

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 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.

Acts Interpretation Amendment Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Attorney-General

Background

This bill amends the *Acts Interpretation Act 1901* to improve its structure, language and application to modern technology and includes:

- ensuring that powers in relation to instruments apply to all types of instruments (contrary to some judicial interpretation that suggests they only apply to instruments of a legislative character);
- allowing section 19B and 19BA Orders to apply retrospectively (these Orders update references in legislation to a particular Minister, Department or Secretary of a Department so that they can be read consistently with responsibilities as allocated under the Administrative Arrangements Order);
- providing that an action by a Minister other than the Minister who is authorised to perform that action is not invalid merely on that basis;
- providing that anything done by or in relation to a person purporting to act under an appointment (including an acting appointment) is not invalid merely because the occasion for the appointment had not arisen, there was a defect or irregularity in connection with the appointment, the appointment had ceased to have effect or, in the case of acting appointments, the occasion to act had not arisen or had ceased; and
- specifying that everything in an Act as enacted by the Parliament should be considered part of an Act.

Retrospective effect

Schedule 1, items 40 and 41

Item 40 of Schedule 1 of the Bill enables orders made under section 19B of the *Acts Interpretation Act* to apply retrospectively. Such orders update references in legislation to a particular Minister, Department or Secretary of a Department where there is no longer such a Minister or the Department is abolished or has had its name changed. Despite the fact that modern drafting

practice avoids reference to a specific named Minister or Department, the explanatory memorandum suggests that there are ‘still a range of references to a specific Minister or Department or Secretary in legislation’ (at page 22). Section 19B orders allow legislation to be read consistently with current administrative arrangements without the need to amend legislation in cases where a Minister or Department is specifically referred to but there is no longer such a Minister or Department.

The explanatory memorandum at page 22 justifies giving retrospective operation to section 19B orders as follows:

In the absence of such a retrospective operation, where there are gaps in past orders, or their operation is unclear, legislation which includes specific references may not be able to have an effect, or its effect may be unclear, or it may not reflect the actual internal Commonwealth arrangements. To avoid such clearly inappropriate results, the ability to make retrospective orders is warranted.’

It is also noted that there are other Commonwealth provisions that allow for retrospectivity in the context of ‘machinery of Government changes’ (also at page 22 of the explanatory memorandum).

The same issue arises in item 41, which relates to updating references to a particular Minister, Department or Secretary when there are changes to the Administrative Arrangements Order. The same justification for the provision is provided in the explanatory memorandum (at page 23).

The Committee acknowledges the justification provided in each instance and in its view the retrospectivity involved has no impact on the rights or obligations of the public.

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

Insufficiently defined administrative powers Schedule 1, item 43

Item 43 inserts a new section in the Act dealing with the validity of acts done by Ministers in situations where a function, duty or power is conferred on one Minister by an Act, and a second Minister purports to perform the function or duty or exercise the power. The new provision provides that, ‘if a Minister

purports to exercise a power or perform a function or duty that is conferred or imposed on another Minister by an Act, the exercise of that power or that performance of that function or duty is not invalid merely because the power, function or duty is conferred or imposed on the other Minister’.

As this power allows a person other than the repository of the power, duty or function to exercise it, it may be considered to make rights, liberties or obligations unduly dependant on insufficiently defined administrative powers.

The explanatory memorandum refers to the idea accepted by the High Court that Parliament can specify whether breach of a statutory requirement results in invalidity (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355) and states that ‘invalidity is not an appropriate result for a failure to comply with internal government administrative arrangements’.

Further, the explanatory memorandum notes at page 24 that the provision is consistent with the convention of collective responsibility and does not diminish the accountability of the government for decisions made by Ministers. Given the detailed justification for the provision and the fact that it does not undermine the capacity of affected persons to seek judicial review if a decision is invalid on another basis, the Committee considers that the does not make rights, liberties or obligations unduly dependant on insufficiently defined administrative powers.

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

Aged Care Amendment Bill 2011

Introduced into the House of Representatives on 26 May 2011
Portfolio: Health and Ageing

Background

This bill amends the *Aged Care Act 1997* to:

- limit the permitted uses for accommodation bonds;
- introduce new criminal offences where misuse of accommodation bonds has been identified and the approved provider has failed financially, owing accommodation bond refunds;
- introduce new information gathering powers to enable the Secretary of the Department of Health and Ageing to better monitor approved providers; and
- remove restrictions on the use of income derived from accommodation bonds, retention amounts and accommodation charges.

The bill amends the *Health Insurance Act 1973* and *National Health Act 1953* to remove redundant provisions.

Also, the bill repeals the *Aged or Disabled Persons Care Act 1954* and the *Nursing Home Charge (Imposition) Act 1994*.

Trespass on personal rights and liberties **Schedule 1, item 1**

This bill amends the *Aged Care Act 1997* to make a number of changes in relation to the use and misuse of accommodation bonds, and to introduce new information gathering powers to enable the Secretary to better monitor approved providers that may be experiencing financial difficulties and using accommodation bonds for non-permitted uses.

Item 1 of Schedule 1 inserts a new section 9-3B which enables the Secretary to require information about the ability to refund accommodation bond balances where he or she holds a belief on reasonable grounds in relation to specified matters. Paragraph 9-3B(4)(a) provides that requests for such

information must be complied with within 28 days or such ‘shorter period as is specified in the request’. It is an offence (30 penalty units) not to comply with a request for information and failure to comply can also result in other sanctions being imposed under the legislation.

The explanatory memorandum does not indicate why a shorter period may be required. **The Committee therefore seeks the Minister's advice as to why a shorter period could be required and whether the minimum period for the production of information should be 14 days as recommended in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.**

Pending the Minister's reply, 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, item 5

Item 5 of Schedule 1 inserts a new section 57-17B which relates to offences for non-permitted use of accommodation bonds. Subsection 57-17B(1) provides for an offence for a corporation who is an approved provider. Subsection 57-17B(2) provides for an offence for individuals who are ‘key personnel’. Section 8-3A defines the phrase ‘key personnel’. Paragraph 57-17B(2)(d) conditions liability for the offence on whether or not the individual ‘knew that, or was reckless or negligent as to whether’ the bond would be used and that its use was not permitted. Where a bill includes provision for a fault element of negligence, the Committee has taken the view that an explanation of the reasons for the use of negligence requirement should be justified. Unfortunately, the explanatory memorandum at pages 24-26 merely repeats the terms of the provision. **The Committee therefore seeks the Minister's further advice as to examples of the circumstances of possible offences and an explanation as to why negligence is an appropriate standard of fault in this context.**

Pending the Minister's reply, 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.

Appropriation Bill (No.1) 2011-2012

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

Background

This bill appropriates \$72.9 billion to meet payments for the ordinary annual services of the government for the financial year ending 30 June 2012.

The Committee has no comment on this bill.

Appropriation Bill (No.2) 2011-2012

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

Background

The bill provides for appropriations totalling \$7.4 million from the Consolidated Revenue Fund for services that are not the ordinary annual services of the government and proposes amendments to the *Commonwealth Inscribed Stock Act 1911*.

Possible insufficient Parliamentary scrutiny

Part 5

Part 5 of this bill contains amendments to the *Commonwealth Inscribed Stock Act 1911* that 'relate to the Government's announcement in the 2011-12 Budget on the future of the [Commonwealth Government Securities] market' (see paragraph 75 of the explanatory memorandum). The amendments seek to increase the legislative borrowing limit (see subsection 18(1) and paragraphs 79 to 83 of the explanatory memorandum) and establish two new standing appropriations (see subsection 18(3) and paragraphs 84 to 95 of the explanatory memorandum).

The first new appropriation proposed in subsection 18(3) is 'a special appropriation in the CIS Act for the costs and expenses incurred in relation to the issue or sale of stock and to managing stock that has been issued' (see paragraph 88 of the explanatory memorandum). The second is 'for the costs and expenses incurred in repurchasing or redeeming stock prior to maturity' (see paragraph 93 of the explanatory memorandum).

As far as the Committee is aware it is unusual, if not unprecedented, for amendments to the CIS Act (including those referred to in the explanatory memorandum at paragraphs 77 and 78) to be included in an appropriation bill. The Appropriation Bill No. 2 is usually reserved 'to propose appropriations from the Consolidated Revenue Fund for services that are not the ordinary annual services of the Government' (see paragraph 2 of the explanatory memorandum). In the past, significant amendments to the CIS Act have been included in *Commonwealth Subscribed Stock Amendment Acts* of 2009 and 2002 and the *Commonwealth Securities and Investment Legislation*

***Amendment Act 2008.* The Committee is concerned to ensure that the proposed amendments to the CIS Act receive sufficient Parliamentary scrutiny (in accordance with Standing Order 24(i)(v)) and therefore draws these provisions to Senators' attention.**

Appropriation (Parliamentary Departments) Bill (No.1) 2011-2012

Introduced into the House of Representatives on 10 May 2011

Portfolio: Finance and Deregulation

Background

This bill appropriates \$180.2 million to meet the expenses of the parliamentary departments for the financial year ending 30 June 2012.

The Committee has no comment on this bill.

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Attorney-General

Background

This bill is part of a legislative package of three bills and enables:

- collection and administration of supervisory cost recovery levy;
- imposes a penalty for late payment; and
- provides for the levy or late payment penalty to be waived in certain circumstances.

Retrospective effect

Clause 7

The explanatory memorandum states at page 9 that:

A liable entity is liable to pay the levy for a financial year ending after the commencement of the Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Bill 2011. It is intended that cost recovery for AUSTRAC's supervisory activities would commence from the 2011-12 financial year.

The clear intention of the bill is that a levy imposed may be charged to cover a period that precedes the commencement of the relevant legislation. **In the circumstances the Committee leaves the appropriateness of this provision to the Senate as a whole.**

Information for Senate legislation Committee

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

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Consequential Amendments) Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Attorney-General

Background

This bill is part of a legislative package of three bills. The bill amends the *Anti-Money Laundering and Counter-terrorism Financing Act 2006* to require reporting entities to enrol with AUSTRAC and allow infringement notices to be issued for failure to enrol and failure to appropriately maintain enrolment details.

The Committee has no comment on this bill.

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Attorney-General

Background

This bill is part of a legislative package of three bills. The bill imposes a levy on certain entities regulated by Australian Transaction Reports and Analysis Centre (AUSTRAC). The levy will enable AUSTRAC to recover the costs of its supervisory activities from 1 July 2011.

Possible over-collection of a levy

Clause 8

This bill creates the liability to impose a levy allowing AUSTRAC to recover the costs of its regulatory activities from 1 July 2011. Clause 8 of the bill provides that the levy is payable in accordance with section 7 of the Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery (Collection) Bill 2011. The Minister must, pursuant to subclause 9(1) determine the amount of levy payable by a leviable entity by legislative instrument. There is a global statutory limit set for the levy (see clause 7). The explanatory memorandum states at pages 5-6:

The actual amount to be collected will be equal to the costs of AUSTRAC supervisory activities. This will be determined in accordance with the standard budgetary processes applied to all Australian government agencies. The levy components of each financial year will be based on estimates of the reporting entity population profile determined prior to the financial year in which they will apply. The levy will be imposed on leviable entities based on the actual reporting entity population profile on the census day in the relevant financial year. It is possible therefore that due to changes in the leviable entity population, the amount collected will differ to AUSTRAC's supervisory activities for that financial year. The statutory limit is set with a sufficient margin to reduce the risk of breaching the limit. In circumstances where AUSTRAC over or under collects, the levy in future years will be adjusted

Clearly the intention is that the levy should not amount to a tax, and is to be charged according to a cost recovery basis. Nevertheless, it is of concern that the assurance that over-collection will be adjusted in subsequent years is not reflected in the legislation. The Committee has consistently drawn attention to

legislation in which there may be 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 therefore seeks the Minister's advice as to whether consideration has been given to including a safeguard in the legislation to provide that any over-collection will be adjusted.**

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

Retrospective effect Subclause 9(4)

Subclause 9(4) provides that a determination of the levy payable under subsection 9(1), may, despite subsection 12(2) of the *Legislative Instruments Act*, be made after the commencement of the 2011-12 financial year. The explanatory memorandum indicates that the 'purpose of this provision is to ensure that leviable entities will be liable for the entire financial year irrespective of the date of the commencement of clause 8 of the Bill' and the determination (by legislative instrument) of the levy payable pursuant to clause 9. That is, the clear intention of the bill is that a levy imposed may be charged to cover a period that precedes the coming into operation of the legislative instrument that determines the levy payable for a financial year. **In the circumstances the Committee leaves the appropriateness of this provision to the Senate as a whole.**

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

Information for Senate legislation Committee

The Committee notes that this bill was referred to a Senate 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.

Customs Tariff Amendment (Taxation of Alternative Fuels) Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Home Affairs

Background

This bill forms part of a package of bills concerning the taxation of alternative fuels. The bill amends the *Customs Tariff Act 1995* to

- set the excise-equivalent customs duty rates applying in certain alternative fuels from 1 December 2011;
- calculate the duty payable to blended goods.

The Committee has no comment on this bill.

Energy Grants (Cleaner Fuels) Scheme Amendment Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Treasury

Background

This bill forms part of a package of bills concerning the taxation of alternative fuels. The bill amends the *Energy Grants (Cleaner Fuels) Scheme Act 2004* to continue the grant arrangements for biodiesel and renewable diesel beyond 30 June 2011.

The Committee has no comment on this bill.

Excise Tariff Amendment (Taxation of Alternative Fuels) Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Treasury

Background

This bill forms part of a package of bills concerning the taxation of alternative fuels. The bill amends the *Excise Tariff Act 1921* to set the excise rates applying to certain alternative fuels from 1 December 2011, and to calculate the duty payable on blended goods.

The Committee has no comment on this bill.

Family Assistance and Other Legislation Amendment Bill 2011

Introduced into the House of Representatives on 2 June 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill makes a number of amendments relating to family assistance, social security, paid parental leave and Aboriginal land rights.

Schedule 1 amends the *A New Tax System (Family Assistance) Act 1999* to lower the maximum child age of eligibility for Family Tax Benefit Part A from 24 to 21 on 1 January 2012.

Schedule 2 amends the *A New Tax System (Family Assistance) Act 1999* and *Paid Parental Leave Act 2010* to the following indexation arrangements:

- Family Tax Benefit Part A both the basic amount and the additional amount for each child after the first;
- Family Tax Benefit Part B income limit;
- Baby Bonus income limit;
- Paid Parental Leave indexation will not commence until 1 July 2014; and
- Family Tax Benefit Part A and B supplements to be paused for three years from 1 July 2011.

Schedule 3 amends the *Social Security Act 1991* introducing new assessment arrangements for Disability Support Pension commencing from 3 September 2011.

Schedule 4 amends the *Social Security (Administration) Act 1999* to enable a proposed 12 month extension of the welfare reform trial in the Cape York area.

Schedule 5 amends the *Aboriginal Land Rights (Northern Territory) Act 1976* to clarify that the *Public Works Committee Act 1969* does not apply to Aboriginal Land Trusts.

The Committee has no comment on this bill.

Family Assistance Legislation Amendment (Child Care Financial Viability) Bill 2011

Introduced into the House of Representatives on 26 May 2011

Portfolio: Employment Participation and Childcare

Background

This bill amends the *A New Tax System (Family Assistance) (Administration) Act 1999* to provide for the assessment and monitoring of the financial viability of large long day care centre operators of approved child care services in the context of the approval and continued approval of such services for the purposes of the family assistance law and to authorise the Secretary to engage an expert to carry out an independent audit of such an operator where there are concerns about its ongoing financial viability.

'Henry VIII' clause

Schedule 1, item 7

This bill is intended to promote the ongoing stability of the child care industry by more closely monitoring the financial viability of large long day care centre operators.

Schedule 1, item 7, is a *Henry VIII* clause which means that its effect is to enable regulations to override primary legislation. The Committee has long drawn attention to such clauses as they may inappropriately delegate legislative power. In this case item 7 enables the Minister to alter the definition of 'large long day care centre operator' by varying the number of 'approved centre based long day care services' which are specified in the definition contained in the bill.

It is difficult to assess the appropriateness of the delegation of legislative power as the explanatory memorandum is silent on the justification for the approach taken. **The Committee therefore seeks the Minister's advice as to the necessity for this provision.**

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

Insufficiently defined administrative powers Schedule 1, item 15

Schedule 1, item 15, inserts provisions enabling the Secretary to require financial information relating to large long day care centre operators. Proposed subsection 219GA(5) provides that a notice requiring information must specify a period which ‘must be reasonable in the circumstances’. This provision may be considered to insufficiently define administrative powers. The explanatory memorandum does provide a detailed explanation at pages 31-32. It is said that the approach:

...provides the Secretary with the flexibility to require financial information to be provided within a short time in a situation where urgent provision of such financial information is necessary: for example, in a rapidly evolving situation where a large long day care centre operator appears to be on the verge of insolvency, and financial information may be required within hours rather than days or weeks.

The explanatory memorandum also goes on to suggest that in normal situations there will be no urgency and ‘notice will provide for a substantial period of time for the provision of the financial information’. **In these circumstances, the Committee leaves the question of the appropriateness of this matter to the Senate as a whole.**

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.

Strict liability Schedule 1, item 19, subsection 219LA(3) and 219LA(6)

Schedule 1, item 19, inserts subsection 219LA(3) which makes it an offence to refuse to produce any documents, records or things required by an audit team which has entered premises to carry out an audit. The offence is of strict liability. Proposed subsection 219LA(6) makes it an offence to fail to provide an audit team with all reasonable facilities and assistance for the effective exercise of their powers to carry out an audit. Again, the offence is one of strict liability. The explanatory memorandum notes that these provisions ‘mirror the corresponding offences in subsections 219L(1A) and (3A)’ of the Act and that the size and nature of the penalties are the same. Further, the

strict liability nature of the offences is justified as being ‘an appropriate basis for the offence because of the difficulty the prosecution would have in proving fault (especially knowledge or intention) and the fact that the offence does not involve dishonesty or a serious imputation affecting a person’s reputation’ (see page 35 of the explanatory memorandum). The penalties for the offences are within the parameters set out in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. **In these circumstances the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

Financial Framework Legislation Amendment Bill (No.1) 2011

Introduced into the House of Representatives on 2 June 2011

Portfolio: Finance and Deregulations

Background

This bill amends 8 Acts across 5 portfolios to: clarify the Commonwealth's financial framework and amend the governance and financial arrangements of existing government

t bodies. Specifically the bill:

- improves the readability of the *Commonwealth Authorities and Companies Act 1997* by moving the detail for the corporate plans of a Government Business Enterprise into the *Commonwealth Authorities and Companies Regulations 1997*;
- improves the readability of the *Financial Management and Accountability Act 1997* by clarifying its interaction with the *Legislative Instruments Act 2003*, and clarifying a reference to the 'external auditors' of FMA Act agencies as meaning a reference to the Auditor-General; and
- amends six other Acts to update and clarify specific provisions relating to the Commonwealth's financial framework and governance arrangements.

Possible delayed commencement

Clause 2

The amendments in Schedules 1 and 2 of the Bill commence either on a day to be fixed by Proclamation or if the provisions do not commence within 12 months, then 12 months after the Act receives the Royal Assent. The explanatory memorandum at page 3 states that this is to allow sufficient time to develop detailed regulations and to undertake detailed consultation (schedule 1), and to disseminate information to relevant parties of the changes (schedule 2).

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

Higher Education Support Amendment (Demand Driven Funding System and Other Measures) Bill 2011

Introduced into the House of Representatives on 26 May 2011
Portfolio: Education, Employment and Workplace Relations

Background

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

- remove the annual caps on Commonwealth Grant Scheme funding;
- change the way in which higher education providers will be eligible for funding;
- abolish the student learning entitlement;
- require higher education providers to promote and protect free intellectual inquiry into learning, teaching and research; and
- require higher education providers to enter into a mission based compact with the Commonwealth.

The Committee has no comment on this bill.

Indigenous Education (Targeted Assistance) Amendment Bill 2011

Introduced into the House of Representatives on 26 May 2011

Portfolio: School Education, Early Childhood and Youth

Background

This bill amends the *Indigenous Education (Targeted Assistance) Act 2000* to extend the existing funding arrangements, including indexation arrangements, for the 2013 calendar year.

The Committee has no comment on this bill.

Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011

Introduced into the House of Representatives on 11 May 2011

Portfolio: Immigration and Citizenship

Background

This bill amends the *Migration Act 1958* to:

- enable the Minister to refuse to grant, or to cancel, a visa where a person fails the character test because the person has been convicted of any offence committed while they are in immigration detention; and
- increase the penalty for the manufacture, possession, use or distribution of weapons by immigration detainees from three to five years imprisonment.

The first purpose of the bill is to enable the question of whether a visa applicant or holder fails the character test to be determined by reference to whether they have been convicted of any offence committed while they are in immigration detention (including during or after an escape from immigration detention).

The second purpose is that the bill increases the maximum penalty for the manufacture, possession, use or distribution of weapons by immigration detainees from 3 years to 5 years imprisonment. The explanatory memorandum at page 1 states that the bill is a response to criminal behaviour during recent disturbances in immigration detention centres and is intended to ‘provide a more significant disincentive for people in immigration detention from engaging in violent and disruptive behaviour’ and to allow for those who engage in criminal activity while in detention to be dealt with appropriately.

Undue trespass on personal rights and liberties Schedule 1, item 1

The second purpose of the bill is achieved through item 1 of schedule 1, through the proposed introduction of subsection 197B(1) into the *Migration Act*. The provision increases the maximum penalty for the manufacture, possession, use or distribution of a ‘weapon’ from 3 to 5 years imprisonment. A weapon is defined to include ‘a thing made or adapted for use for inflicting

bodily injury’ or ‘a thing where the detainee who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury’. It is noted that the definition of a weapon is framed very broadly. For example, one may threaten to use a thing to inflict bodily injury without there being any real or significant risk that injury may in fact result.

The justification provided for this amendment in the explanatory memorandum is as follows: (1) the expectations of the Australian community; (2) the alignment of the penalty for this offence with that provided in relation to section 197A, which prohibits detainees from escaping, and (3) the fact that the increase is ‘not inconsistent’ with other penalties provided in Commonwealth legislation, for example, section 49 of the *Aviation Transport Security Act 2004* which has a penalty of 7 years for the offence of carrying or possession of a weapon on board an aircraft.

In terms of Standing Order 24 (1)(a)(i), the first two reasons for the increase do not of themselves substantively address the question of whether the increase for this offence may be considered proportionate. In the Committee's view it is also relevant that the legislation gives a very broad definition given to ‘weapon’. On this issue it is notable that the definition of ‘weapon’ in the *Aviation Transport Security Act 2004* is more circumscribed and determinate in its operation: it refers specifically to ‘firearms’ or things which are prescribed by the regulations to be a weapon. By contrast, whether or not a person commits an offence in relation to a weapon under the *Migration Act* may depend upon subjective intentions and whether threats have been made (regardless of any objective assessment of danger posed by the weapon). **The Committee therefore seeks the Minister's advice as to whether the proposed increase in penalty is proportionate given the breadth of the definition of 'weapon' in this context.**

Pending the Minister's reply, 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 trespass on personal rights and liberties Schedule 1, items 2 and 4

The first purpose of the bill relating to the character test is achieved through items 2 and 4, which would insert into the Act new subsections 500A(3) and

501(6)(a). The effect of both of these proposed subsections is to provide additional grounds upon which the Minister or his or her delegate may decide to refuse to grant, or to cancel, a visa on character grounds. New paragraph 500A(3)(d) of the Act provides that the Minister may refuse to grant to a person a temporary safe haven visa, or may cancel a person's temporary safe have visa if the person has been convicted of any offence which was committed while the person was in immigration detention, during an escape from immigration detention, or after an escape from immigration detention. New paragraph 501(6)(aa) provides that a person who is convicted of any offence in these same circumstances does not pass the character test for the purposes of section 501.

New paragraph 500A(3)(e) provides that the Minister may refuse to grant to a person a temporary safe haven visa, or may cancel a person's temporary safe haven visa if the person has been convicted of an offence against section 197A of the Act which prohibits detainees from escaping. New paragraph 501(6)(ab) provides that a person who is convicted of an offence against section 197A does not pass the character test for the purposes of section 501.

These amendments supplement the existing powers of the Minister under the Act to take into account criminal conduct. The explanatory memorandum states at page 5 that the purpose of the provisions is to strengthen the consequences of criminal behaviour by persons in immigration detention and (at page 2 of the explanatory memorandum) to send 'a strong and clear message that the kind of behaviour seen recently in immigration detention centres will not be tolerated'. On the other hand, the legislation already enables the Minister or delegate to consider past and present criminal conduct in determining whether to exercise the discretionary powers under the existing 'character test' outlined in sections 501 and 500A. Further, the Committee is very concerned that the application of the new provisions could mean that criminal behaviour which may be relatively minor can, of itself, justify the exercise of these powers (without the need for any assessment of the circumstances and details of the offence) and this outcome may be thought to be disproportionate in some cases. **The Committee seeks the Minister's advice as to why the existing powers are thought inadequate to respond to criminal acts by those whom are or should be lawfully detained under the Act and whether, if new powers are considered necessary, it is appropriate to specify types of offences or a minimum term of imprisonment for the offences rather than including all offences.**

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

Retrospective commencement

Clause 2, table item 3

The amendments to section 500A and 501 will commence from 26 April 2011 (see Clause 2 of the Bill). The explanatory memorandum at page 1 indicates that the provisions will operate 'whether the conviction or offence occurred before, on or after' that date. Although the amendments do not retrospectively impose criminal liability, decisions which have very serious consequences for individuals will be made on the basis of legislative provisions which are given retrospective operation. One central element of the rule of law is that persons should be able to guide their actions by reference to the law and that the legal consequences of breaches of the law should be capable of being known with a tolerable level of clarity in advance. To this extent, the rule of law is sometimes said to promote personal liberty. As these amendments 'strengthen the [adverse] consequences of criminal behaviour' (see the explanatory memorandum at page 5) and do so with retrospective effect, there is a clear argument that they do unduly trespass on personal liberty.

The explanatory memorandum 'notes on individual clauses' for Clause 2 simply states that the items will commence on 26 April 2011, but provides no context or rationale for the approach. At page 2 the explanatory memorandum appears to suggest that the proposed approach is justified because on 26 April 2011 the Minister made a public announcement of the legislative changes proposed in this bill—thereby putting 'all immigration detainees on notice that the Australian government takes criminal behaviour very seriously and will take appropriate measures to respond to it.'

However, in the Committee's view this does not adequately respond to concerns about the retrospective operation of the legislation. Given the nature of the individual interests which may be affected by decisions made under sections 500A and 501 of the *Migration Act*, it is suggested that 'legislation by press release' is not appropriate. As discussed in its *Report on the 39th Parliament*, the Committee consistently draws attention to reliance on Ministerial announcements which contain an implicit requirement that persons arrange their affairs in accordance with such announcements rather than in

accordance with the law. This approach undermines the principle that the law is made by Parliament, not by the Executive. The practice is of particular concern in the context of the application of laws which have the capacity to affect significant individual liberty interests. **The Committee therefore seeks the Minister's advice as to the justification for the proposed approach, taking into account the Committee's concern that they may unduly trespass on personal rights and liberties.**

Pending the Minister's reply, 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.

Information for Senate legislation Committee

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

Military Justice (Interim Measures) Amendment Bill 2011

Introduced into the House of Representatives on 11 May 2011

Portfolio: Defence

Background

This bill amends Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* to provide for the appointment, remuneration and entitlement arrangements provided for in that Act for an additional two years, namely for a period of four years, or until the Minister for Defence declares, by legislative instrument, a specified day to be a termination day, whichever is sooner.

The Committee has no comment on this bill.

Mutual Assistance in Criminal Matters Amendment (Registration of Foreign Proceeds of Crime Orders) Bill 2011

Introduced into the House of Representatives on 11 May 2011

Portfolio: Justice

Background

The Bill amends section 34A of the *Mutual Assistance in Criminal Matters Act 1987*, section 45 of the *International War Crimes Tribunal Act 1995* and section 156 of the *International Criminal Court Act 1995* to address issues raised by the High Court in the case of *International Finance Trust Company Ltd v New South Wales Crime Commission* [2009] HCA 49 (*International Finance*).

The bill provides courts with:

- the discretion to refuse to register a foreign proceeds of crime order if it would be contrary to the interests of justice to register the order; and
- the discretion to refuse to hear an application for registration on an *ex parte* basis.

The Committee has no comment on this bill.

Navigation Amendment Bill 2011

Introduced into the House of Representatives on 25 May 2011

Portfolio: Infrastructure and Transport

Background

This bill amends the *Navigation Act 1912* to implement the Maritime Labour Convention in Australia by setting minimum requirements for working and living conditions for seafarers working on certain ships engaged in commercial activities. The bill also enables vessel traffic services to be extended to the southern part of the Great Barrier Reef.

Possible delayed commencement

Clause 2

The bill provides that Schedule 1, Part 1, commences on a day to be fixed by Proclamation within 6 months of the day the Maritime Labour Convention comes into force for Australia. The explanatory memorandum at page 4 provides further detail about the commencement of the Convention and the fact that it cannot be known when it will come into force for Australia.

In the circumstances, the Committee makes no further comment on the proposed approach.

Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011

Introduced into the House of Representatives on 25 May 2011

Portfolio: Resources and Energy

Background

This bill is part of a package of five bills. The bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to establish two new regulatory bodies to administer and regulate petroleum and greenhouse gas storage operations in Commonwealth waters in the Australian offshore area. The new bodies will replace the Designated Authorities, who are State and Northern Territories Ministers who, through their departments, have performed functions and exercised powers conferred directly on them by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and its predecessor Act the *Petroleum (Submerged Lands) Act 1967*.

Commencement

Clause 2

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3. In this instance, the explanatory memorandum explains (at page 6) the delayed commencement as follows:

...if any of the provisions of this Part do not commence within 12 months of the day on which the National Regulator Amendment Act received Royal Assent, the provisions will commence on the day after the end of the 12 month period. A 12 month period has been set to ensure adequate time to establish National Offshore Petroleum Titles Administrator (NOPTA) and National Offshore Petroleum Safety and Environment Management Authority (NOPSEMA) before the commencement of this Part. There is a higher risk that setting a shorter period before automatic commencement, such as 6 months, will not enable sufficient time for necessary work to establish NOPTA and NOPSEMA prior to the commencement of this Part.

The Committee notes that the proposed commencement is thought necessary to ensure sufficient time to establish the regulatory bodies.

The amendment effected by Schedule 5 has a commencement date of 9 October 2009. However, the reason for the retrospective operation of the Schedule is ‘that the provision in this Schedule effects a technical amendment by correcting a drafting error in the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Act 2009*’ (see the explanatory memorandum at page 7).

In the circumstances, the Committee makes no further comment on the proposed approach.

Strict liability **Schedule 2, item 164**

Item 164 of Schedule 2 of the bill inserts a new section 286A into the *Offshore Petroleum and Greenhouse Gas Storage Act*. The new section places a number of notification requirements on registered holders of petroleum titles. Subsection 286A(7) makes it an offence to breach these requirements; and subsection 286A(8) makes it an offence of strict liability (50 penalty units). The explanatory memorandum argues at page 31 that strict liability is necessary to ‘ensure that the legislation can be enforced more effectively’. The fact that the offshore petroleum industry is a ‘high risk industry’ is emphasised as a reason for preferring strict liability to improve compliance. The notification requirements themselves are considered important as the regulatory agencies rely upon being provided with relevant contact details and consider that these are necessary for the effective performance of their regulatory responsibilities. **In the circumstances the Committee leave the question of the appropriateness of this approach to 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.

Incorporating material by reference **Schedule 2, Part 1, item 333, subsection 574A(7)**

Subsection 574A(7) enables a direction to apply, adopt or incorporate a code of practice or standard as in force when adopted or as existing from time to time. The provision thus raises 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. The Committee notes that while subsection 574A(10) requires any instruments applied, adopted or incorporated under subsection 574A(7) to be published on the Department’s website, this is subject to copyright restrictions. **The Committee seeks the Minister's advice about the justification for the proposed approach and whether it is likely that access to any material to be incorporated 'from time to time' will be restricted by copyright.**

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.

Strict liability

Schedule 2, Part 1, items 337, 354 and 359

Item 337 has the effect of making it an offence for a person to breach a direction issued under either section 574 (given by NOPSEMA) or section 574A (by the Minister). The offence is one of strict liability and the penalty is set at 100 penalty units, which is higher than the standard for strict liability offences set out in *A Guide to Framing Commonwealth Offences*.

The explanatory memorandum (at pages 48-50) provides a comprehensive justification for (a) the justification for the offence (b) the strict liability issue, and (c) the setting of the penalty. The necessity for breach of a direction being an offence is related to being able to give the regulators the capacity to deal with emergency situations, especially in relation to particular offshore facilities. The high risk nature of the industry and the difficulty of dealing with emergencies in advance is said to make reliance on the general power to make regulations inadequate.

Next, strict liability is said to be justified ‘given the remote and complex nature of offshore operations and the prevalence of multiple titleholder arrangements’. These factors would make it difficult to prove intent. Further, it the high risk nature and serious consequences which may flow from offences being committed are said to justify this approach. The maximum

penalty is considered appropriate in the context of the fact that ‘offshore resources activities, as a matter of course, require a very high level of expenditure’. The penalty is also consistent with other provisions in the OPGGS Act.

The explanatory memorandum also emphasises the fact that subsection 576(3) provides a defence in circumstances where the defendant did not know, or could not reasonably have known, of the existence of the direction. Although the defendant bears an evidentiary burden of proof, these matters are peculiarly within their knowledge.

Similar issues and justifications also arise in relation to item 354 and 359 (see pages 51-53 of the explanatory memorandum).

Given the detailed justification for the overall approach in these provisions, **the Committee leaves the question of whether it is appropriate to the consideration of the Senate as a whole.**

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

Reversal of onus Schedule 2, Part 1, item 346

Item 346 adds subsection 578(2). This subsection provides a defence in a prosecution for a an offence in relation to a breach of a direction given by the responsible Minister, where the defendant can prove that they took all reasonable steps to comply with a direction. In making out this defence the defendant bears a legal burden of proof. To justify this approach the explanatory memorandum at page 50 relies on the matters to be proved being within the knowledge of the defendant and the remote nature of offshore operations. Also, given the nature of the risks involved to persons and to the environment, **the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

Information for Senate legislation Committee

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

Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Amendment Bill 2011

Introduced into the House of Representatives on 25 May 2011

Portfolio: Resources and Energy

Background

This bill is part of a package of five bills and amends the *Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006* to correctly reference the new National Offshore Petroleum Titles Administrator which is proposed to be established through amendments contained in the *Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011*.

The Committee has no comment on this bill.

Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No.2) Bill 2011

Introduced into the House of Representatives on 25 May 2011

Portfolio: Resources and Energy

Background

This bill is part of a package of five bills and amends the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* to impose new cost-recovery levies on holders of offshore petroleum and greenhouse gas storage titles.

Imposing a levy by regulation Schedule 1, item 20

This item provides for cost-recovery levies to be set in regulations without setting an upper limit in the bill: see item 20, subsections 10E(4) and 10F(4). 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 circumstances may exist in which the rate of a levy 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.

A similar issue was raised by the Committee in relation to the *Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No. 1) Bill 2011*. The Minister's response appears in the Committee's *Third Report of 2011* at pages 158-60. It details a number of requirements applying the levies in the earlier bill '...to ensure that levy amounts are not increased in an excessive or undue manner, so that it is not

necessary to include an upper limit in the [Bill] on the amount of the levy that may be imposed.' Unfortunately, in relation to the current bill, the explanatory memorandum does not identify whether any similar measures are in place to ensure that the proposed new levies are also not set or increased in an excessive or undue manner. **The Committee therefore seeks the Minister's further advice in relation to this issue.**

Pending the Minister's reply, 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.

Offshore Petroleum (Royalty) Amendment Bill 2011

Introduced into the House of Representatives on 25 May 2011

Portfolio: Resources and Energy

Background

This bill is part of a package of five bills and amends the *Offshore Petroleum (Royalty) Act 2006* to correctly reference the new National Offshore Petroleum Titles Administrator which is proposed to be established through amendments contained in the *Offshore Petroleum Greenhouse Gas Storage Amendment (National Regulator) Act 2011*.

The Committee has no comment on this bill.

Offshore Resources Legislation Amendment (Personal Property Securities) Bill 2011

Introduced into the House of Representatives on 25 May 2011

Portfolio: Resources and Energy

Background

This bill is part of a package of five bills and amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and the *Offshore Minerals Act 1994* to exclude application of the *Personal Property Securities Act 2009*.

The Committee has no comment on this bill.

Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oil Transfers) Bill 2011

Introduced into the House of Representatives on 25 May 2011

Portfolio: Resources and Energy

Background

This bill amends the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement amendments to Annex I of the International Convention for the Prevention of Pollution from Ships which codifies existing practices for ship-to-ship oil transfers between oil tankers.

The Committee has no comment on this bill.

Public Service Amendment (Payments in Special Circumstances) Bill 2011

Introduced into the Senate on 12 May 2011

By: Senator Xenophon

Background

This bill amends the *Public Service Act 1999* to enable agencies to make special circumstances payments in excess of \$100 000.

The Committee has no comment on this bill.

Social Security Amendment (Parenting Payment Transitional Arrangement) Bill 2011

Introduced into the House of Representatives on 26 May 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Social Security Act 1991* to provide that parenting payment recipients are only covered by the transitional arrangement in respect of children who were in their care before 1 July 2011.

The Committee has no comment on this bill.

Taxation of Alternative Fuels Legislation Amendment Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Treasury

Background

This bill forms part of a package of bills concerning the taxation of alternative fuels. The bill amends the *Excise Act 1901*, the *Fuel Tax Act 2006*, the *Product Grants and Benefits Administration Act 2000*, and the *Taxation Administration Act 1953* to:

- establish LPG reporting requirements, fuel tax credit entitlements and penalties concerning unauthorised excise free LPG sale or use; and
- set out transitional excise licensing requirements for the gaseous fuels (LPG, LNG and CNG).

The Committee has no comment on this bill.

Tax Laws Amendment (2011 Measures No. 3) Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Treasury

Background

This bill amends the *A New Tax System (Goods and Services Tax) Act 1999* to allow supplies of particular types of new recreational boats to be GST-free if the boats are exported within a specified 12 month period. The bill also amends the *Income Tax (Transitional Provisions) Act 1997* to remove a technical deficiency that prevents the ongoing imposition of the general interest charge in some circumstances.

Retrospective commencement

Clause 2, table item 3

Schedule 2 of this bill makes amendments to the *Income Tax (Transitional Provisions) Act 1997* so as to remove a ‘technical deficiency that prevents the ongoing imposition of the general interest charge [‘GIC’] in some circumstances’ (explanatory memorandum at 15). The amendments are a response to an unexpected result of the enactment of the *Tax Laws Amendment (Transfer of Provisions) Act 2010*. This Act rewrote and transferred the GIC imposition provisions from the *Income Tax Assessment Act 1936* to the *Income Tax Assessment Act 1997*. The unexpected result was that the general interest charge (payable in relation to overdue income tax) would not be payable in a number of limited instances (these are detailed on page 16 of the explanatory memorandum and relate to the year in which the liability arose or the date it becomes due for payment). The amendments in this bill impose the GIC on all income tax and shortfall interest charge liabilities irrespective of the year the liability relates to or the date when the liability becomes due for payment.

The amendments will operate from July 2010—the date the ‘technical deficiency’ was created. The law will clearly have an adverse impact on persons who become liable to pay the GIC in circumstances where, due to the technical deficiency created by the 2010 amendments, they would not have been liable to pay the charge.

In the explanatory memorandum, the following points are noted (see page 3 and pages 15-16):

- in the public consultations undertaken on the draft legislation that rewrote and transferred the GIC provisions, ‘none of the six submissions ... received identified this specific deficiency in the draft.
- the amendments in this bill restore the ongoing imposition of the GIC by removing a ‘technical deficiency and ‘ensure the equal treatment of unpaid amounts of income tax and shortfall interest charge under the law’.
- the amendments ‘only affect some taxpayers that have unpaid income tax or shortfall interest charge liabilities’.

Given that persons affected by the ‘technical deficiency’ may have relied upon the fact that they were no longer liable to pay the GIC in relation to a particular tax liability, there is an argument that this bill may constitute an undue encroachment on personal rights and liberties. In general it is thought that those subject to the law are entitled to plan their affairs on the basis that it will not be changed retrospectively. There is no suggestion in the explanatory memorandum that it would have been unreasonable for affected taxpayers to rely upon the 2010 amendments which operated in their favour. **The Committee therefore seeks the Treasurer's advice as to the detriment this approach could cause and whether the retrospective operation of these amendments may unduly encroach upon personal rights.**

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

Tax Laws Amendment (2011 Measures No. 4) Bill 2011

Introduced into the House of Representatives on 26 May 2011

Portfolio: Treasury

Background

This bill amends the *Taxation Administration Act 1953* and *Income Tax Assessment Act 1936* to implement the following:

- Schedule 1 reduces 2011-12 pay as you go instalments from 8 per cent to 4 per cent;
- Schedule 2 removes the ability of minors (children under 18 years of age) to use low income tax offset to offset tax due on their unearned income;
- Schedule 3 streamlines the process for claiming tax deductions for the cost of total and permanent disability insurance provided through superannuation; and
- Schedule 4 ensures additional employer contributions imposed by an industrial agreement, or the rules of a superannuation fund, will not be reportable employer superannuation contributions.

The Committee has no comment on this bill.

Tax Laws Amendment (2011 Measures No. 5) Bill 2011

Introduced into the House of Representatives on 2 June 2011

Portfolio: Treasury

Background

The bill amends various taxation laws as follows:

Schedule 1 amends the *Income Tax Assessment Act 1997* to allow trust beneficiaries to continue to use the primary production averaging and farm management deposits provisions in a year where the trust has a loss for trust law purposes.

Schedule 2 amends *Income Tax Assessment Act 1997* to ensure that, where permitted by the trust deed, the capital gains and franked distributions (including any attached franking credits) of a trust can be effectively streamed for tax purposes to beneficiaries by making them 'specifically entitled' to those amounts.

Schedule 2 also amends the *Income Tax Assessment Act 1936*, to include specific anti-avoidance rules to address the potential opportunities for tax manipulation that can result from the inappropriate use of exempt entities as beneficiaries.

Schedule 3 makes several technical amendments which have arisen from the interaction between the tax law and the *National Rental Affordability Scheme Act 2008* and associated regulations.

Schedule 4 amends the *Income Tax Assessment Act 1936* to phase out the dependent spouse tax offset.

Schedule 5 amends the *Fringe Benefits Tax Assessment Act 1986* to reform the current statutory formula method for determining the taxable value of car fringe benefits by replacing the current statutory rates with a single statutory rate of 20 per cent, regardless of kilometres travelled.

Retrospective effect

Clause 2, various

The amendments in Schedule 1 apply to the 2010-2011 income year but are favourable to taxpayers (see the explanatory memorandum at 3).

The amendments proposed in Division 2 of Part 1 of Schedule 3 (see item 7) are given retrospective application. However, the explanatory memorandum at page 108 states that the amendments will be for the benefit of affected taxpayers. Item 11 states that the amendments in Part 2 of Schedule 3 apply from the 2008-9 income year, but again the explanatory memorandum (at page 107) explains that these amendments are beneficial to taxpayers.

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

Schedule 2 of the bill contains provisions that will make interim changes to improve the taxation of trust income. The measures apply from the start of the 2010-11 income year. In relation to ‘early balancers’ and ‘managed investment trusts’, applying the amendments may be optional. The explanatory memorandum states at page 4 that the measures are ‘generally beneficial to taxpayers’. It is unclear, however, whether there are other categories of taxpayers affected by the changes and for whom they may be detrimental. **The Committee therefore seeks the Treasurer's advice as to whether some tax payers may be detrimentally affected by these changes, and if so, the justification for the changes applying for the 2010-11 year (and having some retrospective operation).**

Pending the Treasurer's reply, 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.

Schedule 5 amends the *Fringe Benefits Tax Assessment Act 1986* to reform the current statutory formula method for determining the taxable value of car fringe benefits by replacing the current statutory rates with a single statutory rate of 20 per cent, regardless of kilometres travelled. The reforms will apply to all car fringe benefits after 7:30 pm AEST on 10 May 2011 (when the proposed changes were announced in the Budget), except in cases where it can be proved that an agreement was in place prior to that time and date, and existing contracts are not affected (see explanatory memorandum at 127).

The Committee has regularly been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, though this is usually limited to publication of a draft bill within 6 calendar months after the date of that announcement. Given that this measure was announced in the 2011 Budget **the Committee leaves to the Senate as a whole the question of whether this measure should be given retrospective operation as proposed.**

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

Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2011

Introduced into the House of Representatives on 12 May 2011

Portfolio: Treasury

Background

This bill amends the *Medicare Levy Act 1986* to increase the Medicare Levy low-income thresholds for:

- individuals and families. The dependent child/student component of the family threshold will also be increased and is in line with movements in the consumer price index; and
- pensioners below age pension age so that they do not have a Medicare levy liability where they do not have an income liability.

The bill also amends the *A New Tax System (Medicare Levy Surcharge-Fringe Benefits) Act 1999* to increase the Medicare levy surcharge low-income threshold in line with movements in the consumer price index.

The Committee has no comment on this bill.

Veterans' Entitlements Amendment Bill 2011

Introduced into the House of Representatives on 1 June 2011

Portfolio: Veterans' Affairs

Background

This bill amends the *Veterans' Entitlements Act 1986* to:

- introduce a Prisoner of War Recognition Supplement;
- clarify and affirm the original intention of the compensation offsetting policy in relation to disability pensions; and
- rationalise the temporary incapacity allowance and loss of earnings allowance.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Autonomous Sanctions Bill 2010

[Digest 6/10 and response in 10/10. Bill reintroduced Digest 8/10 – no comment]

On 10 May 2011 a replacement explanatory memorandum was tabled in the Senate and the bill was passed with no amendments.

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

[Digest 2/11 and response in 3/11 Report]

On 21 March 2011 a replacement explanatory memorandum was tabled in the House of Representatives. On 12 May 2011 four Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the House of Representatives. None of the amendments fall within the Committee's terms of reference.

Electoral and Referendum Amendment (Provisional Voting) Bill 2011

[Digest 3/11 – no comment]

On 11 May 2011 the Senate agreed to two Independent (Senator Xenophon) amendments. Subsequently, the House of Representatives agreed to the Senate amendments and the bill was passed. None of the amendments fall within the Committee's terms of reference.

Electronic Transactions Amendment Bill 2011

[Digest 2/11 and response in 3/11 Report]

On 10 May 2011 an addendum to the explanatory memorandum explaining the scope of the retrospective application of some provisions was tabled in the Senate and the bill was passed with no amendments.

The Scrutiny of Bills Committee thanks the Minister for responding to its request for this additional information to be included in the explanatory memorandum.

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

[Digest 8/10 and response in 9/10 Report]

On 18 November 2010 three Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the House of Representatives. On 22 November 2010 a revised explanatory memorandum was tabled in the Senate. On 10 May 2011 the Senate agreed to four Government amendments and tabled a supplementary explanatory memorandum and a revised supplementary memorandum. On 11 May 2011 the House of Representatives agreed to the Senate amendments and the bills was passed. None of the amendments fall within the Committee's terms of reference.

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

[Digest 4/11 – no response required]

On 31 May 2011 eight Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the House of Representatives. The Committee notes that proposed amendment number (8) includes a new subsection 1167B(3D) in the following terms:

(3D) Part 4 of the Administration Act (about review of decisions) does not apply in relation to a decision of the Secretary under subsection (3B) or (3C).

In relation to this provision the supplementary explanatory memorandum states that:

It is not appropriate for decisions relating to agreements between large corporations and the Secretary to be subject to the merits review process, which has been created to provide efficient and economical review of decisions relating to social security and other entitlements for natural persons.

The Committee does not agree that with the suggestion that merits review should be limited to natural persons, but in the circumstances of a legislative base-line of a minimum of 14 days notice for payment and the consensual nature of any notification agreement the Committee has no further comment on this particular proposed amendment.

Human Services Legislation Amendment Bill 2010

[Digest 1/11 and responses in 3/11 & 4/11 Report]

On 21 March 2011 a replacement explanatory memorandum was tabled in the House of Representatives. On 23 March 2011 the House of Representatives agreed to 55 Government amendments and tabled a supplementary explanatory memorandum. On 10 May 2011 a revised explanatory memorandum was tabled and the bill was passed with no amendments in the Senate. In the circumstances the Committee has no comment about these amendments.

Sex and Age Discrimination Legislation Amendment Bill 2010

[Digest 8/10 and response in 9/10 Report]

On 12 May four Opposition amendments were agreed to in the Senate and the bill was passed. None of the amendments fall within the Committee's terms of reference.

Social Security Legislation Amendment (Job Seeker Compliance) Bill 2011

[Digest 4/11 – no comment]

On 11 May 2011 three Government amendments were agreed to and a supplementary explanatory memorandum tabled in the House of Representatives. None of the amendments fall within the Committee's terms of reference.

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*.

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

Appropriation Bill (No. 2) 2011-2012 — Part 5, item 18, sections 13A and 13B

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

Indigenous Education (Targeted Assistance) Amendment Bill 2011 — Schedule 1, item 7: special appropriation clause – for a finite period of time (i.e. for circumstances