

Senate Standing Committee
for the
Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

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Senator R Siewert

Senator the Hon J Troeth

Terms of Reference

Extract from **Standing Order 24**

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

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

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

Appropriation Bill (No.3) 2010-2011

Introduced into the House of Representatives on 10 February 2011

Portfolio: Finance and Deregulation

Background

This bill appropriates \$1.36 billion from the Consolidated Revenue Fund to meet payments for the ordinary annual services of the Federal Government, in addition to those provided in the 2010-2011 Budget.

The Committee has no comment on this bill.

Appropriation Bill (No.4) 2010-2011

Introduced into the House of Representatives on 10 February 2011
Portfolio: Finance and Deregulation

Background

This bill appropriates a little over \$1 billion from the Consolidated Revenue Fund, for services that are not the ordinary annual services of the Federal Government, in addition to those provided in the 2010-11 Budget.

The Committee has no comment on this bill.

Assisting the Victims of Overseas Terrorism Bill 2010

Introduced into the House of Representatives on 21 February 2011

By: Mr Abbott

Background

This bill establishes a framework to provide financial assistance to persons or their next of kin who are injured or killed as a result of overseas terrorist acts.

No explanatory memorandum

This bill, introduced as a private Member's bill, was introduced without an explanatory memorandum. The Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents assist in the interpretation of bills, and ultimately, Acts. If the bill proceeds to further stages of debate the Committee **requests that the Private Member** provide an explanatory memorandum.

Pending the Member's reply, the Committee draws Senators' attention to this circumstance, 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.

Delegation of legislative authority

Clause 5

This bill is substantively identical to a bill introduced into the Senate on 26 November 2010 and about which the Committee commented in *Alert Digest No. 1 of 2011*. The Committee's view is that important matters such as eligibility requirements should be included in primary legislation whenever possible or an explanation of the intended scope of, and justification for, the the proposed approach should be included in the explanatory memorandum. If this bill proceeds to further stages of debate, the Committee **seek's the Private Member's advice** as to whether this can occur.

Pending the Private Member'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.

Broadcasting Legislation Amendment (Digital Dividend and Other Measures) Bill 2011

Introduced into the House of Representatives on 24 February 2011
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992* to amend the Australian Communications and Media Authority planning and enforcement powers for the implementation of the re-stack of digital television channels and the realisation of digital dividend spectrum.

The Committee has no comment on this bill.

Combating the Financing of People Smuggling and Other Measures Bill 2011

Introduced into the House of Representatives on 9 February 2011

Portfolio: Attorney-General

Background

This bill amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), the *Financial Transaction Reports Act 1988* (FTR Act) and the *Privacy Act 1988* (Privacy Act).

The main purpose of this bill is to:

- reduce the risk of money transfers by remittance dealers being used to fund people smuggling ventures and other serious crimes by introducing a more comprehensive regulatory regime for the remittance sector;
- introduce measures for the Australian Intelligence Community information sharing of financial intelligence prepared by the Australian Transaction Reports and Analysis Centre (AUSTRAC); and
- change requirements for businesses regulated under the AML/CTF Act to more effectively and efficiently verify the identity of their customers by enabling reporting entities under the AML/CTF Act to use personal information held on an individual's credit information file for the purposes of electronic verification of customer identity.

Also, the bill amends the FTR Act to enable the AUSTRAC Chief Executive Officer to exempt cash dealers from obligations under the FTR Act in the same way in which the AUSTRAC CEO can do so under the AML/CTF Act.

Trespass on personal rights and liberties

Schedule 1, items 16 to 18

Items 16 to 18 of Schedule 1 of this bill would amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* so as to extend the powers of AUSTRAC to request further information after a reporting entity has communicated a suspicious matter. Currently this power is limited to

seeking further information from the reporting entity, but the amendments would extend this power to include the power to require the production of further information from the reporting entity or any other person where that information is in the possession or control of the entity.

At page 94 the explanatory memorandum states that this approach 'is consistent with the information gathering powers of a number of government agencies' (the ACCC, ASIC and ATO are listed as examples). The explanatory memorandum also gives the following example:

If a casino submitted a suspicious matter report to AUSTRAC on the presentation by a customer of a large bank cheque in exchange for chips, the Act as currently drafted limits AUSTRAC to seeking further information only from the casino as the reporting entity.'

The explanatory memorandum argues at page 94 that the amendments 'will mean that AUSTRAC can also seek further information from the bank that issued the cheque so that it is better able to evaluate the matter.'

In the example it seems clear that in seeking further information from the bank the AUSTRAC CEO would have a reasonable belief that the bank would have information relevant to the suspicious matter. However, this belief does not seem to be included in the proposed legislation. In the Committee's view it is appropriate that the extension of the power to issue a notice to produce to 'any person' be subject to a requirement that the AUSTRAC CEO forms a reasonable belief that the person asked to produce further information has knowledge, or custody or control of documents or information which will assist in the administration of the legislative scheme. As stated in the *Guide to Framing Commonwealth Offences*, at page 97, such a requirement ensures that a person will not be subject to coercive powers without proper justification. The committee **seeks the Attorney-General's advice** as to whether this approach can be taken or alternative the justification for the proposed approach.

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

Trespass on personal rights and liberties

Schedule 1, items 16 to 18

Further to the above comments the existing power in section 49 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, does not specify a minimum time period for the giving of information required by a notice. The *Guide to Framing Commonwealth Offences* at page 98 states that 14 days should generally be allowed for compliance with a notice to produce information or documents. As the proposed amendments extend this power to require information beyond a reporting entity to ‘any person’ the Committee **seeks the Attorney-General’s advice** as to whether consideration has been given to this issue.

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

Insufficient parliamentary scrutiny

Schedule 1, item 31, section 75C, 75G and 75H

Item 31 of Schedule 1 would insert a new regime for the registration of persons operating within the remittance sector. The proposed new section 75C requires the AUSTRAC CEO to register a person if satisfied that it is appropriate to do so having regard to (a) whether registering the person would involve a significant money laundering, financing or terrorism or people smuggling risk; and (b) such other matters if any as are specified in rules. Subsection (3) of the proposed section 75C sets out a non-exhaustive list of matters that may be specified under the rules. The Committee welcomes the inclusion of the list of matters in section 75C, but **seeks the Attorney-General’s advice** as to whether consideration has been given to whether all of the matters relevant to the making of a registration could be included in the primary legislation. A similar issue arises in relation to cancellation decisions under the proposed section 75G and suspension decisions under the proposed section 75H and the Committee also **seeks the Attorney-General’s further advice** about these provisions.

Pending the Attorney-General’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.

Insufficient parliamentary scrutiny
Schedule 1, item 31, section 75M

Pursuant to proposed section 75 M, to be inserted by item 31 of Schedule 1, a registered person must advise AUSTRAC of material changes that could affect their registration and of any matters specified in the Rules. Failure to comply with this provision could result in a civil penalty (subsection 75M(5)). Under subsection 175(4) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the maximum civil penalty that the Federal Court may order is \$11million for a body corporate and \$2.2 million for a person other than a body corporate. Given the severity of the potential penalties, the Committee **seeks the Attorney-General's advice** as to how a registered person stays informed about the content of the Rules and whether the further matters that might be specified in the Rules could be specified in the primary legislation.

Pending the Attorney-General'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.

Reversal of onus
Schedule 3, item 6

Proposed sections 35H and 35K, to be inserted by item 6 of Schedule 3 of the bill, place an evidential burden of proof on a defendant in relation to offences imposed for the unauthorised access to verification information and the disclosure or unauthorised use of such information. This reverse onus applies in relation to the question of whether the action was in accordance with, or otherwise authorised by, the legislation or any other law. The explanatory memorandum is silent on this issue. The Committee expects explanatory memoranda to explain in detail why any reversal of the onus of proof is justified with reference to the *Guide to Framing Commonwealth Offences*. The Committee therefore **seeks the Attorney-General's advice** as to the justification for the approach so that the appropriateness of the provision can be better evaluated.

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

Legislative Instruments Act - exemption
Schedule 4, item 1

Item 1 of Schedule 4 of the Bill enables the AUSTRAC CEO to, by written instrument, exempt a specified person from one or more provisions of the *Financial Transaction Reports Act 1988*. The proposed new subsection 41A(5) of the *Financial Transaction Reports Act* states that such an instrument is not a legislative instrument. Unfortunately, the explanatory memorandum does not address the question of whether this is intended as a substantive exemption from the *LIA* and, if so, why the exemption is warranted. Although an exemption instrument under this provision applies in relation to a specified person it does appear to operate to change their legal rights and obligations. In these circumstances the Committee **seeks the Attorney-General's advice** clarifying whether this is a substantive exemption from the *LIA*,⁰ and if so, the justification for this approach.

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

Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011

Introduced into the House of Representatives on 23 February 2011

Portfolio: Treasury

Background

The bill provides for measures to amend Australia's executive remuneration framework and give shareholders more power over the pay of company directors and executives. It implements many of the recommendations made by the Productivity Commission (PC) in its recent inquiry into executive remuneration in Australia.

The key measures include:

- strengthening the non-binding vote on the remuneration report, by requiring a vote for directors to stand for re-election if they do not adequately address shareholder concerns on remuneration issues over two consecutive years;
- increasing transparency and accountability with respect to the use of remuneration consultants;
- addressing conflicts of interests that exist with directors and executives voting their shares on remuneration resolutions;
- ensuring that remuneration remains linked to performance by prohibiting hedging of incentive remuneration;
- requiring shareholder approval for declarations of 'no vacancy' at an annual general meeting (AGM);
- prohibiting proxy holders from 'cherry picking' the proxies they exercise, by requiring that any directed proxies that are not voted default to the Chair, who is required to vote the proxies as directed; and
- reducing the complexity of the remuneration report by confining disclosures in the report to the key management personnel (KMP).

Strict Liability

Schedule 1, item 8, subsections 206K(5), 206J(5) and 250W(6)

Item 8 of Schedule 1 of this bill would insert a new subsection 206K(5). This subsection makes it a strict liability offence for a company to enter into a contract where the proposed remuneration consultant has not been approved. The explanatory memorandum states at page 13 that strict liability is justified ‘as a failure to seek approval would be a serious breach of the requirements and would diminish board accountability.’

The Committee has taken the view that fault liability is one of the most fundamental protections of the criminal law and that strict liability should only be introduced after careful consideration. Although the explanatory memorandum does address the issue, it does so briefly and with little evidence of careful consideration being given to the issue. The Committee understands that there are circumstances in which the proposed approach is appropriate, but in the circumstances **seeks the Treasurer’s advice** as to a fuller explanation of the need for strict liability. Further, the offence contained in the proposed subsection 206J(5) is a strict liability offence. As there does not appear to be any commentary on this provision in the explanatory memorandum, it is suggested that the Committee also **seeks the Treasurer’s advice** about the justification for the proposed approach.

The same general issue also arises in relation to (1) the proposed section 206 and section 250W. Subsection 206(3) makes it a strict liability offence for a remuneration consultant to fail to include with their recommendation a declaration that the recommendation is made free from undue influence. Subsection 250W(6) makes it a strict liability offence for a company to fail to hold a required spill meeting within 90 days of the spill resolution being passed. In these instances, there is a brief justification for the provision in the explanatory memorandum at page 14, but it does not demonstrate that the *Guide to Framing Commonwealth Offences* has been consulted. The Committee **seeks the Treasurer’s advice** about the justification for the proposed approach in these provisions.

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

Reversal of onus

Various

There are a number of new provisions that place an evidential burden of proof on defendants:

- Subsection 250BD(2)
- Subsection 250BD(3)
- Subsection 250W(7)
- Subsection 250W(8)

Although such provisions may be justified, the matters relevant to this issue set out in the *Guide to Framing Commonwealth Offences* should be addressed in the explanatory memorandum. The Committee therefore **seeks the Treasurer's advice** about the justification for the proposed approach in these provisions.

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

Poor explanatory memorandum – index

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

In the Committee's view particular care should be taken to ensure that an explanatory memorandum which adopts a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order) includes an index that is accurate and cross-references every provision in the bill.

In this instance an index is included, but every entry is incorrect and numerous provisions are not included at all. The Committee is aware that this may have been due to a technical issue.

In addition, some other problems of which the Committee is aware include:

- that there is no explanation for Schedule 1, item (in particular the reasons for the scope of the definition and why it is necessary to delegate a power to prescribe others in regulations); and
- an error in the page 22 paragraph 4.9 as the reference to Schedule 1 item 5, subsection 206J(4), should refer instead to item 8.

Given the importance of accurate explanatory memoranda the Committee **seeks the Treasurer's advice** about these matters and as to whether a corrected explanatory memorandum will be provided.

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

Corporations and Other Legislation Amendment (Trustee Companies and other Measures) Bill 2011

Introduced into the House of Representatives on 23 February 2011

Portfolio: Treasury

Background

This bill amends the trustee company provisions in Chapter 5D of the *Corporations Act 2001* including to facilitate the consolidation of the industry through voluntary transfers and by clarifying certain powers of trustee companies and strengthening compliance.

The bill also amends the *Payment System Regulation Act 1998* to provide ongoing protection for payment system participants, from Part IV of the *Competition and Consumer Act 2010*, when complying with the ATM Access regime as determined by the Reserve Bank of Australia.

Retrospective effect

Schedule 1, item 12

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 explanatory memorandum notes at page 19 that the proposed amendment, which will allow licensed trustee companies to charge a reasonable fee for tax return preparation:

...needs to have retrospective effect to link into the current financial year, so as to streamline business systems within licensed trustee companies. It is not expected to cause detriment to stakeholders of trustee companies, because it reinstates the former law, and will benefit the companies by providing certainty.

The Committee acknowledges the usefulness of this comprehensive explanation which addresses the explanation for the proposed approach and whether it is expected to have a detrimental effect on any person.

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

Customs Amendment (Serious Drugs Detection) Bill 2011

Introduced into the House of Representatives on 23 February 2011

Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* to enable officers of Customs, using prescribed equipment, to undertake an internal non-medical scan of a person who is suspected to be internally concealing a suspicious substance.

Possible trespass on personal rights and liberties

Various

This bill will allow Customs and Border Protection, using prescribed equipment, to undertake an internal non-medical scan of a person who is reasonably suspected to be internally concealing a suspicious substance. Clearly, this procedure can be considered as an encroachment on personal rights and liberties and in particular the right to privacy. However, the bill replicates existing levels of protections in relation to internal scans, which currently can only be undertaken by a medical practitioner.

Furthermore, the bill would only allow for an internal non-medical scan if the detainee gives their consent. In this regard it is noteworthy that the proposed subsection 219ZAA(1) sets out requirements designed to ensure that consent is informed consent, proposed subsection 219ZAA(2) provides for the invitation to consent and any consent to be recorded (by audiotape, videotape or other means or in writing), and proposed subsection 219ZAA(3) provides that the equipment used to undertake the scan be operated by an authorised officer of the same sex as the detainee.

The purpose of allowing authorised officers in Customs and Border Protection to undertake an internal non-medical scan by consent is to reduce the number of persons referred to hospital to undergo an internal search, thereby reducing the impact on the resources of the AFP, hospital emergency units and Customs and Border Protection. (The provisions in relation to the prescription of equipment to be used and for the authorisation of officers to undertake the scans replicate existing provisions in the legislation, explanatory memorandum at pages 13-14.)

Lastly, it is worth noting that the Office of the Australian Information Commissioner provided input into the impact of the Bill on individual rights to privacy. The second reading speech reports that ‘all comments have been incorporated’ into the bill.

In the Committee’s view the general question of whether this legislation is a proportionate encroachment on personal rights and liberties is one which should appropriately be **left to the Senate as a whole**.

Nevertheless, the Committee has specific questions in relation to two matters. First, the explanatory memorandum states at page 2 that if the procured technology has a broader scan capability than that required for an internal non-medical scan, a ‘locked calibration to limit the scan capability to internal cavities within a skeletal structure’ (which cannot be changed by an officer at the airport) will be required. However, this important safeguard does not appear to be reflected in the legislation. The Committee **seeks the Minister’s advice** about whether it is, or will be, included directly in the primary legislation.

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.

Secondly, item 16 would insert proposed paragraph 219SA(1)(a) which provides that an internal non-medical scan of the person may be undertaken if, inter alia, there are reasonable grounds to believe that the detainee is ‘not in need of protection’. The explanatory memorandum states at page 8 that a person is in need of protection if he or she is under 18 years of age or is in a mental or physical condition that renders them incapable of managing their own affairs, but this information has not been included in the legislation. The Committee **seeks the Minister’s advice** as to whether consideration has been given to including a definition of the circumstance when a person is in need of protection in the legislation.

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.

Electronic Transactions Amendment Bill 2011

Introduced into the House of Representatives on 9 February 2011
Portfolio: Attorney-General

Background

This bill amends the *Electronic Transactions Act 1999* to reflect internationally recognised standards on e-commerce.

The bill also provides for the following amendments which include:

- clarifying uncertainties in using electronic communications in formation and performance of contracts;
- clarifying that a contract can still be legally effective despite being formed by an automated message systems;
- refining default rules for determining whether the method used for an electronic signature is reliable; and
- providing default rules to ascertain the place of business of the parties to a transaction, taking into account modern business practices such as the use of automated message systems. Importantly, this will assist parties to determine the jurisdiction in which the contract was formed.

Retrospective effect Schedule 1, item 22

Item 22 of Schedule 1 provides for transitional provisions in relation to the proposed amendments. Subsection 17(2) provides that proposed sections 15B, 15C, and 15D extend to relevant matters arising prior to the commencement date. The explanatory memorandum claims that ‘these provisions do not have retrospective application in respect of a contract formed prior to the commencement of the provisions’, but it is unclear whether there may be any adverse impact on any person in relation to a contract formed after commencement. The Committee therefore **seeks the Attorney-General’s further advice** as to the justification for approach and, in particular, an indication of whether it is possible that any individual may be detrimentally affected by this provision.

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

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Election Commitments and Other Measures) Bill 2011

Introduced into the House of Representatives on 10 February 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill provides for amendments to the work bonus for pensioners; the baby bonus; the Family Tax Benefit child rates for certain teenagers in secondary study, Thalidomide payments and improvements to income management provisions.

The Committee has no comment on this bill.

Family Assistance and Other Legislation Amendment (Child Care and Other Measures) Bill 2011

Introduced into the House of Representatives on 23 February 2011

Portfolio: Employment Participation and Childcare

Background

This bill amends the *A New Tax System (Family Assistance) (Administration) Act 1999* and the *Family Assistance Legislation Amendment (Child Care Management System and Other Measures) Act 2007* in relation to recovery of fee reductions, enrolment advances and business continuity payments paid to approved child care services.

The Committee has no comment on this bill.

Family Assistance Legislation Amendment (Child Care Rebate) Bill 2011

Introduced into the House of Representatives on 23 February 2011

Portfolio: Employment Participation and Childcare

Background

This bill amends the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999* to introduce fortnightly child care rebate payments for individuals who are eligible for child care benefit by fee reduction.

Strict liability

Schedule 1, item 62, subsections 219EA(3), 219EB(3) and 219EB(7)

Item 62 of Schedule 1 inserts new subsection 219EA(3) which makes it an offence for an approved child care service to fail to pass on the child care rebate to an individual due to receive fee reductions. The new subsection 219EA(4) states that this offence is one of strict liability. At page 52 the explanatory memorandum gives the following reasons in justification of the use of strict liability: most offences relating to services' obligations in Part 8A of the *Family Assistance Administration Act* are also strict liability offences, the prosecution would have difficulty in proving fault (especially knowledge or intention) in this case, and the offence does not involve dishonesty or serious imputation affecting a person's reputation. Further it can be noted that the penalty is 60 penalty units which is consistent with levels of penalty thought appropriate for strict liability set out in the *Guide to Framing Commonwealth Offences*. In light of this useful explanation the Committee has no further comment on this subsection.

Although the explanatory memorandum does not specifically address the use of strict liability in the new subsections 219EB(3) and 219EB(7), also inserted by item 62, the reasons applicable to subsection 219EA(4) also appear to apply in relation to these provisions.

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

Higher Education Support Amendment (No.1) Bill 2011

Introduced into the Senate on 10 February 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill introduces a number of measures to the *Higher Education Support Act 2003* to the Government's income contingent loan programs for the higher education and vocational education and training (VET) sectors i.e. FEE-HELP and VET FEE-HELP respectively, including to ensure consistency with other Commonwealth frameworks.

Broad delegation

Schedule 1, items 3 and 21

Items 3 and 21 of Schedule 1 propose to introduce amendments which introduce a new requirement that the Minister be satisfied that bodies seeking approval as a higher education provider or a VET provider be 'fit and proper'. In making this determination, the Minister must specify, by legislative instrument, criteria that must be considered. The explanatory memorandum does not indicate why these criteria or at least parameters for them, which structure the exercise of a broad discretionary power, cannot be specified in the legislation. The Committee **seeks the Minister's explanation** of the appropriateness of this delegation of legislative power.

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.

Procedural fairness
Schedule 1, items 5 and 23

Items 5 and 23 insert new provisions that would allow the Minister to impose conditions on the approval of a body as a higher education provider or a VET provider at or after the time a provider is notified of its approval. Although the Minister must notify a provider of a decision to impose or vary a condition and give reasons for the decision, there is no statutory provision providing for a hearing in relation to such a decision. It is true that such a decision is reviewable (see items 18 and 31), but the reviewability of a decision is rarely sufficient to convince courts that the legislature has intended to exclude the operation of the fair hearing rule of procedural fairness. The Committee **seeks the Minister's advice** as to whether consideration has been given to an explicit statutory right to be heard in relation to the imposition or variation of conditions, especially where this occurs after the time of approval. Such a provision would remove potential doubts as to whether the common law would in any event require a hearing in such 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.

Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011

Introduced into the House of Representatives on 10 February 2011

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997*, the *Income Tax Rates Act 1986* and the *Income Tax (Transitional Provisions) Act 1997* to introduce a one-year progressive flood reconstruction levy in the form of additional income tax on Australian resident and foreign resident individuals in the 2011-12 financial year.

The Committee has no comment on this bill.

Migration Amendment (Complementary Protection) Bill 2011

Introduced into the House of Representatives on 24 February 2011

Portfolio: Immigration and Citizenship

Background

This bill amends the *Migration Act 1958* to establish a system for considering complementary protection claims, consistent with Australia's arrangements for meeting its *non-refoulement* obligations under the *International Covenant on Civil and Political Rights*, the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, the *Convention on the Rights of the Child* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

As the Minister noted in his second reading speech (at page 2), the Bill is based on a 2009 (introduced on 9 September 2009) and incorporates certain changes to address matters raised in the report of the Senate Legal and Constitutional Affairs Committee.

The only comment the Committee has in relation to the bill is to repeat comments it made in 2009 in relation to Schedule 1, item 13, subsections 36(2B) and 36(2C).

Trespass unduly on rights and liberties

Schedule 1, item 13, new subsections 36(2B) and (2C)

Proposed new subsections 36(2B) and (2C), to be inserted by item 13 of Schedule 1, contain specific exceptions for when Australia will *not* have a *non-refoulement* obligation to a non-citizen who seeks protection pursuant to the proposed complementary protection provisions. New subsection 36(2B) reflects that *non-refoulement* obligations exist only in circumstances of a 'real risk' of harm that is personal and present, by listing particular circumstances when it will be taken *not* to be a real risk that a non-citizen will be irreparably harmed.

The Committee notes that new paragraphs 36(2C)(a) and (b) mirror, respectively, Articles 1F and 33(2) of the Refugee Convention. The

explanatory memorandum states (at paragraphs 88 to 90) that the intended effect of these provisions is to provide the same exclusions to the complementary protection regime as applies to those who make a valid application for a protection visa, claiming protection under the Refugees Convention.

The explanatory memorandum explains (at paragraph 90) that, while the *International Covenant on Civil and Political Rights* (International Covenant) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) have absolute *non-refoulement* obligations which cannot be derogated from, it was considered necessary to exclude an obligation to certain applicants (including those who pose national security risks).

This is because the delivery of Australia's humanitarian program must be balanced 'with protecting the Australian community and to prevent Australia from becoming a safe haven for war criminals and others of serious character concern'. The explanatory memorandum notes further that there is no obligation on Australia to grant a particular form of visa to those to whom *non-refoulement* obligations are owed, and that it is intended that alternative case resolution solutions will be identified where a person might not be granted a protection visa because of this exclusion provision.

Under principle (1)(a)(i) of its terms of reference, the Committee has regard to whether provisions in bills trespass *unduly* on rights and liberties. The explanatory memorandum notes (at page 10) that the proposed exceptions will ensure Australia's obligations accord with international law (because the Covenant and the CAT require a high threshold for these obligations to be engaged), at the same time balancing the obligation to the Australian community. Since this is clearly a matter of policy, the Committee considers that further consideration of these provisions and whether they strike the appropriate balance **should be left to 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.

Military Rehabilitation and Compensation Amendment (MRCA Supplement) Bill 2011

Introduced into the House of Representatives on 10 February 2011

Portfolio: Veterans' Affairs

Background

This bill amends *Military Rehabilitation Compensation Act 2004* to ensure that certain wholly dependent partners of a deceased Defence Force member or former member will be eligible to receive the MRCA Supplement and will prevent duplicate payments of the MRCA Supplement where a person may be eligible under a different Act for an equivalent payment.

The Committee has no comment on this bill.

National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011

Introduced into the Senate on 10 February 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Education Services for Overseas Students Act 2000*, *Higher Education Support Act 2003* and the *Indigenous Education (Targeted Assistance) Act* to ensure that the new regulatory framework interacts properly with other regulatory frameworks and funding programs.

Incorporating material by reference

Schedule 1, items 29 and 39

Item 29 of Schedule 1 inserts new sections 176B and 176C into the ESOS Act. Under the proposed amendments the Minister may, by legislative instrument, make ELICOS Standards and Foundation Program Standards. The proposed subsections 176B(12) and 176C(2) provide that despite subsection 14(2) of the *LIA*, the standards may apply, adopt, incorporate, with or without modification any matter contained in any other instrument in writing as existing at a particular time or from time to time.

These provisions thus raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. Although the incorporation of instruments into regulations ‘from time to time’ may be justified in certain circumstances, it is unfortunate that the explanatory memorandum merely repeats the effect of these provisions without any explanation or justification of why this is considered an appropriate delegation of power in this instance. 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.

Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies (Consequential Amendments) Bill 2011

Introduced into the House of Representatives on 24 February 2011
Portfolio: Resources and Energy

Background

This bill makes consequential amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* in relation to new well levies.

In particular, the bill provides for the application of a late payment penalty where either a well investigation levy, annual well levy or well activity levy remains wholly or partly unpaid after the day it becomes due and payable.

The Committee has no comment on this bill.

Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No.1) Bill 2011

Introduced into the House of Representatives on 24 February 2011

Portfolio: Resources and Energy

Background

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Act 2003* (Safety Levies Act) to impose cost-recovery levies on holders of offshore petroleum titles in respect of wells and well-related activities in those titleholders' title areas.

The bill also amends the title of the Safety Levies Act to the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*, to reflect the expansion of its content to include levies relating to wells.

Imposing a levy by regulation

Schedule 1, item 17, clauses 9(4), 10(4) 10A(4) and 10B(4)

These proposed subsections provide that the rate of each well levy to be imposed is to be fixed by regulations, with no upper limit being set in the bill. The Committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by regulation. This creates a risk that the levy may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

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

In this instance, the Committee notes that the explanatory memorandum states that the levy in each case 'is the amount specified in or calculated in

accordance with the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004*, but it is not clear whether it is intended that additional regulations will be made and how the levy will be calculated. The explanatory memorandum provides no explanation as to why the rate of the levy needs to be set by regulation. Similarly, the explanatory memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of this power, such as specifying a maximum amount above which the levy cannot be set by regulation, or a formula for calculating the amount of the levy. The Committee **seeks the Minister's advice** in respect of these matters.

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

Patent Amendment (Human Genes and Biological Materials) Bill 2010

Introduced into the House of Representatives on 21 February 2011

By: Mr Dutton, Mr Oakeshott, Mr Forrest and Mr Turnbull

Background

This bill amends the *Patent Act 1990* to prevent the patenting of human genes and biological materials existing in nature, and for related purposes.

No explanatory memorandum

This bill, introduced as a private Members' bill, was introduced without an explanatory memorandum. 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. If the bill proceeds to further stages of debate the Committee **seeks the Members' advice** as to whether an explanatory memorandum could be provided.

Pending the Members' reply, the Committee draws Senators' attention to this circumstance, 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.

Personal Property Securities (Corporations and Other Amendments) Bill 2011

Introduced into the House of Representatives on 23 February 2011

Portfolio: Attorney-General

Background

This bill is the final set of amendments to the *Personal Property Securities Act 2009* (PPS Act) and consequential amendments to other Commonwealth legislation prior to the Personal Property Securities (PPS) regime coming into effect.

This bill makes a number of amendments which have been raised by stakeholders and practitioners following an inquiry by the Senate Standing Committees on Legal and Constitutional Affairs into the 2010 PPS Act.

The amendments will:

- provide exemptions to the rules on taking personal property free of security interests for temporarily perfected transitional security interests and transitional security interests which were not previously registered by serial number;
- ensure that the definition of *security interest* is consistent with the New Zealand legislation and remove any potential for confusion;
- clarify that CHESSE securities are intermediated securities and the means by which CHESSE securities can be subject to control;
- ensure access to third party data through the Register as an important consumer protection measure;
- impose conditions on accessing and using data on the Register to ensure that parties cannot sell this data and undermine the Commonwealth's ability to recover costs associated with the implementation and ongoing administration of the PPS system;
- enable the Registrar to investigate breaches of the rules authorising searches of the Register and registration of security interests on the Register; and

- clarify the provisions on security interests in authorised deposit-taking institutions and the provisions on control of inventory and accounts.

The Committee has no comment on this bill.

Schools Assistance Amendment (Financial Assistance) Bill 2011

Introduced into the House of Representatives on 23 February 2011
Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Schools Assistance Act 2008* to extend the existing funding arrangements, including indexation arrangements, until the end of 2013 and for Grants for Capital Expenditure until the end of 2014.

The Committee has no comment on this bill.

Tax Laws Amendment (2011 Measures No.1) Bill 2011

Introduced into the House of Representatives on 24 February 2011

Portfolio: Treasury

Background

This bill amends various taxation laws to implement recent disaster related initiatives and improvements to Australia's tax laws.

Schedule 1 amends the *Income Tax Assessment Act 1997* to exempt from income tax:

- the Disaster Income Recovery Subsidy paid to those affected by the floods that occurred in Australia on or after 29 November 2010 and those affected by Cyclone Yasi; and
- ex-gratia payments to New Zealand non-protected special category visa holders for a disaster that occurred in Australia during the 2010-11 financial year.

Schedule 2 amends the *Income Tax Assessment Act 1997* to provide an exemption from income tax for Category C Natural Disaster Relief and Recovery Arrangements grants paid to small businesses and primary producers, where the Category C grant relates to flooding that occurred in Australia on or after 29 November 2010 and those small businesses and primary producers affected by Cyclone Yasi.

Schedule 3 amends the *First Home Saver Accounts Act 2008* by allowing money in a First Home Saver Account to be paid into a genuine mortgage after the end of a minimum qualifying period (should the account-holder purchase a dwelling prior to the release conditions being satisfied) rather than requiring it to be transferred to a superannuation or retirement savings account.

The Committee has no comment on this bill.

Tax Laws Amendment (Temporary Flood Reconstruction Levy) Bill 2011

Introduced into the House of Representatives on 10 February 2011

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997*, the *Income Tax Rates Act 1986* and the *Income Tax (Transitional Provisions) Act 1997* to introduce a one-year progressive flood reconstruction levy in the form of additional income tax on Australian resident and foreign resident individuals in the 2011-12 financial year.

The Committee has no comment on this bill.

Therapeutic Goods Legislation Amendment (Copyright) Bill 2011

Introduced into the House of Representatives on 24 February 2011

Portfolio: Health and Ageing

Background

This bill provides an exemption to the infringement of copyright that may subsist under the *Copyright Act 1968* where a person uses the relevant text for the purposes of applying to register a medicine, or for the purpose of varying the approved Product Information document (PI) of a medicine, or any incidental or ancillary acts. The exemption applies to these acts irrespective of when the PI was approved. The exemption will also apply to third parties supplying, reproducing, publishing, communicating or adapting an approved PI for a medicine where such acts are for purposes related to the safe and effective use of the medicine.

Diminishing statutory rights

Various

The purpose of this bill is to establish an exemption to the infringement of copyright that may subsist where a person uses the text of a product information document (which documents are lodged as part of the application process for registration of medicines under the *Therapeutic Goods Act 1989*). The exemption applies where a person uses the relevant product information text for the purposes of applying to register a medicine or for the purpose of varying the approved product information of a medicine or any incidental or ancillary acts. The explanatory memorandum states that this allows the provision of consistent product information documents in relation to generic versions of an 'original' medicine which has been approved at an earlier stage. Not only is this said to promote consistent information but it facilitates the policy of 'brand substitution', and thereby encourages the use of generic medicines.

Although the Federal Court has not yet determined whether pharmaceutical companies do hold copyright in an approved product information document for a registered medicine, it is possible that this legislation has the result in diminishing statutory rights held by such companies. Nevertheless, whether the bill's purposes justify the diminution of copyright as provided in the

legislation is clearly a policy question which can appropriately be **left to the Senate as a whole.**

Wild Rivers (Environmental Management) Bill 2011

Introduced into the Senate on 23 February 2010 and reintroduced on 10 February 2011

By: Senator Scullion

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

Background

This bill aims to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild river areas, and for related purposes.

Explanatory memorandum

This bill, introduced as a private Senator's bill, was introduced without an explanatory memorandum. 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. If the bill proceeds to further stages of debate the Committee **seeks the Senator's advice** as to whether an explanatory memorandum could be provided. In particular this would assist the committee to understand the reasons for delegating the establishment of procedures for matters listed in subclause 8(2) of the bill in regulations rather than outlining them in the primary legislation.

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

COMMENTARY ON AMENDMENTS TO BILLS

Defence Force Retirement and Death Benefits Amendment (Fair Indexation) Bill 2010

[Digest 10/2010]

On 10 February 2011 an explanatory memorandum was tabled in the Senate by Senator Ronaldson.

Tax Laws Amendment (Temporary Flood and Cyclone Reconstruction Levy) Bill 2011 and Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011

(Previous title: Tax Laws Amendment (Temporary Flood Reconstruction Levy) Bill 2011 and Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011)

On 24 February 2011 the House of Representatives tabled a supplementary explanatory memorandum, agreed to 12 government amendments and passed the bills. None of the amendments fall within the Committee's terms of reference.

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

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

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

Personal Property Securities (Corporations and Other Amendments) Bill 2011

This bill is the final set of amendments to the *Personal Property Securities Act 2009* (PPS Act) and consequential amendments to other Commonwealth legislation prior to the Personal Property Securities (PPS) regime coming into effect. This bill makes a number of amendments which have been raised by stakeholders and practitioners following an inquiry by the Senate Standing Committees on Legal and Constitutional Affairs into the 2010 PPS Act.

SCRUTINY OF STANDING APPROPRIATIONS

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

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

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

Bills introduced with standing appropriation clauses in 43rd Parliament from the previous Alert Digest

Nil

Other relevant appropriation clauses in bills in the 43rd Parliament from the previous Alert Digest

Schools Assistance Amendment (Financial Assistance) Bill 2011 — Schedule 1, item 4: special appropriation clause – for a finite amount and a finite period of time