

**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.



## TABLE OF CONTENTS

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### **Commentary on bills**

|   |    |
|---|----|
| • Banking and Consumer Credit Protection Amendment (Mobility and Flexibility) Bill 2011                       | 1  |
| Charter of Budget Honesty Amendment Bill 2011   | 3  |
| • Landholders' Right to Refuse (Coal Seam Gas) Bill 2011  | 4  |
| • National Health Reform Amendment (Independent Hospital Pricing Authority) Bill 2011                         | 5  |
| • National Vocational Education and Training Regulator Amendment Bill 2011                                    | 6  |
| Parliamentary Budget Office Bill 2011   | 8  |
| • Parliamentary Service Amendment (Parliamentary Budget Officer) Bill 2011                                    | 9  |
| • Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oils in the Antarctic Area) Bill 2011 | 10 |
| Qantas Sale Amendment (Still Call Australia Home) Bill 2011   | 12 |
| Quarantine Amendment (Disallowing Permits) Bill 2011  | 13 |
| <b>Commentary on Amendments to Bills</b>  | 14 |
| <b>Bills giving effect to National Scheme of Legislation</b>  | 16 |
| <b>Scrutiny of standing appropriations</b>  | 17 |



## **Banking and Consumer Credit Protection Amendment (Mobility and Flexibility) Bill 2011**

Introduced into the House of Representatives on 22 August 2011

By: Mr Bandt

### **Background**

This bill amends the *Banking Act 1959* to:

- impose certain conditions on authorised deposit-taking institutions (ADIs) regarding the transfer of personal transaction accounts;
- require ADIs to provide consumers with certain information regarding term deposits when those deposits are due for reinvestment;

The bill also amends the *National Consumer Credit Protection Act 2009* to:

- require credit contracts to expressly include advice of any unjust transactions and unconscionable interest and other charges; and
- require mortgage indemnity insurance contracts to be terminated when the mortgage it relates to is also terminated.

### **Possible trespass on personal rights**

#### **Schedule 2, item 3**

Item 3 of Schedule 2 of this bill would insert a new section 147A into the National Credit Code. Subsection 147A(1) of the proposed provision states that ‘on termination of a credit contract, any mortgage indemnity insurance contract relating to the contract in force is also terminated’. The proposed provision would also require the credit provider to pay the debtor, or credit the debtor, with an actuarially fair rebate for the premium paid (to be determined in accordance with the regulations), and allowing the credit provider to recover the amount of the rebate from the insurer. Insofar as the proposed new section has the effect of terminating contractual agreements, it may impact on personal rights. Although it appears unlikely that there would be any adverse impact on insured persons, it is regrettable that the explanatory memorandum merely repeats the effect of the provisions. **The Committee requests the**

**Private Member's clarification of the reasons for the proposed amendment and justification as to why the termination of contractual rights is justified in the circumstances.**

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

## **Charter of Budget Honesty Amendment Bill 2011**

Introduced into the House of Representatives on 22 August 2011

By: Mr Hockey

### **Background**

This bill seeks to establish an independent statutory authority which will provide objective and impartial advice and analysis on:

- the Commonwealth Budget and budget cycle;
- medium and long-term budget projections;
- the costs of policy proposals; and
- other matters as requested by Members and Senators.

*The Committee has no comment on this bill.*

## **Landholders' Right to Refuse (Coal Seam Gas) Bill 2011**

Introduced into the House of Representatives on 24 August 2011

By: Senator Waters

### **Background**

This bill provides Australian landholders the right to refuse the undertaking of coal seam gas mining activities on their land without prior written authorisation.

### **Possible trespass on personal rights**

#### **Subclause 12**

Subclause 12(1) provides that, without limiting the relief that a court may grant to a plaintiff who brings an action under section 10 (in relation to unauthorised coal seam gas mining), a court may grant an injunction. Subclause 12(2) provides that a court must order that all costs incurred by a plaintiff under this Act are to be paid by the defendant unless the proceedings were instituted vexatiously or without reasonable cause or it would be unreasonable, in the circumstances, to do so. Regrettably the explanatory memorandum merely restates the effect of this provision, and does not explain why this direction to courts as to how costs should be awarded is justified. **The Committee requests the Senator's advice as to the justification for this provision as it may be thought to adversely impact on rights asserted in the course of the litigation.**

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

## **National Health Reform Amendment (Independent Hospital Pricing Authority) Bill 2011**

Introduced into the House of Representatives on 24 August 2011

Portfolio: Health and Ageing

### **Background**

This bill establishes the Independent Hospital Pricing Authority as set out in the National Health Reform Agreement agreed to by the Council of Australian Governments (COAG) on 2 August 2011.

### **Reversal of onus**

#### **Schedule 1, item 21, clause 213 and clause 215**

Item 21 of Schedule 1 of the Bill inserts a new Chapter 4 into the *National Health Reform Act 2011*. The proposed subsection 213(1) provides that a person who is or has been an official of the Pricing Authority commits an offence if they use or disclose protected information which has been obtained in the course of their work. The proposed subsection 213(2) provides that the offence will not be established where the disclosure or use is authorised by 'this Part' or where it is in compliance with a requirement under a law of the Commonwealth or a prescribed law of a State or Territory. The *Note* to this subsection states that a defendant bears an evidential burden of proof in relation to these exceptions. The reason for this approach is explained in the explanatory memorandum at page 17 as follows:

It would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing the information should reasonably be aware of the basis for their disclosure.

The same issue arises in relation to the exceptions provided for by the proposed subsection 215(3).

Given the circumstances **the Committee leaves the appropriateness of these provisions to the Senate as a whole.**

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

## **National Vocational Education and Training Regulator Amendment Bill 2011**

Introduced into the House of Representatives on 24 August 2011

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *National Vocational Education and Training Regulator Act 2011* to:

- add an objects clause;
- clarify which laws of the states and territories apply to registered training organisations;
- clarify the circumstances in which the Regulator can amend an accredited course without an application being made by the course owner; ensure that a person is aware of the cancellation of the qualification or statement of attainment before being liable for a civil penalty; limit the use of force; require authorised officers to possess certain experience, training and qualifications; and
- enable information sharing with the Tertiary Education Quality Standards Agency; and make technical amendments.

### **Definition of administrative power**

#### **Schedule 1, item 17**

Item 17 would insert new provisions in response to the Committee's previous query as to whether or not consideration had been given to specifying the qualifications and training procedures for authorised officers (whom are appointed by the Chief Commissioner) in the legislation. The effect of the new provisions (subsections 89(2) and 89(2A)) is that the Minister may, by legislative instrument determine the experience, training and qualification requirements (if any) for authorised officers, and that the Chief Commissioner must not appoint persons as authorised officers unless they satisfy any such requirements. Although these provisions do not mandate the specification of the requirements in the regulations, it appears from the explanatory memorandum at pages 13 and 14 that it is intended that some regulations to this effect will be made. The Committee thanks the Minister for considering

its previous concerns and **leaves the appropriateness of the proposed approach to the Senate as a whole.**

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

### **Incorporating material by reference Schedule 1, item 22 and item 34**

Items 22 and 34 both insert provisions which enable a variety of legislative instruments to apply, adopt or incorporate matters by reference to material that is contained in other instruments or writing that are in force from time to time. The explanatory memorandum at pages 13 to 16 notes that there is a variety of instruments which are already well understood and used in the industry. Moreover, the examples given involve instruments which are publicly and readily accessible. Given the detailed explanation, the Committee **leaves the appropriateness of these delegations of legislative power to the consideration of the Senate as a whole.**

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

### **Responding to concerns previously raised by the committee Schedule 1, item 5; items 6 to 14; and items 15 and 16**

As noted in the explanatory memorandum to this Bill, in drafting the proposed amendments the Minister has taken into account concerns of the Scrutiny of Bills Committee about the National Vocational Education and Training Regulator Act 2011 raised in *Alert Digest No. 1 of 2011*. The Committee thanks the Minister for this action.

## Parliamentary Budget Office Bill 2011

Introduced into the House of Representatives on 22 August 2011

By: Mr Hockey

### Background

This bill seeks to establish a Parliamentary Budget Office that will be:

- a new body, accountable to the Parliament;
- independent, to enhance the transparency and accountability of the budget process;
- tasked with providing advice and analysis across the parliament on the Commonwealth budget and budget cycle; and
- headed by the Parliamentary Budget Officer, who will be appointed by the presiding officers of the parliament on the advice of a committee of senior government officials.

*The Committee has no comment on this bill.*

## **Parliamentary Service Amendment (Parliamentary Budget Officer) Bill 2011**

Introduced into the House of Representatives on 24 August 2011

Portfolio: Treasury

### **Background**

This bill amends the *Parliamentary Service Act 1999* to establish the Parliamentary Budget Office and the position of Parliamentary Budget Officer.

The bill amends the *Charter of Budget Honesty Act 1998* to provide that parties with at least five members in Parliament may request election costings from the Departments of Treasury and Finance

The bill also amends the *Freedom of Information Act 1982* to list the Parliamentary Budget Office as an exempt agency, and makes consequential amendments to the *Long Service Leave (Commonwealth Employees) Act 1976* and the *Remuneration Tribunal Act 1973*.

### **Possible trespass on personal rights**

#### **Schedule 3**

It is noted that Schedule 3 of the bill, inter alia, introduces amendments with the effect of including the Parliamentary Budget Office and the Officer as an exempt agency under Division 1 of Part I of Schedule 2 of the *Freedom of Information Act 1982*. Although the explanatory memorandum does not justify exempting the PBO from the operation of the FOI Act, an important premise of the legislation is to enable the provision of confidential, independent and non-partisan policy costings. In the circumstances, the Committee **leaves the question of the appropriateness of this provision 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.*

## **Protection of the Sea (Prevention of Pollution from Ships) Amendment (Oils in the Antarctic Area) Bill 2011**

Introduced into the House of Representatives on 25 August 2011  
Portfolio: Infrastructure and Transport

### **Background**

This bill amends the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement amendments to Annex I to the *International Convention for the Prevention of Pollution from Ships* to prevent marine pollution during ship-to-ship oil transfer operations between certain oil tankers.

### **Offences: strict liability, reversal of onus, level of penalty and retrospective application Schedule 1, item 5**

The objective of the Bill is to ban the carriage or use and carriage as fuel of heavy grade oils in the Antarctic Area. The bill imposes offences for contravention of the ban but also includes exceptions in relation to the carriage or use as fuel for the purpose of securing the safety of a ship or saving life at sea (proposed subsections 10A(4) and 10B(4)) and where the heavy grade oil carried into the Antarctic Area is residue that has not been cleaned or flushed from a tank or pipeline of the ship (proposed subsections 10A(5) and 10B(5)).

The bill raises a number of issues which are often of concern to the Committee: the level of penalties, the creation of strict liability offences, the reversal of the onus of proof, and retrospective operation offence provisions.

The level of penalties (and their application to both the owner and master of a ship) is fully explained in the explanatory memorandum at page 4 as being consistent with existing Commonwealth legislation and international law, and as justified given the potential risk that oil spills may pose for this particular environment. The lower level of penalty units (500 rather than 2000 penalty units) attaches to the strict liability offences. The inclusion of strict liability offences is also comprehensively explained (at page 4). The explanatory

memorandum gives emphasis to the following factors: the master and owner of a ship would 'be fully aware if the ship is carrying HGOs in bulk as cargo or as fuel', the importance of discouraging careless non-compliance with the ban on carrying such fuels, and the consistency of the approach with that taken in relation to other similar Commonwealth offences.

The imposition of an evidential burden of proof in relation to the exceptions to the offences is justified as being reasonable given 'a defendant would easily be able to demonstrate that HGOs were carried or used as fuel on a ship for the purpose of securing the safety of a ship or saving life at sea' or that there is a reasonable possibility that the presence of HGOs on the ship is due to residue of oil that has not been cleaned or flushed from a tank or pipeline of the ship due to the carriage of HGOs at any time (whether before or after the commencement of the section) (also at page 4 of the explanatory memorandum).

Further, the explanatory memorandum notes at page 4 that subsections 10A(5) and 10B(5) can apply to HGOs carried by the ship prior to the commencement of the section, and thus has a retrospective effect. However, 'no person will be disadvantaged' as the subsection 'clarifies the situation in relation to any residues of HGOs that may be in the tanks or pipelines of a ship and will be beneficial for the owner or master of the ship as they will not be required to remove residues, irrespective of when HGOs responsible for the residues may have been carried on board the ship or been used as fuel'.

In light of the detailed explanations provided in justification of the approach taken in relation to the above issues, the Committee **leaves these issues to the consideration of the Senate as a whole.**

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

## **Qantas Sale Amendment (Still Call Australia Home) Bill 2011**

Introduced into the Senate on 25 August 2011

By: Senators Xenophon and Bob Brown

### **Background**

This bill amends the *Qantas Sale Act 1992* to:

- require that Qantas' principal operation centre is located in Australia;
- require that two persons – one with at least 5 years professional flight operations experience and one with at least 5 years aircraft engineering experience be appointed as members of the Qantas Board of Directors; and
- provide that the Minister or certain shareholder members may restrain Qantas from engaging in certain particular conduct.

*The Committee has no comment on this bill.*

## **Quarantine Amendment (Disallowing Permits) Bill 2011**

Introduced into the Senate on 25 August 2011

By: Senators Xenophon

### **Background**

This bill amends the *Quarantine Act 1908* to:

- provide for Biosecurity Policy Determinations to be disallowable legislative instruments;
- provide that a permit to import, introduce, or bring in an animal, plant, substance or thing is a disallowable legislative instrument; and
- provide that, when these instruments are presented to Parliament, the minister is required to table a risk analysis in both Houses and refer the instruments to parliamentary committees responsible for agricultural matters.

*The Committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Australian National Registry of Emissions Units Bill 2011**

*[Digest 4/11 & 8/11 [amendments] – response in 6<sup>th</sup> Report]*

On 22 August 2011 the Senate agreed to two Government amendments. On 23 August 2011 the House of Representatives agreed to the Senate amendments and passed the bill. Neither of the amendments fall within the scope of the Committee's terms of reference.

### **Carbon Credits (Carbon Farming Initiative) Bill 2011**

*[Digest 4/11 & 8/11 [amendments] – response in 6<sup>th</sup> Report]*

On 22 August 2011 the Senate agreed to one Independent (Xenophon) amendment. On 23 August 2011 the House of Representative agreed to the Senate amendments and the bill was passed. None of the amendments fall within the scope of the Committee's terms of reference.

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

*[Digest 6/10 – no response required]*

On 23 August 2011 a supplementary explanatory memorandum was tabled in the Senate and on 24 August 2011 the Senate agreed to four Government amendments. On 25 August 2011 the House of Representatives agreed to the Senate amendments and the bill was passed. The Committee has no comment on the supplementary information.

### **Horse Disease Response Levy Bill 2011**

*[Digest 8/11 & 9/11 [amendments] – no comment]*

On 18 August 2011 the House of Representative agreed to two Government amendments. On 23 August 2011 a revised explanatory memorandum was tabled in the Senate. None of the amendments fall within the scope of the Committee's terms of reference.

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

*[Digest 6/10 & 8/10 [reintroduced –no comment] – response in 8<sup>th</sup> Report 10]*

On 22 August 2011 a supplementary explanatory memorandum was tabled in the Senate. On 23 August 2011 one Government amendment was agreed to in

the Senate and on 24 August 2011 the House of Representative agreed to the Senate amendment and the bill was passed. The Committee has no comment on the amendments and the supplementary information.

**Indigenous Affairs Legislation Amendment Bill 2011**

*[Digest 7/11 & 9/11 [amendments] – no response required]*

On 23 August 2011 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the revised information.

**Inspector-General of Intelligence and Security Amendment Bill 2011**

*[Digest 4/11 – no comment]*

On 25 August 2011 the Senate agreed to one Government amendment and a supplementary explanatory memorandum was tabled. The Committee has no comment on the amendment and supplementary information.

**National Health Reform Amendment (National Health Performance Authority) Bill 2011**

*[Digest 5/11 & 9/11 [amendments] – response in 4<sup>th</sup> Report]*

On 22 August 2011 a revised explanatory memorandum was tabled in the Senate, which relates to amendments considered by the Committee in Alert Digest 9 of 2011. The Committee has sought the Minister's advice about one of the proposed amendments.

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

*[Digest 6/10 & 8/10 [reintroduced –no comment] – response in 8<sup>th</sup> Report 10]*

On 22 August 2011 the Senate agreed to 39 Government amendments and tabled a supplementary explanatory memorandum. On the 23 August 2011 the Senate agreed to a further two Government amendments. On 24 August 2011 the House of Representative agreed to the Senate amendments. The Committee has no comment on the amendments and the supplementary information.

## **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.

### **National Health Reform Amendment (Independent Hospital Pricing Authority) Bill 2011**

### **National Vocational Education and Training Regulator Amendment Bill 2011**

*Please see above pages 5-7 for further information.*

## SCRUTINY OF STANDING APPROPRIATIONS

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

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

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

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

Nil

### **Other relevant appropriation clauses in bills in the 43<sup>rd</sup> Parliament since the previous *Alert Digest***

**Parliamentary Service Amendment (Parliamentary Budget Officer) Bill 2011** — Schedule 1, item 16, section 64D: special appropriation clause – for a finite amount and a finite period of time.