights (see, for example, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights); and freedom of expression is a recognised human right (see Article 19 of the International Covenant on Civil and Political Rights). Further, political opinion is not necessarily a selection criterion for senior political staff positions.

Such disqualification is based on bias – actual, perceived or vicarious – and the disqualification of all those covered by the provisions is for life. Importantly, it would apply to people who occupied the relevant positions prior to the commencement of the legislation. The Committee **seeks the Minister’s advice** as to the rationale for why this is considered appropriate, as well as the particular reasons why appointment to the ABC and SBS Boards is considered ‘different’ or ‘special’ to other appointments. The Committee also **seeks the Minister’s advice** as to why the term ‘senior political staff member’ will be defined by legislative instrument rather than being defined in the bill itself (which would provide certainty as to the precise positions intended to be covered).

Relevant extract from the response from the Minister

Trespass unduly on rights and liabilities

Schedule J, items 12 and 24, new subsections 12(5A) and 17(2A)

The national broadcasters - the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) - play an important role in Australian life, and it is imperative that they perform their functions in an independent and impartial manner. To this end, the Bill establishes a statutory merit-based and transparent selection process for the appointment of non-executive directors to the ABC and SBS Boards.

To complement the new merit-based selection process, the Bill would also exclude current and former politicians and senior political staff from appointment to the ABC and SBS Boards (see Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)). These measures are intended to strengthen the independence and integrity of the ABC and SBS Boards, which is consistent with the statutory duties of the Boards (see s 8 of the *Australian Broadcasting Corporation Act 1983* and s 10 of the *Special Broadcasting Service Act 1991*).

I do not agree that the exclusion of politicians and senior political staff from appointment to the Boards of the national broadcasters unduly trespasses on the rights and liberties of those affected by the rule. Rather, the new exclusion rule is a response to longstanding public concerns that ABC and, to a lesser extent, SBS Board appointments have been politically motivated. Such concerns have the potential to undermine public confidence, not only in the process whereby

appointments are made to the Boards, but also in the management of the national broadcasters.

The ability of the national broadcasters to shape and influence public opinion is significant. It is essential, therefore, to ensure that the Boards of the national broadcasters fulfil their statutory Charters in a manner that is impartial and independent from the Government of the day. To this end, the new exclusion rule, along with the statutory appointment process, will ensure that appointments to the Boards of the national broadcasters are merit-based.

Further, it should be noted that the exclusion rule would only apply to a limited class of persons irrespective of their political persuasion or opinion, and would in no way curtail any person's freedom to express an opinion or view.

The term 'senior political staff member' is intended to cover a class of persons ineligible for appointment to the ABC and SBS Boards. It is anticipated that such a class of persons would include those who serve, or have served, politicians as Chiefs of Staff, Special Advisers, Principal Advisers, Senior Advisers, Media Advisers and Advisers. The roles and responsibilities attaching to these positions, as well as the position titles themselves, have changed over time and it is likely that they will continue to evolve and adapt. Defining the term 'senior political staff member' via legislative instrument provides the flexibility necessary to ensure that the definition remains relevant and up-to-date should job titles and responsibilities change or become redundant, or where new positions are created, without the need to amend primary legislation.

The Committee thanks the Minister for this response and draws it to the attention of the Senate. The Committee also seeks further clarification about these items. The Committee acknowledges the intention of the policy, but is not satisfied that the approach strikes a reasonable balance between the competing interests of strengthening the independence of these statutory appointments and protecting people's rights. The Committee **seeks the Minister's further advice** about whether consideration has been given to removing the retrospective application of the requirement so that it will only apply to those people who undertake or remain in 'senior political staff member' positions after commencement of the bill; and whether consideration has been given to limiting the period of exclusion (so that a person would be eligible to apply if they had not been in a proscribed position for a specified period of time). The Committee notes that clause 7 of the *Lobbying Code of Conduct* establishes exclusion periods of 18 months for former Ministers or Parliamentary Secretaries and 12 months for other specified employment (including persons employed in the Offices of Ministers or Parliamentary Secretaries under the *Members of Parliament (Staff) Act 1984* at adviser level and above).

Relevant extract from the response from the Minister

Trespass unduly on rights and liabilities

Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)

The decision to exclude current and former politicians and senior political staff from appointment to the Boards of the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (S13S) was an election commitment that addressed longstanding public perceptions that ABC and to a lesser extent, SBS Board appointments have been politically biased. This new exclusion rule, along with the statutory appointment process, is intended to strengthen the independence of the national broadcasters and will ensure that appointments to their Boards are merit-based and not politically motivated.

The Government considers that the proposed exclusion rule is appropriately narrow in its intended application and effect. Specifically, the rule would only apply to a limited class of persons irrespective of their political persuasion. It would in no way curtail any person's freedom to express an opinion or view. The rule is also limited to appointments of non-executive Directors to the Boards of the national broadcasters.

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It has no application outside this limited context. For these reasons, I do not consider it appropriate to further limit the scope of the rule's application.

I reiterate the points I made in my letter of 3 February 2010. The ability of the national broadcasters to shape and influence public opinion is significant.

It is essential, therefore, to ensure that the Boards of the national broadcasters fulfil their statutory duties and uphold their Charters in a manner that both appears to be and, as far as reasonably possible, is impartial and independent from the Government of the day. These amendments are intended to achieve this objective.

The Committee thanks the Minister for his response. The Committee has considered the points made, but retains its concern about whether the approach strikes a reasonable balance between the competing interests of strengthening the independence of these statutory appointments and protecting people's rights. The Committee draws the provisions to the attention of the Senators and **leaves to the Senate as a whole** the question of whether they trespass unduly on personal rights and liberties.

National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Health and Ageing

Background

This bill amends the *National Health Act 1953* (the Act) to:

- set out new Pharmaceutical Benefits Scheme (PBS) pricing arrangements aimed at reducing growth in PBS expenditure and will provide certainty to the pharmaceutical industry in relation to PBS pricing policy; and
- provide for the collection of 'under co-payment data' from approved suppliers (certain pharmacists, hospitals and medical practitioners).

The bill also amends the *Health Insurance Act 1973* and the *Medicare Australia Act 1973* which are consequential to the changes made in relation to section 100 listing arrangements.

The Committee has no comment on this bill.

National Security Legislation Amendment Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Attorney-General responded to the Committee's comments in a letter dated 11 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.5 of 2010

Introduced into the House of Representatives on 18 March 2010

Portfolio: Attorney-General

Background

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

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

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

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

Delegation of legislative power

Schedule 1, Part 1, item 15

Part 1 of Schedule 1 contains amendments relating to treason and sedition offences. The new treasons offence, inserted by item 15, depends upon the enemy being specified by Proclamation. The proposed new subsection 80.1AA(2) of the Criminal Code enables a Proclamation declaring an enemy to be an enemy at war with the Commonwealth to take effect from a day before the day on which it is registered under the *Legislative Instruments Act 2003*. (Such a Proclamation may not, however, take effect before the day it is made (subsection 80.1AA(2)).

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

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

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

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

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

Relevant extract from the response from the Minister

Schedule 1 - Treason and Urging Violence

Delegation of Legislative Power

The Alert Digest notes that there are fine considerations to be made in balancing security of the community with the protection of personal rights and liberties. The Committee elected not to draw its own conclusions on whether or not proposed subsection 80.1 AA(2) of the *Criminal Code Act 1995* (the Act) inappropriately delegates legislative power by allowing part of the content of the offence to be set out in a proclamation.

It is Commonwealth criminal law policy that the elements of an offence should be stated in the offence provision and not provided under another instrument, unless appropriate limitations apply. However, there are occasions when it is necessary to delegate some of the offence elements to secondary instruments. The only element that is delegated to a subordinate instrument in the relevant offence is that Australia is at war with the specified country. I consider the delegation of the particular element in the proposed offence at subsection 80.1AA(2) is appropriate and justified.

Proclamation

The Alert Digest notes that the Committee seeks my advice on the justification for a proclamation under proposed subsection 80.1AA(2) of the Act taking immediate effect in a national security emergency situation, rather than taking effect at the time it is registered under the Legislative Instruments Act 2003.

In the proposed offence, the requirement that the enemy with whom Australia is at war is the subject of a Proclamation ensures both sufficient scrutiny of the decision to declare that enemy and also ensures that the scope and effect of the offence is clear to the Government, the Parliament and those subject to the offence.

It is necessary and appropriate that the offence be contained in the Act. It is also appropriate for the specific enemy to be identified under a subordinate instrument. It would not be practicable for an amendment to the Act to be made within the necessarily short timeframe that Australia was at war with a specific enemy. It is impossible to predict whether electronic communications or other means of communications would be adversely impacted if Australia was at war. Accordingly, including the requirement that the offence did not commence operation until the Proclamation was published might defeat the intended operation of the offence. The offence contains an appropriate safeguard by requiring the Government to make an accountable decision that Australia is at war with the enemy specified in the Proclamation. This element of the offence serves as an additional safeguard as that element would have to be proved beyond reasonable doubt for a prosecution to be successful.

I also note that, under the existing legislation, a person cannot be prosecuted for treason or sedition unless that person assists an enemy who is *both* at war with the Commonwealth (whether or not war has been declared) *and* the enemy has been specified by Proclamation for the purposes of the relevant criminal offence (see paragraphs 80.1(1)(e) and 80.2(7)(c)). Accordingly, for a successful prosecution, it would be necessary to prove both these matters beyond a reasonable doubt. While paragraphs 80.1(1)(e) and 80.2(7)(c) are proposed to be repealed, the latter completely, these requirements will still exist under proposed new section 80.1AA of the Act.

In addition, the content that is to be determined under the subordinate instrument is defined and circumscribed in the Act; that is, the country with which Australia is at war.

The Committee thanks the Attorney-General for this comprehensive response, but remains concerned about whether the public will be adequately notified of a Proclamation specifying an enemy to be an enemy at war with the Commonwealth, especially in the period after the Proclamation is made and before its registration under the *Legislative Instruments Act 2003* is finalised.

In the Committee's view the publication of a Proclamation should be contemporaneous with its commencement. In addition, the public should be informed not only of the making of a Proclamation, but also of its effect (giving rise to new criminal liability). In the Committee's view this need to be achieved by publishing the material aspects of the Proclamation and offence. The Committee does not accept that the reasons offered justify the general exclusion of a publication requirement. In view of its concern that this provision will trespass unduly on personal rights and liberties, the Committee **recommends and requests that the Attorney-General amends** the bill to address these concerns.

Reversal of onus of proof

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

The new subsection 80.1AA(6) makes it a defence of an offence of treason that the conduct is engaged in for the purposes of the provision of aid or humanitarian assistance. The explanatory memorandum does not state why it is appropriate that the defendant bear the onus of proof in relation to this aspect of the criminal offence. The *Guide to Framing Commonwealth*

Offences indicates that any reversal needs to be well justified. The Committee therefore **seeks the Attorney-General's advice** about the justification for placing the evidentiary onus on the defendant in relation to this element of the offence.

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

Relevant extract from the response from the Minister

Defence relating to Humanitarian Aid

The Alert Digest notes that the defendant bears the onus of proof in relation to whether conduct engaged in is for the purposes of the provision of aid or humanitarian assistance. You have requested my advice on the justification for placing the evidentiary onus on the defendant in relation to that element of the offence.

Existing section 80.1(1A) of the Act creates a defence where the conduct is for the provision of aid of a humanitarian nature. This defence is being retained and renumbered under the amended provisions to subsection 80.1AA(6) of the Act as a result of the relocation of the offence of 'materially assisting enemies'.

The prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. This is the case where assistance or humanitarian aid as contemplated by the defence is provided to an enemy at war with Australia.

This matter is peculiarly within the defendant's knowledge and not available to the prosecution. Accordingly, it is legitimate to cast the matter as a defence. Furthermore, the defence only provides that the defendant bears the standard 'evidential burden'. Accordingly, the defence is only required to adduce or point to evidence that suggests a reasonable possibility that the defence is made out (section 13.3 of the Act).

Once this is done the prosecution must refute the defence beyond reasonable doubt (section 13.1 of the Act). The defence does not impose a 'legal burden' defence, in which case it would be necessary for the defendant to establish the defence on the balance of probabilities. It was considered appropriate to create this defence in

addition to the standard defences in Part 2.3 of the Act that apply to all Commonwealth criminal offences.

This is because those general defences may not adequately cover the conduct the subject of this specific defence. As recommended by Commonwealth criminal law policy, because the matter is intended to be a defence, it has been set out separately from the offence, in a separate subsection.

The Committee thanks the Attorney-General for this response, which addresses its concerns. The Committee notes that it would have been useful if some of this information had been included in the explanatory memorandum.

Freedom of speech
Schedule 1, Part 2, item 35

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

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

Relevant extract from the response from the Minister

Freedom of Speech

The Alert Digest notes that the amendments to Item 35, Part 2 of Schedule I, as it relates to 'urging violence against groups' and 'members of groups', encroach upon

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freedom of speech. It leaves open the question of whether these limitations are proportionate and justified, in light of the broader objectives of the amendments.

The 'urging violence' offences are serious offences, which are directed at the urging of violence in circumstances where the person intends that force or violence will occur as a result of their urging.

The offences provide a good faith defence which quarantines genuine good faith speech from the scope of the offence. The new provision under the proposed expanded good faith defence will explicitly recognise the work of artists, academics and journalists and will ensure that legitimate expression is not captured under the offence.

The new provision under the proposed expanded good faith defence is dealt with as a defence to the offences because it is consistent with the way criminal law is drafted and will avoid complicating the newly drafted urging violence offences. However, the primary safeguard to free speech is the explicit requirement that, in order for a person to commit an offence, they must intentionally urge the use of force or violence, intending for that force or violence to occur.

The Committee thanks the Attorney-General for this additional information.

Possible insufficient parliamentary scrutiny

Schedule 2, item 3

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

As there are significant offences connected to the activities of listed terrorist

organisations, the Committee **seeks the Attorney-General's advice** about the justification for applying this amendment to listings made before the commencement of this item.

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

Relevant extract from the response from the Minister

Schedule 21 Item 3 - Listing of terrorist organisations under the Criminal Code

The Alert Digest notes that the proposed amendment to extend the period of operation of listing regulations from 2 years to 3 years will apply retrospectively to regulations that are in force immediately before the commencement of the new law. The Committee has indicated that this has the effect of removing the parliamentary oversight at the time that it would have been expected when the regulation was originally adopted.

Organisations that are listed as terrorist organisations by regulations under the Act are monitored by the Australian Security Intelligence Organisation (ASIO) throughout the period that the regulations remain in force. Should there be any developments or a change in circumstances that might affect whether or not an organisation continues to meet the legislative test for listing as a terrorist organisation under the Act, these developments are brought to the attention of the Attorney-General. Subsection 102.1 (4) of the Act specifically provides that, should the Attorney-General cease to be satisfied that an organisation continues to meet the legislative test for listing as a terrorist organisation, that organisation must be delisted. In light of this continuous monitoring of organisations that are listed as terrorist organisations, I am confident that extending the period of operation of listing regulations from 2 years to 3 years will still afford an appropriate level of Parliamentary scrutiny to these regulations.

The Committee thanks the Attorney-General for this response.

Trespass on personal rights and liberties

Schedule 3

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

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

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

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

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

Relevant extract from the response from the Minister

Schedule 3 - Investigation of Commonwealth offences

Part 1C of the *Crimes Act 1914* provides a framework for how a person can be detained and questioned once they have been arrested for a Commonwealth offence. It also contains important investigatory safeguards to balance the practical consideration that police should be able to question a suspect about an offence before they are brought before a judicial officer. These safeguards include the right for a suspect to have a lawyer present during questioning and the right to be treated with humanity and respect for human dignity.

The provisions in Part 1C were considered by the Hon John Clarke QC, who I appointed to conduct an independent inquiry into the case of Dr Mohamed Haneef. Mr Clarke produced a Report on his inquiry. One aspect of the Report looked at deficiencies in the relevant laws of the Commonwealth that were connected to Dr Haneef's case, including Part 1C of the Crimes Act. Schedule 3 of the Bill will amend Part 1C in response to the findings in the Clarke Report. The amendments will improve the practical operation of Part 1C and enhance existing safeguards.

The Committee thanks the Attorney-General for this additional information.

Trespass on personal rights and liberties

Schedule 4, item 4

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

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

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

Relevant extract from the response from the Minister

Schedule 4 - Powers to search premises in relation to terrorism offences

Item 4

Schedule 4 of the Bill will amend the Crimes Act to include a new power for police to enter premises without a warrant in emergency circumstances. The Committee asks for advice about whether the emergency situations envisaged are inconsistent with alternative forms of accountability such as requiring senior executive authorisation or that the exercises of these powers be supervised by general reporting requirements to the Parliament.

The proposed power is narrowly constrained so that it can only be used where the police officer suspects on reasonable grounds that:

- it is necessary to prevent a thing that is on the premises from being used in connection with a terrorism offence and
- it is necessary to exercise this power without the authority of a warrant because there is a serious and imminent threat to a person's life, health or safety.

For example, the proposed amendment will provide police with clear authority to take immediate action where a member of the public alerts the police to a terrorist threat such as the presence of an explosive device in a building. Without the ability to take such action in a scenario such as this, there is the risk that lives could be lost or property destroyed. The powers available under the proposed amendments will be

limited to searching and seizing a particular thing in emergency circumstances. They cannot be used for general evidence gathering. If, in the course of their search, police find evidence relevant to an offence, they must secure the premises and obtain a search warrant to be able to seize that evidence.

Given the imminent threat, it would be impractical to seek senior executive authorisation prior to the officer entering the premises.

There are also sufficient mechanisms in place to ensure accountability which would limit the utility of reporting to Parliament on the use of this power. The power cannot be exercised covertly and a seizure notice is required to be given to the owner of anything that is taken from the premises. The use of the power will be scrutinised by the courts if criminal proceedings are initiated.

Furthermore, if a person is concerned the power was not exercised correctly, they could lodge a complaint either directly with the AFP or with the Australian Commission for Law Enforcement Integrity (ACLEI) or the Commonwealth Ombudsman who could investigate the complaint. Furthermore, the newly established Independent National Security Legislation Monitor, once appointed, will review the use or purported use of this provision in accordance with its functions.

The Committee thanks the Attorney-General for this response, which identifies avenues of complaint available to a person concerned about the exercise of these powers. The Committee notes that it would have been useful if some of this information had been included in the explanatory memorandum.

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

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

its existing ability to determine whether the material the subject of the conclusive certificate is able to be disclosed (section 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).

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

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

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

Relevant extract from the response from the Minister

Schedule 8 - Amendments relating to the disclosure of national security information in criminal and civil proceedings

Items 36, 37, 79 and 80

If the Attorney-General is notified of an expected disclosure of information which relates to or may affect national security, the Attorney-General may issue a criminal non-disclosure certificate in a federal criminal proceeding under section 26 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act) if satisfied that disclosure of the information would be likely to prejudice

national security. Under section 27, once a criminal non-disclosure certificate is given in a federal criminal proceeding, a closed court hearing takes place to determine whether it will maintain, modify or remove the restriction on disclosure of information. The Attorney-General's certificate is conclusive evidence that disclosure of the information in the proceeding is likely to prejudice national security, but *only* until the closed court hearing takes place. Items 36 and 37 are consequential amendments to section 27 as a result of the proposed amendment to the definition of federal criminal proceedings so that it does not include extradition proceedings.

Proposed new section 38H of the NSI Act provides the Attorney-General with the power to issue a witness exclusion certificate in a civil proceeding if he or she has been notified by a party or expects that a person whom a party intends to call as a witness may disclose information by his or her mere presence and the disclosure would be likely to prejudice national security. Items 79 and 80 are consequential to other amendments in the Bill to reflect the fact that the legal representative of a party (as well as a party) could also notify the Attorney-General of the potential disclosure.

The Committee thanks the Attorney-General for this additional information.

Inappropriately delegate legislative power

Schedule 8, items 103 and 107

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

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

Nevertheless, the explanatory memorandum (at pages 63 and 72) does not explain why it is necessary to delegate legislative power in relation to the storage, handling and destruction of national security information. Given that failure to comply with the Regulations is an offence which carries with it a

penalty of imprisonment the Committee **seeks the Attorney-General's advice** about the justification for the proposed approach.

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

Relevant extract from the response from the Minister

Schedule 8 - Amendments relating to the disclosure of national security information in criminal and civil proceedings

Items 103 and 107

Items 103 and 107 will create new offences to contravene the National Security Information Act (Criminal and Civil Proceedings) Regulations (the Regulations). The Regulations incorporate the Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings (the Requirements), which specify how and where national security information must be accessed, stored and otherwise handled and address a range of physical security matters. The penalty for the proposed new offences will be 6 months imprisonment. The Committee asks why it is necessary to delegate legislative power in relation to the storage, handling and destruction of national security information.

The consequences of failing to comply with the requirements in the Regulations are serious, and accordingly should attract a criminal sanction. Given the detailed nature of the requirements, it would be impractical to include their content in specific offence provisions in the Act. Further more, the proposed new offences are consistent with existing offences in the Act for contravening a court order (see sections 45 and 46F).

At any time during a federal criminal proceeding, the prosecutor and defendant may agree to an arrangement about the disclosure of national security information in the proceeding. The court has a broad discretion under subsection 22(2) of the NSI Act to make orders it considers appropriate to give effect to the arrangement. When a section 22 arrangement is in place, the requirements set out in the Regulations and Requirements do not apply. Section 22 arrangements have become common practice in most cases, particularly where parties are willing to negotiate to protect the information appropriately.

The Committee thanks the Attorney-General for this response and notes the reasons for the proposed approach and the availability of section 22 arrangements.

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

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2010*. The Minister for Resources and Energy responded to the Committee's comments in a letter dated 15 March 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.2 of 2010

Introduced into the House of Representatives on 10 February 2010
Portfolio: Resources and Energy

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:

- retain fees raised under the *Offshore Petroleum and Greenhouse Gas (Registration Fees) Act 2006* (the Registration Fees Act) to provide establishment funding for the National Offshore Petroleum Regulator (NOPR);
- augment the functions of the National Offshore Petroleum Safety Authority (NOPSA) to include regulatory oversight of non-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;
- clarify that a titleholder's occupational, health and safety (OHS) responsibilities relate only to wells and not to facilities more generally; and
- update listed OHS laws in Section 638 and provide transitional arrangements.

Retrospective application

Schedule 1, Part 6, subsections 8A(4) to (6), 8B(4) to (6), 13A & 13B

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee considers that the reasons for the retrospectivity should be set out in the relevant explanatory memorandum.

In this case clauses 8A and 8B of the bill seek to establish that the responsibilities associated with a petroleum or greenhouse gas title are derived from the preceding title(s). The explanatory memorandum outlines (at p.12) that this concept is then applied to new clauses 13A and 13B so that 'a titleholder's duty of care in relation to wells will extend not only to wells in respect of which activities are carried out during the term of the current title but also to wells in respect of which activities have been carried out under the authority of any previous title in the series of titles regardless of the identity of the titleholder.' These sections recast existing offences 13A and 13B in Schedule 3 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to correct some uncertainty about their application and to ensure that all conduct that was intended to be dealt with is covered.

These clauses are clearly designed to have retrospective effect, but the Committee is concerned to ensure that the retrospective application does not have a detrimental effect, especially as existing clauses 13A and 13B do 'not cover all aspects...' and are being expanded. Therefore, the Committee **seeks the Minister's advice** on the rationale for imposing retrospective liability in relation to a titleholder's duty of care and whether the retrospective application is appropriate in all 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.

Relevant extract from the response from the Minister

In particular, the Committee has asked for my advice on the rationale for imposing retrospective liability in relation to a titleholder's duty of care and whether the retrospective application is appropriate in all circumstances.

Part 6 of the Bill removes an unintended ambiguity that a titleholder's responsibility extends to ensuring that all facilities including ships, platforms etc, are designed to be safe when properly used, and instead clarifies that their responsibility is limited to ensuring wells are safe. However, in order to ensure wells are safe in all circumstances it is necessary to not only reduce risks that may arise from well design but also inter alia construction, maintenance, alteration and ongoing operation of a well. These elements have been expressly outlined in the new clauses.

The amendments in Part 6 also add the concept of a derived title. This is so that responsibility for a well is not disregarded on the basis of a change in title. A clear example of titles changing would be when a petroleum company, which holds an exploration permit, drills a well and discovers petroleum. Following this the company applies for and is granted a petroleum licence. Here the title has changed but the well which discovered petroleum and is the subject of regulation is the same well. Further, if a company acquires an existing title in which wells have been sunk, it has a clear responsibility to ensure those wells function properly and do not fail, whether or not they are being used.

Thus while there is an element of retrospectivity to Part 6 of the Bill, this is to ensure that the titleholder's responsibility is always linked to well safety and not diluted by historical circumstance such as progression from a permit to a licence or through changes in title ownership.

These amendments fulfil the original policy intention to make a titleholder responsible for the occupational health and safety aspects of wells, as the titleholder holds the essential knowledge of the geology of the oil or gas reservoir including pressures in the reservoir and is thus best able to determine where the well should be located and how it should be designed, constructed, maintained and operated in a safe manner.

The Committee thanks the Minister for this response. The additional information provided assists the Committee to understand the justification for the retrospective aspects of these provisions. The Committee notes that it would have been useful for some of this information to be included in the explanatory memorandum.

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

Introduced into the House of Representatives on 10 February 2010

Portfolio: Resources and Energy

Background

This bill provides transitional arrangements from 1 January 2010 until 31 December 2012 in relation to section 8 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2003* which imposes a safety case levy in relation to designated coastal waters.

Retrospective application Schedule 1, items 2, 5 and 6

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

In this case the specific purpose of the bill is to provide transitional arrangements from 1 January 2010 until 31 December 2012. The *Offshore Petroleum and Greenhouse Gas Storage Act 2003* was amended in 2009 to extend the safety case levy to cover pipelines and to remove references to the safety management plan levy. As the explanatory memorandum outlines:

While the Amendment Act provided transitional arrangements it did so on the basis that State and Territory regulations which correspond to the Commonwealth regulations would be similarly amended. This has not yet occurred which means that some safety levy payments due to the National Offshore Petroleum Safety Authority may not be collectable until such time as the Act is amended. Thus a transitional period is required...

The Committee acknowledges this explanation and is not aware of a detrimental effect on any person.

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

Ombudsman Amendment (Education Ombudsman) Bill 2010

Introduced into the Senate on 11 March 2010

Portfolio: Senator Hanson-Young

Background

This bill seeks to create the office of the Education Ombudsman to cover the domestic and international education sector in Australia and act as a one-stop national authority for resolving individual student complaints; provide a further avenue for resolving academic disputes, monitoring and enforcing compliance of education institutions, and facilitating communication between state and federal governments and educational organisations.

Legislative Instruments Act – exemption Schedule 1, proposed new subsection 19FR(4)

Proposed new subsection 19FR(4) provides that a Minister's written determination authorised under subsection 19FR(3) specifying the total amount of fees that may be charged in relation to Education Ombudsman investigations 'is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*'.

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this case, the explanatory memorandum notes (at page 2) that Division 4 provides for the Education Ombudsman to charge an education provider fees incurred in relation to an investigation, but does not explain whether subsection 19FR(4) is declaratory or substantively creates an exemption from the *Legislative Instruments Act 2003*. The Committee notes that subsection 19FR(4) is consistent with existing provisions in the *Ombudsman Act 1976* (such as 19ZE) but still expects that an explanation of the proposed provision

will be provided. The Committee **draws this concern to the attention of the proposer** and requests that if the bill proceeds to further stages of debate that an amended explanatory memorandum be provided to the Senate.

Ozone Protection and Synthetic Greenhouse Gas Management Amendment Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Environment Protection, Heritage and the Arts

Background

This bill seeks to amend the operation of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Ozone Act) by:

- introducing a civil penalties regime and providing for the establishment of an infringement notice scheme;
- clarifying the powers of inspectors, particularly in relation to the collection and testing of ozone depleting substances and synthetic greenhouse gases and search of electronic data storage;
- providing for inspectors to be assisted in exercising their powers. This is particularly important where technical specialists are required;
- improving the procedures for dealing with evidential material, including the seizure, retention, return or forfeiture of that material and providing for enhanced testing arrangements;
- clarifying the purposes of the Ozone Account (the Account), which is a Special Account established by the Act, to support the development of evidence-based policy by allowing research to be funded from the Account; and
- making a number of other technical and administrative amendments to the Act.

Retrospective application

Schedule 1, item 118

Item 88 seeks to amend section 57 of the *Ozone Protection and Synthetic Greenhouse Gas Managements Act 1989* in relation to forfeitable goods. Item 118 is a transitional provision which provides that the amended definition of forfeitable goods applies to contraventions that occurred before,

at or after the commencement of the item. The explanatory memorandum at paragraph 177 simply restates the effect of the provision without explaining the justification for it.

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

Parliamentary Joint Committee on Law Enforcement Bill 2010

Introduced into the House of Representatives on 18 March 2010

Portfolio: Attorney-General

Background

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

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

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

The Committee has no comment on this bill.

Plebiscite for an Australian Republic Bill 2008

Introduced into the Senate on 11 November 2008

By Senator Bob Brown

Background

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

The Committee has no comment on this bill.

Poker Machine (Reduced Losses-Interim Measures) Bill 2009

Introduced into the Senate on 28 October 2009

Senator Xenophon

Background

This bill aims to implement key recommendations of the Productivity Commission's draft report into Gambling (pending the publication of the Commission's final report in early 2010), by introducing interim measures to regulate the rate of poker machine losses, and adjust spin rates and the 'volatility' of poker machines.

The Committee has no comment on this bill.

Preventing the Misuse of Government Advertising Bill 2010

Introduced into the Senate on 16 June 2010

Portfolio: Senator Bob Brown

Background

This bill provides the Auditor-General with new functions to review government information and advertising campaigns with a cost in excess of \$250,000 and to report whether they comply with the principles and guidelines set out in the bill and do not contain electoral matter. The bill allows the Auditor-General to use the powers available under the Audit Act to undertake these new functions.

Determination of important matter by regulations

Part 2, item 6

Clause 6 of the bill allows for a national emergency exemption to the application of the guidelines. Subclause 6(4) of the bill, however, allows for 'national emergency' to be defined in the regulations. The Committee prefers to see important matters dealt with in primary legislation and thus expects the need for such matters to be prescribed in regulation to be well justified.

As the explanatory memorandum does not address this issue, if the bill proceeds to further stages of debate, the Committee **seeks the Private Senator's advice** as to the justification for this delegation of legislative power.

Pending the advice of the Private Senator, 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.

Primary Industries (Excise) Levies Amendment Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Primary Industries (Excise) Levies Act 1999* to increase the cap on the research and development component of the laying chickens levy from 10 to 30 cents per laying chicken.

The Committee has no comment on this bill.

Protection of the Sea Legislation Amendment Bill 2010

Introduced into the House of Representatives on 3 February 2009

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill amends the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008*.

Schedule 1 amends Part IIID of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement a revised Annex VI (Air Pollution) of the *International Convention for the Prevention of Pollution from Ships* (MARPOL). The main effect of the revised Annex VI is to provide for a stepped reduction in the sulphur level in fuel oil used in ships to reduce the emission of sulphur oxides.

Schedule 2 adds a responder immunity provision to the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* to protect persons who act reasonably and in good faith.

Possible error in the explanatory memorandum

Clause 2

Clause 2 explains the commencement arrangements for the bill. It explains that 'Schedule 1 will commence on the later of the day after the proposed Act receives Royal Assent and 1 July 2010. The date of 1 July 2009 is when the revised Annex VI of MARPOL enters into force internationally.'

The Committee understands that the proposed commencement date for Annex VI is 1 July **2010**, which is consistent with the actual commencement arrangements for the bill outlined in clause 2. The Committee **draws this matter to the attention of the Minister** for any appropriate action.

The Committee makes no further comment on this matter.

Reversal of onus

Schedule 1, items 9 and 14

As a general principle in criminal law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt. This is reflected in the December 2007 Minister for Home Affairs updated *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. However, the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

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

Items 9 and 14 seek to add defences in relation to the existing offences of using fuel oil above the prescribed sulphur limit. In relation to these defences the defendant will bear an 'evidential' burden. The explanatory memorandum demonstrates that the information required is peculiarly within the knowledge of the defendant. At page four the explanatory memorandum describes that it is reasonable for this burden to be placed on the defendant as he or she 'would easily be able to demonstrate what steps he or she took' to obtain appropriate fuel oil and the absence of appropriate options, or that he or she 'contacted a prescribed officer and, where required, the government of a foreign country.'

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

Strict liability

Schedule 1, items 35 and 36, proposed subsections 26FES, 26FET and 26FEV

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to the attention of Senators any provisions in bills which create strict and absolute liability offences. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

These items seek to introduce new strict liability offences for breaches of documentation and record keeping requirements. The explanatory memorandum refers to this Committee's Sixth Report of 2002 and the *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and observes for each proposed offence (at pp 7, 8 and 9 respectively) that these matters are straightforward for the defendant to demonstrate but would be difficult for the prosecution and that they are consistent with other offences of a similar nature.

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

Radiocommunications Amendment Bill 2010

Introduced into the House of Representatives on 16 June 2010

Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Radiocommunications Act 1992* to:

- provide the Australian Communications and Media Authority (ACMA) with greater flexibility in the timeframe in which it can commence spectrum licence re-issue processes;
- allow the ACMA to issue class licences in the same radiofrequency spectrum as expired or re-issued spectrum licence allocations as well as spectrum in which a spectrum licence is not currently in force, conditional upon there being adequate interference safeguards and it is in the public interest;
- make class of service determinations made by the Minister under subsection 82(3) of the Act legislative instruments that are not subject to disallowance; and
- make spectrum access charge directions by the Minister to the ACMA under subsection 294(2) of the Act not legislative instruments.

Exemption from disallowance

Ministerial direction not a legislative instrument

Schedule 1, item 4 and 9

Items 4 and 9 respectively exempt a legislative instrument from disallowance and specify that a Ministerial direction is not a legislative instrument. The explanation for these items, including in the background discussion contained in the explanatory memorandum at pages 6 and 9, is detailed and the Committee accepts that the proposed approach is satisfactory.

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

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

Introduced into the Senate on 11 November 2008

By Senator Milne

Background

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

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

The Committee has no comment on this bill.

Responsible Takeaway Alcohol Hours Bill 2010

Introduced into the Senate on 13 May 2010

Portfolio: Senator Fielding

Background

This private Senator's bill seeks to restrict the hours during which takeaway alcoholic beverages can be sold.

Explanatory memorandum

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

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.

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.

Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2008

Introduced into the Senate on 17 September 2008

By Senator Bob Brown

Background

This bill repeals the *Euthanasia Laws Act 1997* and amends the *Northern Territory (Self-Government) Act 1978*, the *Australian Capital Territory (Self-Government) Act 1988* and the *Norfolk Island Act 1979* to restore legislative powers to the Northern Territory, the Australian Capital Territory, and Norfolk Island, including the right to legislate for voluntary euthanasia.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanation of the intent and operation of the proposed amendments, preferably in the form of an explanatory memorandum. The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of such documents. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and explanatory material, *Preparing Private Senator's Bills, Explanatory Memoranda and Second Reading Speeches. A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may assist Senators and Members in preparing explanatory memoranda.

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

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

Safe Climate (Energy Efficient Non-Residential Buildings Scheme) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. Senator Milne responded to the Committee's comments in a letter dated 17 November 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 13 of 2009

Introduced into the Senate on 17 September 2009

By Senator Milne

Background

This bill introduces an emissions intensity cap and building efficiency certificate trading scheme for non-residential buildings in order to provide an economic incentive for investment in energy efficiency.

Inappropriate delegation of legislative power

Subclause 7(1)

Subclause 7(1) provides that the Act is intended to apply to the exclusion of a state or territory law that is prescribed by regulations. Section 109 of the Constitution provides that, when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid. In these circumstances, subclause 7(1) need have only a declaratory effect which could be achieved through means other than regulations. The Committee **seeks the Senator's comments** on whether an alternative method of identifying inconsistent state and territory laws might be considered.

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

Relevant extract from the response from the Senator

As noted by the committee, under section 109 of the Constitution, a law of the Commonwealth prevails over an inconsistent law of a state, to the extent of the inconsistency. It is not the intention of the bill to exclude or limit concurrent operation of any state and territory laws that are consistent with the Bill (see subclause 7(2) of the bill).

The intention of subclause 7(1) is to allow any future laws that are contrary to the intent of the bill to be excluded by the regulations. There appear to be no current laws that are contrary to the intent of the bill, and none are expected in the future.

The Committee thanks the Senator for this response.

Drafting note

Apparent typographical errors

Paragraphs 12(2)(b) and 15(2)(b)

Paragraphs 12(2)(b) and 15(2)(b) make reference to subsection 10(3) of the bill. However, the Committee notes that subsection 10(3) does not exist. There is a proposed new paragraph 10(c) which provides for the Minister to determine, by legislative instrument, conditions relating to the use of methods to meet criteria to measure emissions intensities from non-residential buildings. Both paragraphs 12(2)(b) and 15(2)(b) seem to relate to paragraph 10(c) because they refer to ‘methods determined by the Minister’. The Committee **draws to the Senator’s attention** these apparent typographical errors.

Relevant extract from the response from the Senator

Noted, the references should in fact be to section 10 not subsection 10(3). I will make the appropriate corrections.

The Committee thanks the Senator for this response.

**Inappropriate delegation of legislative power
Subclauses 12(3) and 15(3)**

Clause 12 provides for transitional reporting by owners to the Greenhouse and Energy Data Officer (GEDO) on emissions relating to their non-residential building. Subclause 12(3) provides that regulations made for the purposes of paragraph 12(2)(c) (which states that transitional reports must include ‘any information specified by the regulations for the purposes of this paragraph’) ‘may specify different requirements for different circumstances’.

Similarly, clause 15 provides for annual reporting by building owners to the GEDO on emissions in relation to their building. Subclause 15(3) provides that regulations may specify ‘different requirements for different circumstances’ for the purposes of providing information pursuant to paragraph 15(2)(c).

These provisions contain very broad delegations of legislative power and it is not clear what type of circumstances the power is intended to cover. While noting that the regulations would be subject to the usual scrutiny and disallowance regime provided for under the *Legislative Instruments Act 2003*, the Committee nevertheless **seeks the Senator’s comments** on whether the scope of the proposed powers might be limited (or at least explained) in some way.

Pending the Senator’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.

Relevant extract from the response from the Senator

The broad delegation is intended to allow for different levels of reporting specificity, primarily depending on the size of the entity in question. I take your advice on board and will consider clarification in light of evidence expected to be presented to the Economics Committee inquiry in this Bill.

The Committee thanks the Senator for this response.

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

Introduced into the House of Representatives on 16 June 2010

Portfolio: Attorney-General

Background

This bill implements a decision of the Standing Committee of Attorneys-General to establish a framework that enables States and Territories to register interstate court-imposed fines that have a cross-border element.

Retrospective application

Schedule 1, item 1, proposed subparagraphs 112(1)(c)(ii) and 112(1)(c)(iii)

This bill provides for a ‘scheme whereby a State or Territory that is owed a fine may request the fine’s enforcement in another jurisdiction’, replacing the existing scheme. In particular the new scheme no longer relies on apprehension and imprisonment for enforcing court-imposed fines across State and Territory borders.

In general, the new scheme applies in relation to the enforcement of fines imposed after the commencement of the relevant amendments. However, the new scheme (see item 1 of Schedule 1 which inserts a new subparagraph 112(1)(c)(ii) into the *Service and Execution of Process Act 1992*) can also apply to ‘pre-commencement fines’ if ‘related to a post-commencement fine’.

The explanatory memorandum at page 3 states that this provision is specifically targeted ‘at persistent or recalcitrant fine defaulters’. The new section 110 (also inserted by item 1 of Schedule 1) defines when a pre-commencement fine is ‘related’ to a post-commencement fine, namely, where the same offender is involved, the pre-commencement fine originates from the same State as the post-commencement fine, and the liability in relation to the post-commencement fine has not been full discharged.

It is also the case that (pursuant to the new subsection 113(3)) that a pre-commencement fine can only be registered if the post-commencement fine to which it is related has been registered in the same State. Although (1) there are limits to the application of the new scheme to pre-commencement

finer, and (2) the new scheme changes the way in which fines imposed under existing laws are to be recovered (as opposed to altering the nature of the substantive rights of those who owe fines), it remains the case that the scheme will apply with retrospective effect in relation to some fines.

The same difficulty arises in relation to the new subparagraph 112(1)(c)(iii), which permits the registration of 'pre-commencement serious fines'. The new section 110 provides that such fines are pre-commencement fines which the originating State considers to be a serious fine because, for example, of the value of the fine, the nature or seriousness of the underlying conduct, or the fact the fine is not the first fine imposed in relation to similar offences. Although subparagraph 112(2)(d)(ii) requires the originating state to provide reasons as to why a pre-commencement fine is considered to be serious, the explanatory memorandum does not squarely address the question of whether the application of the new scheme for the enforcement of fines should apply to fines incurred prior to its commencement.

The Committee is concerned that these arrangements might be considered to unduly trespass on rights and liberties therefore **seeks the Attorney-General's further advice** as to why the pre-commencement fines arrangements proposed in these sections are justified.

Pending the advice of the Attorney-General, 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.

Special Broadcasting Service Amendment (Prohibition of Disruptive Advertising) Bill 2009

Introduced into the Senate on 7 September 2009

By Senator Ludlam

Background

This bill amends the *Special Broadcasting Service Act 1991* to prohibit non-program content (advertising) being shown during programs on SBS television.

The Committee has no comment on this bill.

Stolen Generation Reparations Tribunal Bill 2008

Introduced into the Senate on 24 September 2008

By Senator Siewert

Background

This bill establishes the Stolen Generations Reparations Tribunal to provide a reparations process for certain Aboriginal and Torres Strait Islander persons who were removed from their families as children.

The Committee has no comment on this bill.

Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2009*. The Assistant Treasurer responded to the Committee's comments in a letter dated 5 January 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 15 of 2009

Introduced into the House of Representatives on 19 November 2009
Portfolio: Treasury

Background

This bill amends the secrecy and disclosure provisions applying to taxation information – currently found across 18 taxation Acts – by consolidating and standardising the various enactments into a single new framework. This framework will be contained in Schedule 1 to the *Taxation Administration Act 1953*.

The new framework is designed to provide clarity and certainty to taxpayers, the Australian Taxation Office, and users of taxpayer information; and to provide guiding principles to assist in framing any future additions or changes. The primary objective of the new framework is to protect the confidentiality of taxpayer information.

Insufficient parliamentary scrutiny Schedule 1, item 1

The proposed framework gives effect to its primary objective by placing a general prohibition on the disclosure of taxpayer information, except in certain specified circumstances. The guiding principle is that disclosures are permitted where privacy concerns are clearly outweighed by the public benefit of the disclosure.

The bill contains provisions regulating disclosure of protected information by taxation officers (proposed new Subdivision 355-B, to be inserted by item 1 of Schedule 1) and the ‘on-disclosure’ of protected information by other people (proposed new Subdivision 355-C, also to be inserted by item 1 of Schedule 1).

Disclosure by taxation officers to Ministers, a House of the Parliament or a committee of one or both Houses of the Parliament is limited by new section 355-60 of Subdivision 355-B to the disclosure of publicly available information (see proposed new section 355-45) and information that is explicitly permitted to be disclosed for certain purposes under proposed new section 355-55. For example, if a parliamentary committee has requested a taxation officer to provide protected information in writing, such information would be treated as evidence in-camera and made available to the committee (proposed new subsection 355-55(2)).

However, the Committee notes that the provisions relating to ‘on-disclosure’ to the Parliament, by people other than taxation officers, are different. The limits on non-disclosure to Ministers and the Parliament are contained in proposed new section 355-210 which provides that, if an entity has acquired ‘protected information’ (defined in proposed new section 355-30) and makes a record of it for, or discloses it to, the Parliament, that person may only rely on three exceptions to the prohibition. The exceptions are: on-disclosing information that is already publicly available (proposed new section 355-170); on-disclosure to Ministers in relation to statutory powers or functions (proposed new section 355-180); and on-disclosure to a Royal Commission (proposed new section 355-195).

The explanatory memorandum explains (at paragraph 6.21) that the public interest may permit the on-disclosure of information from non-taxation officers but does not explain why the Parliament itself is not able to receive on-disclosed information from a non-taxation officer. The Committee **seeks the Treasurer’s advice** as to the reasons why different rules apply to taxation officers and non-taxation officers; and whether consideration might be given to applying similar rules to non-taxation officers who are requested by the Parliament to provide on-disclosed information.

Pending the Treasurer'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.

Relevant extract from the response from the Assistant Treasurer

The Committee has expressed concerns that the provisions relating to 'on-disclosures' by non-taxation officers do not, unlike those applying to taxation officers, specifically facilitate the disclosure of identifiable taxpayer information to Parliament.

As a Senator myself I would like to assure you that it is not the intention of this Bill to limit Parliament's and, in particular, the Senate and its committees' important role in scrutinising the legislative process and the exercise of legislative powers by the Government and its agencies. Nor, in my view, is there any risk of the Bill having this effect.

Parliamentary committees have contributed greatly to the review and development of policy over the years in a broad range of areas. In informing their consideration on various issues, Government agencies are often called upon to provide information to committees on matters such as the manner in which legislation is implemented and the impact of legislation on the Australian community. As you would be aware, the information required by Parliament and provided by agencies would generally not need to identify specific individuals and specific cases. Notably, this Bill in no way limits the disclosure of such non-specific information, either by taxation officers or non-taxation officers.

Of course in some limited circumstances a committee may require information obtained by an agency that identifies a particular individual or entity in order to properly conduct its review or inquiry. In rare circumstances this may even extend to an individual or entity's taxation information which could include, for instance, their income or amount of tax paid.

The approach taken in the Bill is to balance the obvious privacy issues associated with such disclosures with the need to facilitate the important work of parliamentary committees. It does this by allowing the disclosure of identifiable taxpayer information to such committees by taxation officers, so long as the information is provided *in camera*. While the Committee has correctly identified that such information cannot be provided by those agencies that have themselves received the information from the Tax Office, in my view it is entirely appropriate that the

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information *only* be provided by the Tax Office. In addition to being the agency that has collected the information (and therefore is in the best position to ensure that the information is presented in an appropriate context), the Tax Office will have the greatest awareness of its obligations under this Bill and will likely have in place formal procedures and protocols to ensure that the information is appropriately (and lawfully) presented. Indeed, in relation to disclosures to parliamentary committees that may be made under the existing law, the Tax Office has issued a practice statement (PS LA 2004/9) to guide its staff.

Finally I would note that there has been no attempt to abrogate the powers and privileges of Parliament as it applies to Parliament itself (and its committees). When information is obtained by such committees the limitations imposed by the Bill cease to apply. In addition, Parliament's power to compel the production of information is also unaffected. While the Bill does not allow non-taxation officers that have received taxpayer information from the Tax Office to disclose such information to Parliament, they can still be compelled to do so. However, having regard to the discussion above, I am confident that to the extent that identifiable taxpayer information is required by a committee, such compulsive powers would not need to be used as the Bill already adequately allows for the provision of such information.

I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this comprehensive response, noting his view for the need for certain information to be provided to parliamentary committees only by officers of the Tax Office and not by officers of agencies to whom such information has been on-disclosed.

Tax Laws Amendment (Research and Development) Bill 2010

Introduced into the House of Representatives on 13 May 2010

Portfolio: Treasury

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2010*. The Minister responded to the Committee's comments in a letter dated 22 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2010

Background

This bill is part of a package of two bills which introduces a new research and development tax incentive to replace the existing R & D Tax Concession for all income years starting on or after 1 July 2010.

The bill amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997*, the *Income Tax Rates Act 1986*, the *Taxation Administration Act 1953* and the *Industry, Research and Development Act 1986*.

Determination of important matters by regulation

Determination of important matters by legislative instrument

Schedule 2, Part 1, proposed sections 29A and 32A

Item 1 of Schedule 2, Part 1 includes the new section 29A to be inserted in the *Industry Research and Development Act 1986*. This section deals with the registration of research service providers by the Board. Subsection 29A(2) provides that the Board must not register an entity unless satisfied that it meets criteria specified in regulations made for the purposes of this subsection. The explanatory memorandum (at page 145) notes that 'regulations will specify the criteria the entity must meet to satisfy the Board that it is capable of providing services to R&D entities in one or more specified fields of research' and that specified fields of research will also be

prescribed in the regulations'. The explanatory memorandum does not explain why such criteria might not be specified in the primary legislation.

Similarly, section 32A provides for 'decision-making principles' to be made by legislative instrument. These principles play an important role in determining how the Board should exercise various powers. The explanatory memorandum at page 153 essentially repeats the terms of section 32A and does not explain why such principles might not be specified in the primary legislation.

Although the regulations and legislative instruments will be disallowable and therefore subject to Parliamentary scrutiny, the Committee prefers that important matters are included in primary legislation to increase the level of parliamentary scrutiny and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Treasurer's advice** as to why the criteria referred to in proposed section 29A and why the decision-making principles outlined in proposed section 32A cannot be set out in the primary legislation.

Relevant extract from the response from the Minister

The Committee has noted that sections 29A and 32A of Schedule 2 of the Tax Laws Amendment (Research and Development) Bill 2010 provide powers to make criteria for Research Service Providers (RSPs) and to specify decision-making principles to be complied with in particular circumstances and expressed its concern that these provisions involve an inappropriate delegation of legislative power.

Currently, criteria for Registered Research Agencies (RRAs), the RSP equivalent under the existing R&D Tax Concession, are outlined in guidelines, rather than in regulations or primary legislation. The move to specify these criteria in regulations, rather than as guidelines, is a positive one intended to strengthen the administrative arrangements governing RSPs.

In making administrative decisions under the existing R&D Tax Concession, the Board has limited high-level guidance in relation to its decision-making processes. The current decision making guidance available to the Board is

derived from internal documents, rather than from either primary legislation or a legislative instrument. Under the proposed arrangements, the decision-making principles will provide a clear set of directives for the Board to comply with in making a number of administrative decisions, and will increase the transparency of the administration of the R&D Tax Incentive.

By making these criteria and decision-making principles as subordinated legislation, properly focussed consultation can occur to ensure the rules are appropriate for those who will be affected by them,

As the Committee has noted, the regulations and legislative instrument are disallowable instruments, and will accordingly be subject to Parliamentary scrutiny.

I support the Committee's desire to include important matters in primary legislation, and note the Committee's obligations under its terms of reference. However, as the criteria for RRAs/RSPs is currently outlined in subordinated legislation, and the decision-making principles will enhance the transparency of administrative decision-making, I believe the delegation of powers is appropriate.

Committee Response

The Committee thanks the Minister for this response.

Territories Law Reform Bill 2010

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Minister for Home Affairs responded to the Committee's comments in a letter received 15 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest 5 of 2010

Introduced into the House of Representatives on 17 March 2010

Portfolio: Home Affairs

Background

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

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

Insufficiently defined administrative power

Schedule 1, item 39

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

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

Relevant extract from the response from the Minister

The Territories Law Reform Bill 2010 amends the *Norfolk Island Act 1979* to provide the Administrator with the power to dismiss members of the Legislative Assembly if they have, or are, engaging in seriously unlawful conduct or grossly improper conduct. The amendment will work in partnership with the existing section 39 of the Act, which states that a member of the Legislative Assembly vacates their office if they become an undischarged bankrupt or are convicted of an offence and sentenced to imprisonment for one year or longer.

The purpose of the amendment is to capture behaviour that is not covered by the existing section 39, but is serious enough to require being dismissed from the Legislative Assembly. The Administrator's powers will be exercised at his or her discretion and will be subject to judicial review. As such, the courts will have the power to consider individual cases and ensure procedural fairness in the application of the provision.

The term 'grossly improper' is used in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) in relation to the authority of the Governor-General to dissolve the Assembly. The use of the same term in a similar context within the *Norfolk Island Act* is intended to set a consistent standard in interpretation and implementation.

The Joint Standing Committee on the National Capital and External Territories (JSCNCET) report, 'Quis Custodiet ipsos Custodes? Inquiry into Governance on Norfolk Island', examined issues relating to the Administrator's dismissal powers, particularly in the context of unlawful and corrupt conduct. The Committee made several recommendations to increase these powers. The Committee was of the view that the Administrator should have expanded powers where Members of the Legislative Assembly have acted unlawfully or corruptly. The Australian Government has accepted this view, and carefully considered the conclusions drawn by the Committee in making these recommendations. The Australian Government considers that item 39 of the Bill appropriately addresses the concerns outlined in the Committee's report.

The Committee thanks the Minister for this response.

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

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

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

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

Relevant extract from the response from the Minister

The Territories Law Reform Bill provides for the voting system for Norfolk Island Legislative Assembly elections to be prescribed by regulations. Changes to Norfolk Island's electoral system have been recommended in a number of previous reports on Norfolk Island, including by the JSCNCET. While Norfolk Island has a degree of self-government, it is also part of Australia and the Australian Parliament retains ultimate responsibility for territory electoral matters. The proposed amendments recognise this Commonwealth responsibility.

The Australian Government acknowledges the Committee's view that these matters would be more appropriately dealt with in the primary legislation. However, the Government's view is that the use of regulations is a more efficient and effective approach. The use of regulations enables a detailed and flexible electoral system to be established that responds to the unique circumstances of Norfolk Island.

The Australian Government agrees that the regulations should not be introduced until 2011 to ensure proper consultation with the Norfolk Island Government and community and consideration of appropriate voting systems for Norfolk Island.

Under the commencement provisions of the Territories Law Reform Bill, Part 2 – Amendments relating to elections, any electoral regulations will only take effect from the first meeting of the Legislative Assembly following the first general election after the Bill receives Royal Assent. The first general election after the Bill receives Royal Assent is anticipated to be some time in 2013. Accordingly, the first election to be conducted under any new electoral voting system is not expected to occur until 2016.

I have also agreed to provide the draft electoral regulations to the JSCNCET for review and comment before they are registered.

The Committee thanks the Minister for this response. The Committee retains its concern that these matters may be more appropriately dealt with in primary legislation, but notes the Minister's commitment to proper consultation and to provide the draft electoral regulations to the JSCNCET for review and comment.

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

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

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

Relevant extract from the response from the Minister

Part 4 of the Territories Law Reform Bill proposes amendments to the *Administrative Appeals Tribunal (AAT) Act 1975* which will confer on the AAT merits review jurisdiction for specified decisions under Norfolk Island legislation. In general terms, the reforms will mean that where provided under regulations, administrative decisions which are made under Norfolk Island laws can be reviewed by the AAT on request by an affected party.

The approach taken in the Bill is to ensure a level of consistency with the application of the AAT review process at a Commonwealth level, while taking into account the unique circumstances of Norfolk Island's status as a self-governing territory. In the Commonwealth jurisdiction, the application of the AAT Act must be expressly specified within the Commonwealth Act under the authority of which the administrative decision is made. Generally, during the development phase of Commonwealth legislation the Administrative Law Branch of the Attorney-General's Department will undertake scrutiny of any Commonwealth legislation which authorises an administrative decision and provide advice on whether the decision should be subject to independent merits review by the AAT. The Administrative Law Branch assesses all legislation with reference to Australian Government policy on when merits review should be available.

It would be complex and ineffective to take exactly the same approach to the application of the Act to Norfolk Island. Such an approach would make the application of the AAT Act dependent upon Norfolk Island legislation which is not necessarily subject to the same Commonwealth scrutiny process. This could lead to the AAT being given jurisdiction where merits review is not appropriate (for example 'automatic' decisions) or some discretionary decisions not being subject to AAT review where external merits review should be available according to Australian Government policy. The preferred approach under this Bill is that the application of the Commonwealth AAT Act be controlled and maintained under Commonwealth legislation, enabling appropriate levels of scrutiny and consultation in determining the scope of the AAT's jurisdiction.

Currently, administrative decisions taken under Norfolk Island legislation are subject to a broad range of different and inconsistent administrative review mechanisms which are specified within each particular piece of legislation. Existing administrative review mechanisms under Norfolk Island legislation range from review by the Norfolk Island Administrative Review Tribunal, the Administrator or Executive Members. In some instances no review mechanism is provided at all.

The use of regulations to specify the decisions to which the AAT will have jurisdiction will enable the application of the AAT Act to be rolled out over a period of time in consultation with the AAT and Norfolk Island. The use of regulations also provides greater flexibility to amend the regulations in response to the amendments of a decision-making provision in a specified Norfolk Island Act, or the enactment of new Norfolk Island Acts to which it is appropriate to extend AAT jurisdiction. The use of regulations will also ensure that there is an appropriate level of Parliamentary scrutiny and oversight through the use of a disallowable legislative instrument.

The Attorney-General's Department has commenced officer level consultation with relevant Commonwealth agencies and the Norfolk Island Administration on the development of the regulations related to the application of the AAT to Norfolk Island. It is anticipated that the first phase of the regulations will be in place by the end of 2010.

The Committee thanks the Minister for this comprehensive response and notes the justification for the approach. The Committee notes that it would have been useful if some of this information was included in the explanatory memorandum.

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

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2010*. The Parliamentary Secretary for Health responded to the Committee's comments in a letter dated 3 June 2010. A copy of the letter is attached to this report.

Extract from Alert Digest 5 of 2010

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

Background

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

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

Incorporating material by reference

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

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

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

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

Relevant extract from the response from the Minister

Delegation of legislative power

Schedule 2, Part 1, item 3. subsection 26BB(7)

The Committee has made comment regarding the determination of permitted ingredients for the purposes of listing medicines under section 26A of the Therapeutic Goods Act 1989.

Subsection 26BB(7) replaces existing subsection 26BB(3) in the Act which established that the determination for permitted ingredients may apply, adopt or

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incorporate any matter contained in an instrument or other writing as in force from time-to-time.

It is important to note that the decision providing for the determination of permitted ingredients is not legislative in nature, it is technical within the scope of the legislation, and does not make or alter the law. As a result, the application, adoption or incorporation in a permitted ingredients determination of any matter contained in an instrument, or other writing as in force from time-to-time, does not constitute the making of a legislative decision.

Permitted ingredients determined. to be suitable for inclusion in Listed medicines are regarded to be low-risk in nature, or low-risk subject to specified constraints, for example, a content threshold. In some circumstances constraints are set out in detail in pharmacopoeias or other documents. For example, a mineral compound may be subject to compositional specifications prescribed in a pharmacopoeial monograph. The allowance for the Minister's determination to refer to other documents or instruments is, therefore, appropriate where the determination seeks to apply such specifications or restrictions for a given ingredient and removes the need for unnecessary duplication directly in the determination.

Medicine sponsors and manufacturers are familiar with reference documents such as pharmacopoeias as these are a core mechanism by which requirements for medicines are set, such as under section 10 of the Act, and against which medicines are manufactured. Such references also ensure that Australia's regulatory framework remains in-step with the requirements of corresponding regulatory agencies internationally reducing the potential for variation of requirements for sponsors and manufacturers where they produce products for multiple markets, Therefore, the provision at subsection 26BB(7) is not expected to cause concern or confusion for medicine sponsors or manufacturers but will clarify existing practice.

The Committee thanks the Parliamentary Secretary for this response and notes that it would have been useful if some of this information was included in the explanatory memorandum.

Tradex Scheme Amendment Bill 2010

Introduced into the House of Representatives on 16 June 2010
Portfolio: Industry, Science and Research

Background

This bill amends the *Tradex Scheme Act 1999* to clarify the eligibility of partnerships and remove redundant provisions.

The Committee has no comment on this bill.

Veterans' Affairs and Other Legislation Amendment (Miscellaneous Measures) Bill 2009

Introduced into the House of Representatives on 25 November 2009

Portfolio: Veterans' Affairs

Background

This bill amends the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*, the *Defence Service Homes Act 1918*, the *Veterans' Entitlements Act 1986*, the *Military Rehabilitation and Compensation Act 2004*, the *Veterans' Entitlements Act 1986* and the *Social Security Act 1991* to make a number of corrections and clarifications.

Specifically, the bill:

- extends nuclear test participant eligibility to certain Australian Protective Service officers for the period 20 October 1984 to 30 June 1988;
- enables Defence Service Homes Insurance to pay a State Emergency Service levy to the New South Wales Government;
- extends from three months to twelve months, the period within which claims for certain travel expenses may be lodged;
- makes provision for the serving of notices under both the *Veterans' Entitlements Act 1986* and the *Military Rehabilitation and Compensation Act 2004*;
- clarifies that a war-caused or defence-caused injury or disease remains compensable under the *Veterans' Entitlements Act* even if the injury or disease has been aggravated, or materially contributed to, by Defence service under the *Military Rehabilitation and Compensation Act*;
- enables the Specialist Medical Review Council to review both versions of the Statements of Principles applicable to the same injury, disease or death;

- clarifies that the Specialist Medical Review Council may review a decision of the Repatriation Medical Authority to not amend a Statement of Principles;
- corrects the Veterans' Entitlements Act to enable the payment of a pension to the dependant of a veteran who had been a prisoner of war during operational service under the Veterans' Entitlements Act, where the veteran died on or after the commencement of the Military Rehabilitation and Compensation Act;
- ensures that certain lump sum payments of compensation under the *Military Rehabilitation and Compensation Act 2004* must be paid into a bank account maintained by the compensation recipient;
- corrects errors to remove redundant provisions, clarifies a formatting error and corrects cross references; and
- enables a Victoria Cross recipient to receive a Victoria Cross allowance under the Veterans' Entitlements Act and a Victoria Cross allowance or annuity from a foreign country.

The Committee has no comment on this bill.

Water (Crisis Powers and Floodwater Diversion) Bill 2010

Introduced into the Senate on 18 March 2010

Portfolio: Senators Xenophon and Hanson-Young

Background

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

The Committee has no comment on this bill.

Water Efficiency Labelling and Standards Amendment Bill 2010

Introduced into the House of Representatives on 16 June 2010

Portfolio: Environment Protection, Heritage and the Arts

Background

This bill amends the *Water Efficiency Labelling and Standards Act 2005* to provide that a WELS Standard may require a product to comply with requirements relating to plumbing as contained in a specified document before the product can be registered as a WELS Product.

Incorporation by reference

Subsection 18(1)

This bill provides that a WELS Standard, which must either be set out or incorporated by reference into determinations (which are legislative instrument) under subsection 18(1) of the Act, may require a product to comply with requirements relating to plumbing as contained in a specified document as in force from time to time. In this way such documents may be incorporated by reference into a legislative instrument. This approach, however, is justified in the Explanatory Memorandum at page 3 by reference to the fact that relevant 'plumbing requirements may change'. The Committee acknowledges that the use of delegated legislation is appropriate for highly technical detail.

The Committee has no further comment on this bill.

