

Senate Standing Committee
for the
Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

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.

Air Services (Aircraft Noise) Amendment Bill 2011

Introduced into the House of Representatives on 4 July 2011

By: Mrs Moylan

Background

The bill amends the *Air Services Act 1995* to require Airservices Australia to:

- consult and cooperate with government, aviation industry sectors and communities when modifying or creating flight paths;
- provide a complaints mechanism during the consultation process and publish details of consultations;
- request the minister to appoint a Community Aviation Advocate to represent communities possibly affected by changed flight paths;
- provide information on the composition of the Airservices Australia Board; and
- include details of any complaints in the annual report.

The bill also amends the *Environment Protection and Biodiversity Conservation Act 1999* to require the minister to appoint a Community Aviation Advocate in certain circumstances.

No explanatory memorandum

This bill, introduced as a non-government bill, was not accompanied by an explanatory memorandum. The Committee prefers to see an explanatory memorandum for every bill 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** provides an explanatory memorandum.

Australian Energy Market Amendment (National Energy Retail Law) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Resources and Energy

Background

This bill is part of the Council of Australian Governments' energy reform program, under which non-economic distribution and retail regulation of gas and electricity will come under the national energy institutional framework and regulatory arrangements.

The bill amends:

- the *Australian Energy Market Act 2004* to apply the new National Energy Retail Law and the National Energy Retail Regulations in Australia's offshore areas as laws of the Commonwealth. The National Energy Retail Law is part of a cooperative Commonwealth, State and Territory regime for the regulation of non-economic distribution and retail regulation of gas and electricity known as the National Energy Customer Framework. The new National Energy Retail Law will have the Australian Energy Regulator (AER) as regulator and the Australian Energy Market Commission (AEMC) will be responsible for changes to the new National Energy Retail Rules made under the National Energy Retail Law;
- the *Australian Energy Market Act 2004* to provide for the conferral of functions and powers under the National Energy Retail Law and the National Energy Retail Regulations on the AER, the AEMC, the Australian Competition Tribunal (ACT), and the Commonwealth Minister by the new National Energy Retail Law;
- the *Competition and Consumer Act 2010* to address technical issues with the conferral of functions and powers on the AER by the new National Energy Retail Law and also under local energy instruments made under State application Acts for the three national energy laws (the National Energy Retail Law, the National Electricity Law and the National Gas Law); and

- the *Administrative Decisions (Judicial Review) Act 1977* to provide for judicial review of decisions under the new National Energy Retail Law regime.

Delayed Commencement

Clause 2

Commencement of the bill is linked to the commencement of a South Australian Act and is expected to be delayed. 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 case there is a comprehensive explanation at pages 7 and 9 to 13 of the explanatory memorandum of the commencement provisions set out in clause 2 of the bill. The bill implements a new regulatory framework based on a cooperative State and Territory/Commonwealth scheme and the detailed explanation of the commencement provisions is satisfactory.

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

Incorporating material by reference

Insufficient parliamentary scrutiny

Schedule 1, item 10

Item 10 of Schedule 1 of the bill inserts New Division 2A to the *Australian Energy Market Act 2004* (Cth). The proposed section 11T applies laws ‘as amended from time to time’ by and under the *National Energy Retail Law (South Australia) Act 2011* (SA) as laws of the Commonwealth. This enables Commonwealth law to, in effect, be determined by another Parliament. The explanatory memorandum explains that this is because the bill implements a cooperative State and Territory/Commonwealth scheme. The explanatory memorandum also notes that the relevant laws which will apply as a law of the Commonwealth may only be amended with the unanimous agreement of the Ministerial Council for Energy (which includes the Commonwealth Minister) and, thus, that they may only be ‘amended with the consent of the relevant Commonwealth Minister’ (see the explanatory memorandum at page 17). Further, mechanisms through which the Commonwealth has the power to influence or modify the relevant laws are also noted in the

explanatory memorandum (see the explanatory memorandum at page 17, paragraph 42).

While the Committee understands the arrangements through which cooperative schemes are often implemented and the arguments in favour of a uniform national approach, it is concerned to ensure that legislation is subject to appropriate legislative scrutiny. The Committee would welcome an opportunity for it to consider and comment on an exposure draft of any proposed amendments prior to their adoption. **The Committee therefore requests the Minister's advice about whether any proposed changes will be referred to it prior to their adoption.**

Pending the Minister's reply, 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.

Bankruptcy Amendment (Exceptional Circumstances Exit Package) Bill 2011

Introduced into the Senate on 5 July 2011

By: Senator Xenophon

Background

This bill provides for the Exceptional Circumstances Exit Package to be exempt from bankruptcy proceedings on or after 1 July 2010 where final orders have not been made.

'Henry VIII' clause Schedule 1, clause 3

Schedule 1 of the bill makes amendments to the *Bankruptcy Regulations*. However, clause 3 of the Bill states that the amendments in schedule 1 to regulations can be amended or repealed by regulations made under the bankruptcy legislation. Technically, this enables regulations to modify the operation of primary legislation and may thus be thought to inappropriately delegate legislative power. However, given the proposed amendments in the bill relate to the operation of existing regulations, **the Committee leaves the question of the appropriateness of this provision to the Senate as a whole.**

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

Standing Committee inquiry

The Committee notes that this bill was referred to the Economics 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.

Carbon Tax Plebiscite Bill 2011

Introduced into the House of Representatives on 4 July 2011

By: Mr Abbott

Background

This bill provides for:

- a national plebiscite no later than the last Saturday in November 2011;
- the Electoral Commissioner to provide the Minister with a statement of the results of the plebiscite; and
- the Minister to table the statement in both Houses of Parliament.

No explanatory memorandum

This bill, introduced as a non-government bill, was not accompanied by an explanatory memorandum. The Committee prefers to see an explanatory memorandum for every bill 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** provides an explanatory memorandum.

Customs Amendment (Anti-dumping Improvements) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Home Affairs

Background

This Bill amends Division 5 of Part XVB of the *Customs Act 1901* in response to the Productivity Commission Report into Australia's anti-dumping regime and to respond to Senator Xenophon's proposed amendments to the Anti-Dumping system. The bill:

- provides for the Minister to make a decision within 30 days of receiving a report on an investigation, continuation inquiry, review of measures or a report following a review of a decision by the Trade Measures Review Officer;
- provides for the Minister to consider any impacts on jobs and investment in the domestic industry producing like goods during an investigation to determine whether material injury to an Australian industry is being caused or threatened;
- amends the legislation to reflect the full range of actionable subsidies provided by the World Trade Organization Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures; and
- amends the current definition of "interested party" in relation to anti-dumping and subsidy investigations enabling industry associations, unions and downstream industry to participate in investigations

The Committee has no comment on this bill.

Education Services for Overseas Students (Registration Charges) Amendment Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill is part of a package of two bills and amends the *Education Services for Overseas Students (Registration Charges) Act 1997* following the recommendations arising from the review of the Education Services for Overseas Students legislative framework, dated February 2010, titled *Stronger, simpler, smarter ESOS: supporting international students* (the ESOS Review) conducted by the Hon Bruce Baird AM.

The bill creates a new fee structure to replace the current charging structure for the compulsory annual registration charge payable by all Commonwealth Register of Institutions and Courses for Overseas Students registered providers.

The bill also introduces an *entry to market* charge payable for the first three years of registration.

The Committee has no comment on this bill.

Education Services for Overseas Students Amendment (Registration Charges Consequential) Bill 2011

Introduced into the House of Representatives on 6 July 2011
Portfolio: Education, Employment and Workplace Relations

Background

This bill is part of a package of two bills and provides for provisions to manage the transition to the new registration charges framework payable by Commonwealth Register of Institutions and Courses for Overseas Students registered providers.

The Committee has no comment on this bill.

Excise Legislation Amendment (Condensate) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Treasury

Background

The bill amends the *Petroleum Excise (Prices) Act 1987* to clarify that failure to provide petroleum producers with written notification setting out the terms of a Volume Weighted Average of Realised (VOLWARE) prices determination does not affect the making of the determination.

The bill also provides for producers to seek a review within 28 days of receiving written notice of a final VOLWARE price determination.

Retrospective operation

Schedule 1, Part 2, item 4

The purpose of this bill and the related Excise Tariff (Condensate) Bill 2011 is to address uncertainties which have arisen in relation to policy changes made in 2008. The effect of the 2008 changes was to remove the Crude Oil Excise exemption so that the Crude Oil Excise regime would apply to condensate production from the North West Shelf project area. These changes were implemented on 13 May 2008. It is intended that the amendments proposed by these bills will apply from that date. Thus, the bills clearly have retrospective operation.

The intention of the proposed amendments in the Excise Legislation Amendment (Condensate) Bill is 'to clarify that failure to provide petroleum producers with written notification setting out the terms of a Volume Weighted Average of realised prices determination does not affect the making of the determination' (see page 3 of the explanatory memorandum)

The intention of the proposed amendments in the Excise Tariff Amendment (Condensate) Bill is 'to clarify and confirm the area encompassed by the 'Rankin Trend' condensate production area, located within the North West Shelf project area' (see page 3 of the explanatory memorandum). The relevant area was prescribed in a 2008 by-law as the Rankin Trend, but doubts have arisen as to whether the Rankin Trend encompasses an area which is larger

than was intended. The amendments insert a statutory definition of the Rankin Trend and also allow for additional reservoirs to be added to the Rankin Trend condensate production area in the future (where the Minister is satisfied of particular matters).

The explanatory memorandum for these bills, at page 3, states that the measures will have no revenue impact as they ‘affirm the current application of the Crude Oil Excise regime’ and, at page 10, that the amendments ‘affirm the current operation application of Crude Oil Excise to condensate production’. However, the explanatory memorandum does not squarely address the justification of the retrospective operation of the proposed amendments. The suggestion appears to be that as the amendments conform to the original policy intention of the changes made in 2008 the retrospective operation of the amendments is well justified. Nevertheless, clarification of the law constitutes legal change (even if it is in line with what are considered to be the original policy intentions of the legislation) and the Committee expects changes to the law that are given retrospective operation to be fully justified. In particular, the Committee is attentive to the potential for such changes to adversely affect the rights or interests of affected individuals. It is disappointing that these matters (particularly as they relate to Schedule 1, Part 2, item 4 of this Bill and Schedule 1, Part 2, item 5 of the Excise Tariff Amendment (Condensate) Bill) are not directly addressed in the explanatory memorandum. In these circumstances, the Committee **seeks the Minister’s further explanation of the changes in both bills, and particularly whether they will give rise to detriment to any person.**

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.

Excise Tariff Amendment (Condensate) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Treasury

Background

This bill amends the *Excise Tariff Act 1921* to:

- clarify and confirm the area encompassed by the 'Rankin Trend' condensate production area, located within the North West Shelf project area; and
- make regulations to extend the area of the Rankin Trend to include additional reservoirs or groups of reservoirs.

Retrospective operation

Schedule 1, Part 2, item 5

See comments for the related Excise Legislation Amendment (Condensate) Bill 2011 above seeking the Minister's comments on this provision.

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.

Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Justice

Background

This bills amends the *Crimes Act 1914*, the *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Migration Act 1958*, the *Proceeds of Crime Act 2002*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

Schedule 1 contains general amendments which relate to both extradition and mutual assistance to:

- enable Federal Magistrates to perform functions under the *Extradition Act* and the *Mutual Assistance Act*; and
- clarify privacy and information disclosure provisions relating to extradition and mutual assistance processes.

Schedule 2 contains amendments relating to extradition to:

- reduce delays in extradition processes by amending the early stages of the extradition process
- extend the availability of bail in extradition proceedings
- allow a person to waive the extradition process, subject to certain safeguards
- extend the circumstances in which persons may be prosecuted in Australia as an alternative to extradition
- allow a person to consent to being surrendered for a wider range of offences
- modify the definition of ‘political offence’ to clarify this ground of refusal does not extend to specified crimes such as terrorism, and

- require Australia to refuse to extradite a person if he or she may be prejudiced by reason of his or her sex or sexual orientation following surrender.

Schedule 3 contains amendments relating to mutual assistance which:

- increase the range of law enforcement tools available to assist other countries with their investigations and prosecutions, subject to particular safeguards
- amend existing processes for providing certain forms of assistance to other countries
- strengthen protections against providing assistance where there are death penalty or torture concerns in the requesting country
- amend other grounds on which Australia can refuse to provide mutual assistance to other countries, and
- amend the process for authorising proceeds of crime action, and allow registration and enforcement of foreign non-conviction based proceeds of crime orders from any country.

Schedule 4 contains technical contingent amendments.

Possible inappropriate delegation

Schedule 2, Part 3, item 33, section 5(c)

This item seeks to amend section 5 of the *Extradition Act* to expressly exclude an offence prescribed by regulations from being a political offence in relation to one or more countries (see paragraph 2.67 of the explanatory memorandum). This means that a person is not exempt from extradition for an offence listed in the regulations. The explanatory memorandum notes (at paragraph 2.68) that:

These amendments will streamline the 'political offence' definition by ensuring that exceptions to the definition are generally contained in regulations, rather than in the Act. The amendments are consistent with the United Nations Model Extradition Treaty, which states that countries may wish to exclude from the definition of 'political offence' certain conduct, for example, serious offences involving an act of violence against the life, physical integrity or liberty of a person.

The fact that some offences are to be excluded from the definition is not an issue of specific concern to the Committee. However, the Committee does prefer that important matters are included in primary legislation rather than in regulations whenever possible.

At paragraph 2.69 the explanatory memorandum notes that Australia implements relevant treaty obligations to ensure that certain offences are extraditable offences by providing that such offences are excluded from the definition of political offence in the Extradition Act. However, it appears to the Committee that the extent to which the proposed power in Section 5(c) is to enable Australia to implement bilateral and multilateral treaties the regulation power is framed in terms which are broader than necessary.

The explanatory memorandum at paragraph 2.69 also describes a justification for the use of regulations as being that it will 'ensure the extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act'.

In light of the serious nature of this regulation-making power the Committee **seeks the Minister's further advice about the provision, and in particular, how often it has been necessary to amend the *Extradition Act* to ensure that the extradition regime meets Australia's international obligations, whether the scope of the subclause 5(c) can be narrowed, and whether the statement that the amendments are consistent with the United Nations Model Treaty applies specifically to subclause 5(c) or just more generally to section 5.**

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.

Legislative instruments

Various, including Schedule 2, Part 3, item 46, subclause 44A(4); item 99; item 108

These items declare that these functions are not legislative instruments, but it is not clear whether this is merely describing the effect of the *Legislative Instruments Act 2003* or is being done to avoid the usual operation of that Act. For example, in relation to item 46, the explanatory memorandum states at

page 29 that an 'undertaking is not a legislative instrument within the meaning of section 5 of the *Acts Interpretation Act 1901*', but does not clearly address whether or not such instruments would usually fall within the definition of legislative instruments in section 5 of the *Legislative Instruments Act 2003* and are not otherwise exempt under that Act. Paragraph (b) of subsection 5(2) of the *LI Act*, states that an instrument will be taken to be of a legislative character if it has 'the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right'.

In addition, in relation to item 99, the explanatory memorandum at page 50 states that the provision 'is intended to clarify any existing uncertainty about whether a notice given under subsection 17(1) is a legislative instrument within the meaning of section 5' of the *LI Act*. However, this does not discuss whether the instrument is likely to be legislative in character and an exemption for the *LI Act* is intended, or whether the instruments are unlikely to be legislative, but the provision is for the avoidance of doubt.

The Committee is concerned to ensure that there is appropriate scrutiny of these legislative powers and therefore **seeks further advice from the Minister's as to whether it is appropriate to declare these instruments not to be legislative instruments.**

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

Possible trespass on personal rights and liberties Schedule 3, item 11

This provision relates to providing mutual assistance in criminal matters in which the death penalty could apply. The explanatory memorandum explains this provision as follows (see from paragraph 3.40):

3.40 Subsection 8(1A) of the MA Act currently requires the Attorney-General to refuse a request for assistance if the request relates to the prosecution or punishment of a person *charged with, or convicted of*, an offence for which the death penalty may be imposed in the foreign country,

unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

3. 41 This item will repeal existing subsection 8(1A) and replace it with a new provision. The new subsection 8(1A) will ensure the mandatory ground of refusal for death penalty offences also applies in circumstances in which a person has been *arrested or detained* on suspicion of committing an offence for which the death penalty may apply, regardless of whether formal charges have been laid.

The Committee supports the inclusion of the additional grounds for refusing assistance in death penalty cases.

In relation to the 'special circumstances' which could allow assistance to be provided, the Committee is aware that the proposed provision reflects the current approach. However, the Committee is concerned that while the specific examples outlined at paragraph 3.43 of the explanatory memorandum describe instances in which assistance would either be beneficial or provided in the knowledge that the death penalty will not be imposed, the provision itself would still allow assistance to be provided in circumstances in which the death penalty could apply. Given the importance of this matter, the Committee **seeks the Minister's advice about whether the provision can be drafted to ensure that assistance would not be provided in cases in which the death penalty will be carried out.**

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 3, item 14, subsection 8(2)(c)

Currently, double jeopardy is a mandatory ground for refusal under paragraph 8(1)(f) of the MA Act. The explanatory memorandum explains at paragraph 3.61 that:

This item will insert a new paragraph 8(2)(c) that will provide the Attorney-General with the discretion to refuse a request for assistance if he or she is of the opinion that it relates to the investigation, prosecution or punishment of a person for an offence where the person has been acquitted or pardoned or has undergone punishment for that offence, or another offence constituted by the same conduct. This amendment will make double jeopardy

a discretionary ground for refusal to enable the provision of assistance in appropriate exceptional cases such as where there is fresh evidence that was not available at the original trial, or where there are other circumstances accepted in Australia as being exceptions to the double jeopardy principle.

The Committee supports the extension of the principle of double jeopardy to apply to any country (not just the requesting country as is currently the position (see explanatory memorandum paragraph 3.62) and to the investigation stages of cases (paragraph 3.63). However, the Committee is concerned that the ground for refusal is being changed from mandatory to discretionary. The justification for this is given at paragraph 3.60 of the explanatory memorandum:

However, there may be exceptional circumstances where it is appropriate to provide assistance notwithstanding double jeopardy concerns, for example, if fresh and compelling evidence such as new DNA evidence or evidence obtained through technological developments, has emerged.

In the circumstances the Committee **leaves the question of whether the proposed approach is appropriate 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.

Possible trespass on personal rights and liberties Schedule 3, Part 3

This part of the Bill generally seeks to formalise and extend the provision to foreign countries of information obtained in Australia by telephone interception and surveillance devices, as long as the Attorney-General has agreed to provide mutual assistance in accordance with the Act and as long as offence thresholds are met. In the circumstances the Committee **leaves the question of whether the proposed approach is appropriate 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.

Possible trespass on personal rights and liberties

Part 4

In the context of this Bill, *forensic procedures* include obtaining fingerprints and DNA samples. At paragraph 3.282, the explanatory memorandum states that:

Part 4 of Schedule 3 will amend the MA Act and the Crimes Act to enable the AFP, or a State or Territory police force, to carry out a forensic procedure on a suspect in relation to a foreign serious offence, either with informed consent or compulsorily, at the request of a foreign country. Part 4 would also clarify the procedures for obtaining forensic material from a volunteer on behalf of a foreign law enforcement agency.

Currently in Australia forensic procedures can be carried out: (i) with consent, (ii) as a compulsory ‘non-intimate’ procedure by order of a senior constable, and (iii) as a compulsory procedure by order of a magistrate. Through mutual assistance the provision of material obtained from a forensic procedure to another country is currently available only in circumstance (i) (with consent). The proposed provisions would also allow it to be provided for the purposes of international cooperation in circumstance (iii) (as a result of a compulsory procedure by order of a magistrate). In the circumstances the Committee **leaves the general question of whether the proposed approach is appropriate 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.

Possible trespass on personal rights and liberties

Schedule 3, Part 4, item 78, subsection 23WI(2)

However, the Committee has a specific concern about the proposed approach in subsection 23WI(2). New paragraph 23WI(2)(a) applies to circumstances in which the forensic procedure has been requested by a foreign country and paragraph 23WI(2)(b) applies to all other cases. Paragraph 3.315 of the explanatory memorandum states that:

New paragraph 23WI(2)(a) will require a constable to balance the public interest in Australia providing and receiving international assistance in criminal matters, against the public interest in upholding the physical integrity

of the suspect. Given the fundamental importance of reciprocity in international cooperation in criminal matters, it is important that this is taken into account by the magistrate in determining whether the carrying out of the forensic procedure is justified in all the circumstances.

Given the significance of obtaining forensic material without consent, and noting the importance accorded to reciprocity, the Committee **seeks the Minister's advice as to whether consideration could be given to limiting the provision of assistance to countries from whom Australia could receive similar assistance. The Committee would also welcome the Minister's advice about the reference to 'constable' in this provision and in paragraph 3.315 and the constable's role given that the procedure is to be carried out following an order by a magistrate (see paragraphs 3.283 and 3.284).**

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 3, Part 4, item 103, subsections 23YQC and 23YQD**

These items will allow the provision of forensic material obtained by consent to be provided police-to-police in certain circumstances. The Committee **seeks the Minister's advice about whether, in the process of volunteering or providing informed consent, a person will be advised that it could be possible for the forensic material obtained to be shared with police from other countries.**

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 3, Part 4, item 112, subsection 28A(3) and 28B**

The explanatory memorandum states at paragraphs 3.467 and 3.468 that:

Subsection 28A(3) will clarify that Australia may request that a forensic procedure be carried out in the foreign country even if, under Australian law, the forensic procedure could not have been carried out by using processes similar to those used in the foreign country.

This is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements (set out in Part ID of the Crimes Act which will be amended by items 70 to 105).

The Bill also seeks to provide that the material obtained is not inadmissible as evidence and is not precluded from being used for the purposes of the investigation simply on the ground that it was obtained otherwise than in accordance with Australia's request.

It appears to the Committee that the intention is that Australia could only request a forensic procedure that is already permitted under Australian law, but as this is inferred from the wording of the provision rather than clearly stated, the Committee **seeks the Minister's confirmation about whether this is intended, and if so, whether it can be clearly stated in the legislation.**

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.

Fairer Private Health Insurance Incentives Bill 2011

Introduced into the House of Representatives on 27 May 2009 and reintroduced on 19 November 2009 and 7 July 2011

Portfolio: Treasury

Background

This bill is a package of three bills and amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Private Health Insurance Act 2007*, the *Taxation Administration Act 1953* and the *Taxation (Interest on Overpayments and Early Payments) Act 1983* to introduce three new private health insurance incentives tiers.

This bill is identical to a bill introduced into the House of Representatives on 27 May 2009 and 19 November 2009, negatived in the Senate on 9 September 2009, and upon which the Committee commented in *Alert Digest No. 6 of 2009*. Please refer to *Alert Digest No. 6 of 2009* for further information.

The Committee has no further comment on this bill.

Fairer Private Health Insurance Incentives (Medicare Levy Surcharge) Bill 2011

Introduced into the House of Representatives on 27 May 2009 and reintroduced on 19 November 2009 and 7 July 2011

Portfolio: Treasury

Background

This bill is a package of three bills and amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Private Health Insurance Act 2007*, the *Taxation Administration Act 1953* and the *Taxation (Interest on Overpayments and Early Payments) Act 1983* to introduce three new private health insurance incentives tiers.

This bill is identical to a bill introduced into the House of Representatives on 27 May 2009 and 19 November 2009, negatived in the Senate on 9 September 2009. The Committee considered the bill in *Alert Digests No. 6 and 15 of 2009* but did not make any comment.

The Committee has no comment on this bill.

Fairer Private Health Insurance Incentives (Medicare Levy Surcharge – Fringe Benefits) Bill 2011

Introduced into the House of Representatives on 27 May 2009 and reintroduced on 19 November 2009 and 7 July 2011

Portfolio: Treasury

Background

This bill is a package of three bills and amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Private Health Insurance Act 2007*, the *Taxation Administration Act 1953* and the *Taxation (Interest on Overpayments and Early Payments) Act 1983* to introduce three new private health insurance incentives tiers.

This bill is identical to a bill introduced into the House of Representatives on 27 May 2009 and 19 November 2009, negatived in the Senate on 9 September 2009. The Committee considered the bill in *Alert Digests No. 6 and 15 of 2009* but did not make any comment.

The Committee has no comment on this bill.

Horse Disease Response Levy Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill is part of a package of three bills and imposes a levy on manufactured horse feed and worm treatments for horses, to enable the horse industry to repay the Commonwealth for any monies expended on its behalf in a response to an emergency animal disease outbreak affecting horses.

The Committee has no comment on this bill.

Horse Disease Response Levy Collection Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill is part of a package of three bills and it:

- provides the Commonwealth authority to collect and administer levies on manufactured horse feed and worm treatments for horses;
- imposes penalties for unpaid levies and the remission of any penalties for late payments;
- enables the collection of information and documents as specified by the Commonwealth;
- provides for entry, search and seizure powers; and
- requires the Minister to review the levy mechanism every five years unless levies are active at the time of the review.

Strict liability

Information offence

Privilege against self-incrimination

Clause 12

The bill contains a provision that makes it an offence to refuse or fail to give information, a document, or return which is required to be given. Strict liability applies to this offence, but it is also subject to a reasonable excuse provision (though the defendant bears an evidential burden of proof). The explanatory memorandum at page 2 states that this is necessary to ensure the Commonwealth's levy collection requirements are adhered to and it notes that the principles specified in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* have been considered.

Further, the privilege against self-incrimination is abrogated in relation to giving information etc in relation to the clause 12 offence. However, subclause (5) provides for a direct and derivative use immunity in relation to

criminal proceedings except offences against clause 12 or the false and misleading information provisions of the Criminal Code. The Committee **leaves the question of the appropriateness of these provisions to the Senate as a whole.**

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

Horse Disease Response Levy (Consequential Amendments) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill is part of a package of three bills and amends the *Australian Animal Health Council (Live-stock Industries) Funding Act 1996* to:

- enable funds raised by levies on manufactured horse feed and worm treatments for horses to be appropriated to the Australian Animal Health Council; and
- provide excess levies to be used for research and development or the promotion or maintenance of horse health.

The Committee has no comment on this bill.

Industrial Chemicals (Notification and Assessment) Amendment (Inventory) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Health and Ageing

Background

This bill amends the *Industrial Chemicals (Notification and Assessment) Act 1989* to:

- enable the Director of the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) to add to the Australian Inventory of Chemical Substances (the Inventory) chemicals that are transferred to the industrial chemicals framework from another Commonwealth regulatory scheme;
- formalise notification and assessment arrangements for ultra-violet filters in secondary sunscreen;
- remove the need to prepare and publish summary assessment reports; and
- amend information requirements in the Schedule to the Act consistent with international best practice data requirements for industrial chemicals.

The Committee has no comment on this bill.

Legislative Instruments Amendment (Sunsetting) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Attorney-General

Background

The bill amends the *Legislative Instruments Act 2003* to provide that legislative instruments remain in force for 10 years following registration on the Federal Register of Legislative Instruments.

The Committee has no comment on this bill.

Migration Amendment (Declared Countries) Bill (No.2) 2011

Introduced into the Senate on 5 July 2011

By: Senator Hanson-Young

Background

This bill seeks to amend the *Migration Act 1958* and the *Legislative Instruments Act 2003* to require that any agreement to send asylum seekers to a third country is brought before both houses of Parliament as a disallowable instrument.

The Committee has no comment on this bill.

Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011

Introduced into the House of Representatives on 4 July 2011

By: Mr Bandt, Mr Broadbent, Ms Vamvakinou

Background

This bill amends the *Safety, Rehabilitation and Compensation Act 1988* to create a legal presumption that, if a firefighter has been employed for a certain period before being diagnosed with one of 7 types of cancer, the employment is taken to have been the dominant cause of the contraction of that cancer.

The Committee has no comment on this bill.

Social Security and Other Legislation Amendment Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

The bill amends the *Social Security Act 1991* to:

- allow parenting payment recipients to transfer temporarily to bereavement allowance following the death of a parent;
- remove the family member exemption from the two year newly arrived resident's waiting period before a special benefit is payable;
- clarifying that payments made by an employer to an employee in lieu of notice of termination are regarded as redundancy payments for the purposes of the social security law; and
- introduce new Impairment Tables through a legislative instrument commencing from 1 January 2012.

The bill amends the *Disability Services Act 1986* to:

- introduce a third party certification quality assurance system for disability advocacy services.

The bill amends the *Social Security Act 1991* and *Veterans' Entitlements Act 1986* to:

- amend the integrity of treatment of certain asset-test exempt income streams and the provision of actuarial certificates.

Possible inappropriate delegation of legislative power Schedule 4

This schedule provides that the Minister may, by legislative instrument, set out new Impairment Tables and guidelines containing the rules relating to those tables. The Tables are used in the assessment of a person's work-related impairments and to determine their qualification for a disability support pension. This measure was announced in the 2009-10 budget and is designed

to implement the results of a review in line with contemporary medical and rehabilitation practices (see the explanatory memorandum at page 7). The explanatory memorandum at page 8 states that the ‘placement of the Impairment Tables in a legislative instrument will enable the Impairment Tables to be updated regularly in response to developments in medical or rehabilitation practice.’ The Committee accepts that there are circumstances in which the use of delegated legislation is appropriate, such as for highly technical and detailed provisions. In this case the Committee **leaves the question of the appropriateness of this delegation of legislative power to the Senate as a whole.**

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.

Superannuation Legislation Amendment (Early Release of Superannuation) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Treasury

Background

This bill amends the *Retirement Savings Accounts Act 1997*, the *Superannuation Industry (Superannuation Industry (Supervision) Act 1993* and the *Australian Prudential Regulation Authority Act 1998* to transfer responsibility for the general administration of the early release of superannuation on compassionate grounds from the Australian Prudential Regulation Authority and Commissioner of Taxation to the Chief Executive Medicare.

The Committee has no comment on this bill.

Tobacco Plain Packaging Bill 2011

Introduced into the House of Representatives on 6 July 2011
Portfolio: Health and Ageing

Background

This bill prohibits manufacturers from any form of advertising or promoting tobacco products on tobacco product packaging.

Possible inappropriate delegation

Clause 27

Clause 27 of the bill allows for the regulations to prescribe additional requirements (i.e. in addition to those set out in the bill) in relation to the retail packaging of tobacco products and the appearance of tobacco products ‘to further the objects of this Act’. It is unfortunate that the explanatory memorandum does not explain why it is necessary for additional requirements to be prescribed in the regulations, particularly given that, as Note 2 states, there are offences and civil penalties which ‘apply to the supply, purchase and manufacture etc of tobacco products that do not comply with the requirements’. The Committee prefers that important matters are included in primary legislation whenever possible and **therefore seeks the Minister's advice as to why any further requirements cannot be identified in the primary legislation, particularly as offences and civil penalties may apply.**

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.

Penalties various

Chapter 3, Part 2, of the bill sets out general offences and civil penalty provisions for non-complaint retail packaging and tobacco products. The explanatory memorandum indicates at page 17 that the level of penalties is based on those set out in the *Competition and Consumer Act 2010*, in relation to requirements to display graphic health warnings on tobacco packaging. The bill includes strict liability offences along with fault-based offences for

contraventions, though the maximum penalty for the former is in line with that recommended in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. A number of offences, set out in the explanatory memorandum at page 18, place the onus of proof on the defendant for certain elements of the offence. The explanatory memorandum deals with these matters and the approach is clearly formulated in light of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. Therefore the Committee **leaves the question of the extent to which any of the provisions in Part 2 unduly trespass on personal rights and liberties 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.

Investigative powers

Privilege against self-incrimination

Various

Chapter 4 deals with powers to investigate contraventions in the bill. These provisions are dealt with in detail in the explanatory memorandum. They appear to be consistent with Part 9 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. It is noted, however, that the privilege against self-incrimination in relation to offences relating to failing to give information etc is partially abrogated by clause 83 of the bill. However, although a person is not excused from giving such information, there is a use and derivative use immunity in relation to criminal proceedings. The explanatory memorandum justifies this approach at page 31.

In considering the abrogation of the privilege against self-incrimination, the Committee looks to see whether the public benefit which is to be achieved will decisively outweigh the resultant harm to the maintenance of civil rights. The availability of use and derivative use immunities is particularly important. In the circumstances the Committee **leaves the question of whether the proposed approach is appropriate 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.

Strict liability

Clause 98

Part 2 of Chapter 5 of the bill deals with civil penalty proceedings. It is noted that clause 98 makes a person's intention irrelevant to whether a contravention of a civil penalty provision has been proved. In effect this amounts to the imposition of strict liability in relation to civil penalty provisions. Two matters should, however, be emphasised. First, the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* indicates that strict liability is likely to be more appropriate in relation to civil penalty provisions. The second is that clause 97 provides that a person will not be liable for a penalty if they can show that they were under a mistaken but reasonable belief about the facts surrounding a contravention, and if the correct understanding of the facts would not have led to a contravention. Although this ameliorates the affect of strict liability, the affected person must prove, on the balance of probabilities, their own mistake of fact (ie, they bear an evidential burden of proof). In the circumstances the Committee **leaves the question of whether these provisions strike the appropriate balance between the public policy objectives of the bill and the rights and liberties of affected persons 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.

Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Innovation, Industry, Science and Research)

Background

This bill amends the *Trade Marks Act 1995* to provide for regulations to be made in relation to the plain packaging of tobacco so that businesses are not prevented from registering new trade marks or from protecting trade marks against infringement.

'Henry VIII' clause

Section 231A

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to so-called 'Henry VIII' clauses as such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

The main purpose of this bill is to enable regulations to be made under the *Trade Marks Act* in relation to the operation of the Tobacco Plain Packaging Bill 2011. In the second reading speech the Minister explained that the bill will enable the government to quickly remedy any unintended interaction between the *Plain Packaging Act* and the *Trade Marks Act*. The proposed section 231A clearly enables regulations to be made which are inconsistent with the *Trade Marks Act*. However, the explanatory memorandum contains a detailed explanation for the possible need for this clause at pages 3 and 4, including the need to comply with its obligations under the Madrid Protocol.

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

Work Health and Safety (Transitional and Consequential Provisions) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill proposes to

- repeal the *Occupational Health and Safety Act 1991* (the OHS Act);
- make transitional provisions covering a range of matters where action of some kind may have commenced under the OHS Act before it was repealed or where breaches of that Act might have occurred before it was repealed; and
- make consequential amendments to the *Safety, Rehabilitation and Compensation Act 1988* and the *Social Security Act. 1991*.

The Committee has no comment on this bill.

Work Health and Safety Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill will implement the Model Work Health and Safety Bill within the Commonwealth jurisdiction and will form part of a system of nationally harmonised occupational health and safety (OHS) laws. The Bill will apply to businesses and undertakings conducted by the Commonwealth, public authorities, and, for a transitional period, non-Commonwealth licensees.

In February 2008, the Workplace Relations Ministers Council agreed that the use of model legislation is the most effective way to achieve harmonisation of OHS laws. The Commonwealth and each of the States and Territories subsequently signed the Intergovernmental Agreement for Regulatory and Operational Reform in OHS which commits jurisdictions to implement the model laws by December 2011.

'Henry VIII' clause

Subclauses 12(7) and 12(8)

The combined effect of subclause 12(7) and subclause 12(8) of the bill is to enable the making of regulations which relate to matters of a transitional, application or savings nature and these provisions may modify the operation of the primary legislation. As such, this item is a so-called Henry VIII clause, which is a provision which enables a regulation to amend primary legislation. This clearly involves a delegation of legislative power and can be of concern to the Committee.

The Committee is aware that in preparing new legislation it can be difficult to foresee all transitional issues, but is of the view that it is also important to ensure that provisions are not broader than necessary. It is regrettable that in this case the explanatory memorandum does not address the appropriateness of this delegation of legislative power.

The Committee therefore **seeks the Minister's advice as to the need for this provision and whether it would be appropriate for it to be limited to a particular period, such as six months from the commencement of the Act.**

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.

**Possible inappropriate delegation of legislative power
Subclause 12C(1) and subclause 12D**

Subclause 12C(1) of the bill provides that nothing in the Act requires or permits action or inaction that would be, or could reasonably be expected to be, prejudicial to Australia's national security. Subclause 12C(2) states that the Director-General of Security may declare that specified provisions of the Act do not apply or apply in a modified way in relation to work a person is carrying out for the Director-General. This amounts to a delegation of legislative power. Although any declaration must be approved by the Minister, and can only be made if the objects of the Act have been considered, the provision confers a broad discretionary power on an administrator that, in effect, enables them to modify the operation of statutory requirements. Clause 12D has a similar operation in relation possible action or inaction under the Act which may be prejudicial to Australia's defence. As the explanatory memorandum merely repeats the effect of these provisions the Committee **seeks the Minister's advice as to the justification for the proposed approach.**

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.

**Legislative instrument
Subsection 12D(2) and subclause 273B(2) and others**

A concern with these provisions is that although subclause 273B(1) requires a declaration under subsection 12D(2) (Australia's defence) to be made by legislative instrument, subclause 273B(2) provides that a declaration made pursuant to subsection 12C(2) (national security) is not a legislative instrument. Confusingly, the explanatory memorandum at page 93 states that subclause 73B(1), which lists what will be legislative instruments, includes both declarations 'relating to national security and defence'. The bill,

however, clearly provides that the two classes of declarations are to be treated differently.

More generally, it can be noted that it is regrettable that the explanatory memorandum is not clear as to whether the instruments listed in subclause 273B(2) of the bill, i.e. instruments which are ‘not legislative instruments’ are considered to be declaratory of the scope of the *Legislative Instruments Act* or, on the contrary, are considered to be substantive exceptions to its requirements.

The Committee seeks the Minister's advice as to whether instruments made under subsection 12D(2) and subclause 273B(2) are legislative instruments, and generally as to whether instruments which are stated to not be legislative instruments do not fall within the scope of the Legislative Instruments Act or are being exempted from its operation.

Pending the Minister's reply, 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 Subclause 12F(2)

Subclause 12F(2) of the bill provides that strict liability applies to each physical element of each offence under the Act, unless otherwise stated. The justification for, in general, removing fault elements from offences under the Act is set out in the explanatory memorandum at page 6. In addition to noting that mistake of fact continues to be a defence, it is emphasised that the general approach has ‘been carefully considered’ and a detailed explanation is provided. The Committee **leaves the question of the appropriateness of the 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.

Reversal of onus Clause 110

Clause 110 of the bill clarifies the way that the onus of proof operates in criminal proceedings for discriminatory conduct, which is prohibited by clause 104. Once the prosecution has adduced evidence that the discriminatory conduct was engaged in for a prohibited reason, it is for the defendant to establish, on the balance of probabilities that the prohibited reason was not the dominant reason for the discriminatory conduct. The burden of proof is a legal burden, which means that the accused must prove the existence of the matter, i.e. that the prohibited reason was not the dominant reason for the impugned conduct. The explanation of this approach given at page 47 of the explanatory memorandum is that:

[I]t will often be extremely difficult, if not impossible, for the prosecution to prove that the person engaged in discriminatory conduct for a prohibited reason. The fact that it will be easier for the accused to prove on the balance of probabilities that the prohibited reason was not the dominant reason means that they will not be unfairly treated.

Given the importance of the principle that the presumption of innocence, the Committee usually comments on any bill which reverses the onus of proof. Consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, at page 29, the mere fact that it will be difficult for the prosecution to prove a particular matter is normally not thought to be sufficient justification. Given that this provision imposes a legal burden of proof (rather than an evidential burden), the Committee **seeks the Minister's further advice as to a fuller explanation of the proposed approach.**

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.

Reversal of onus Various

A number of other provisions (subclauses 118(4), 144(2), 155(6), 165(3), 171(7), 185(5), 200(2) and 242(2) place an evidential burden of proof on the defendant to show a reasonable excuse. The explanatory memorandum at

page 7 justifies this on the basis that ‘the defendant is the only person who will be able to provide evidence of any reasonable excuse for refusing or failing to meet the relevant duty or obligation’. In these circumstances, the Committee **notes these provisions, particularly the fact that it is an evidential burden that is imposed, and leaves the question of their appropriateness to the Senate as a whole.**

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

Privilege against self-incrimination Subclause 172

Subclause 172 of the bill operates to abrogate the privilege against self-incrimination in relation to obligations to provide information under the legislation. Subclause 172(2), however, provides for a use and derivative use immunity which means that information directly or indirectly obtained as a result of providing information etc in response to a question or demand made pursuant to the legislation cannot be used against the individual concerned in civil or criminal proceedings. The justification for this limitations on the ‘right to silence’ is set out in the explanatory memorandum in some detail at pages 66 and 67, but the main issue raised is to refer to the importance of being able to enforce the legislation given the important objectives of ensuring work health and safety are adequately protected. In light of the justification offered and the inclusion of a use and derivative use immunity the Committee **leaves the question of the appropriateness of the approach to the Senate as a whole.**

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

Incorporating material by reference Sections 274 and 76

The bill provides that codes of practice which may be approved under the proposed section 274, and which are legislative instruments, may apply, adopt or incorporate material from other instruments as in force 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. It is regrettable that the explanatory memorandum does not explain the reason for the proposed approach.

The same issue arises in relation to the general regulation making power set out in clause 76 of the bill, again without explanation.

The Committee therefore seeks the Minister's advice about the justification for the proposed approach in these provisions and whether it is likely that any material to be incorporated 'from time to time' will be readily available, involve a cost or be restricted by copyright.

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.

Drafting error

Note: there is a typo in the Note to subclause 274(3) of the bill. It incorrectly refers to section 275B(1); the reference should be to section 273B(1).

Referral to Standing Committee

The Committee notes that this bill was referred to the Education, Employment and Workplace Relations 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.

COMMENTARY ON AMENDMENTS TO BILLS

Australian National Registry of Emissions Units Bill 2011

[Digest 4/11 and response in 6/11 Report]

On 6 July 2011 a replacement and supplementary memoranda were tabled in the Senate, indicating that two amendments will be moved on behalf of the Government. Neither of the amendments fall within the Committee's terms of reference.

Carbon Credits (Carbon Farming Initiative) Bill 2011

[Digest 4/11 and response in 6/11 Report]

On 6 July 2011 a replacement and supplementary memoranda were tabled and 12 Government and two Australian Greens amendments were agreed to in the Senate. None of the amendments fall within the Committee's terms of reference.

Child Support (Registration and Collection) Amendment Bill 2011

[Digest 4/11 and response in 5/11 Report]

On 7 July 2011 one Independent (Xenophon) amendment was agreed to in the Senate. Subsequently on the same day the House of Representatives agreed to the Senate amendment. The amendment does not fall within the Committee's terms of reference.

Competition and Consumer Amendment Bill (No.1) 2011

[Digest 4/11 and response in 6/11 Report]

On 7 July 2011 seven Government amendments were agreed to and two supplementary explanatory memoranda were tabled in the House of Representatives. The Committee has previously stated its concern that the important matter of the scope of the application of the prohibitions in the Bill is to be determined solely by delegated legislation. The Treasurer replied that:

...the application of the anti-competitive price signalling prohibitions by way of regulation allows a comprehensive assessment to be undertaken by Government as to the potential impacts of the new prohibitions on specific goods and services before they are applied to those goods and services.

The Treasurer also noted that the regulations will be disallowable instruments. The Committee thanked the Treasurer for his reply, but remained concerned and left the matter to the consideration of the Senate as a whole.

One of the proposed amendments will require that the regulations prescribe a process for the Government to follow when making the regulations which will extend the application of the Bill to new industries. The Committee supports this initiative as it will ensure that a consistent framework for considering extending the application of the Bill will be applied, but **seeks the Treasurer's advice about whether the process could be included in the primary legislation, either in the current bill or in a future amendment.**

Financial Framework Legislation Amendment Bill (No.1) 2011

[Digest 5/11 & 7/11 [amendments] - no response required]

On 4 July 2011 a revised explanatory memorandum was tabled in the Senate and the bill was passed without amendment. The Committee has no comment on the additional material.

Intelligence Services Legislation Amendment Bill 2011

[Digest 4/11 and response in 6/11 Report]

On 4 July 2011 a replacement explanatory memorandum was tabled in the Senate and the bill was passed without amendment. The Committee has no further comment on the additional material.

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

[Digest 5/11 and response in 8/11 Report]

On 4 July 2011 an addendum to the explanatory memorandum was tabled in the Senate and the bill was passed without amendment. The Committee has no further comment on the additional material.

Offshore Petroleum (Royalty) Amendment Bill 2011

[Digest 5/11- no comment]

On 6 July 2011 a supplementary explanatory memorandum was tabled and 17 Government amendments were agreed in the House of Representatives. None of the amendments fall within the Committee's terms of reference.

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

[Digest 5/11 and response in 7/11 Report]

On 6 July 2011 three Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the House of Representatives.

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.

Australian Energy Market Amendment (National Energy Retail Law) Bill 2011

This bill is part of the Council of Australian Governments' energy reform program, under which non-economic distribution and retail regulation of gas and electricity will come under the national energy institutional framework and regulatory arrangements.

Work Health and Safety Bill 2011

This bill will implement the Model Work Health and Safety Bill within the Commonwealth jurisdiction and will form part of a system of nationally harmonised occupational health and safety (OHS) laws. The Bill will apply to businesses and undertakings conducted by the Commonwealth, public authorities, and, for a transitional period, non-Commonwealth licensees.

In February 2008, the Workplace Relations Ministers Council agreed that the use of model legislation is the most effective way to achieve harmonisation of OHS laws. The Commonwealth and each of the States and Territories subsequently signed the Intergovernmental Agreement for Regulatory and Operational Reform in OHS which commits jurisdictions to implement the model laws by December 2011.

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 the 43rd Parliament since the previous *Alert Digest*

Nil

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

Nil