

**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.

## **Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2011**

Introduced into the Senate on 21 September 2011

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *Coal Mining Industry (Long Service Leave Fund) Act 1992*; the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992*; the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*; and the *Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009* to:

- legislate minimum long service leave entitlements for all eligible employees in the black coal mining industry based on the precursor award entitlement;
- change the basis on which the levy is imposed and to facilitate changes to the employer reimbursement arrangements;
- provide for a greater compliance role for the Coal Mining Industry (Long Service Leave Funding Corporation);
- make changes to the structure and representation of the Board of Directors of the Corporation; and
- establish a regime for transition from the award-derived long service leave scheme.

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

#### **Clause 39F**

Clause 39F provides that any benefits or rights in respect of long service leave are subject to cancellation, revocation, termination or variation under legislation and no compensation is payable in that event. The rights are being granted by legislation and it is possible for future legislation to modify or revoke them. While this does not automatically give rise to a problem, the explanatory memorandum merely repeats the effect of this provision and does not indicate the need for it and whether it could be the basis of amendments that could trespass unduly on personal rights and liberties. As employees may

justifiably act on the basis of an understanding of the statutory rights intended to be granted by this Bill, the Committee **seeks the Minister's advice as to the reasons for the proposed approach.**

*Pending the Minister's reply, 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.*

## **Reversal of onus**

### **Clause 49CB**

Clause 49CB imposes an evidential burden on a person who wishes to rely on the mistake of fact defence to avoid the imposition of a civil penalty order. As the explanatory memorandum does not justify this approach, the Committee **seeks the Minister's advice as to the justification for the provision.**

*Pending the Minister's reply, 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.*

## **Strict liability**

### **Clause 49CC**

Clause 49CC, in effect, makes civil penalty provisions strict liability offences. As the explanatory memorandum does not justify this approach, the Committee **seeks the Minister's advice as to the justification for the provision.**

*Pending the Minister's reply, 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.*

## **Strict liability**

### **Subclause 52A(6)**

Subclause 52A(6) provides that the offence of failing to comply with a notice to produce information or documents is one of strict liability. Although similar

provisions appear in other Commonwealth legislation, the Committee expects that the justification for the use of strict liability is in accordance with the *Guide to framing Commonwealth Offences* and is outlined in the explanatory memorandum. In this case the explanatory memorandum does not address in the issue and the Committee therefore **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 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.*

### **Strict liability**

#### **Schedule 3, item 11; and item 14 subsections 10(2) and 10A(4)**

Item 11 of Schedule 3 proposes to substitute a new subsection 5(3) in the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*. The proposed subsection makes it an offence of strict liability for a person to contravene the requirement for an employer to make a return within 28 days of the end of the month in which they employ an eligible employee. The explanatory memorandum does not address why a strict liability offence is necessary in the circumstances.

The same issue also arises in relation to item 14 of Schedule 3, proposed subsections 10(2) and 10A(4).

The Committee therefore **seeks the Minister's advice as to the justification for the proposed** approach in these provisions.

*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.*

## **Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011**

Introduced into the House of Representatives on 19 September 2011

By: Mr Katter

### **Background**

This bill amends the *Competition and Consumer Act 2011* to provide for a code of conduct for the horticulture industry.

### **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. The Committee therefore **requests that the Private Member** provides an explanatory memorandum to the bill.

## **Constitutional Corporations (Farm Gate to Plate) Bill 2011**

Introduced into the House of Representatives on 19 September 2011

By: Mr Katter

### **Background**

This bill requires grocery retailers to display the farm gate price of fresh produce next to the retail price.

*The Committee has no comment on this bill.*

## **Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011**

Introduced into the House of Representatives on 21 September 2011

Portfolio: Treasury

### **Background**

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

- introduce several enhancements to the national consumer credit law;
- introduce new protections for seniors seeking to take out a reverse mortgage;
- cap the maximum amount credit providers can charge under both small amount credit contracts, and all other credit contracts, and introduce additional obligations in relation to small amount contracts; and
- provide greater regulatory consistency between consumer leases and credit contracts.

The bill also amends the *Corporations Act 2001* to clarify a requirement relating to executive remuneration.

### **Reversal of onus**

#### **Schedule 2, item 10 and item 133DD(4)**

Item 10 of Schedule 2 proposes to introduce an offence in relation to requirements to give projections of equity before entering a reverse mortgage agreement. The defendant bears an evidential burden of proof in relation to defences based upon their reasonable beliefs. The explanatory memorandum at page 39 justifies this approach as ‘it would be relatively easier for the defendant to prove that they believed a consumer has been provided with either the projections or information statement by reference to internal procedures’. It is noted, however, that proposed subsection 133DB(4) enables the regulations to prescribe further circumstances in which licensees are not required to give a consumer a reverse mortgage information statement and provides that the defendant will bear an evidential burden in relation to these matters.

The same issue also arises in relation to proposed subsection 133DD(4).

The Committee is concerned that it is possible that the regulations could prescribe circumstances in which it would not be appropriate for the defendant to bear an evidential burden. The Committee therefore **requests 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 trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### **Possible insufficient Parliamentary scrutiny Schedule 4**

Schedule 4 of the bill introduces new obligations restricting the maximum amount that can be charged under both small amount credit contracts and all other credit contracts regulated by the Code. The relevant provisions (e.g. paragraph 32B(3)(c)) enable regulations to prescribe relevant amounts to enable the Government to 'quickly respond to attempts to circumvent the objective of these reforms'. The explanatory memorandum at page 67 states that such regulation-making powers are introduced in recognition of the fact that, in Australian jurisdictions that have a cap on costs, a range of methods and practices have developed to enable credit providers to evade the effective operation of the caps. The Committee usually prefers that important matters are included in primary legislation, however in light of the explanation provided 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

### **Retrospective effect Schedule 6, item 8**

Schedule 6 contains a number of application provisions. Item 8 concerns amendments made to section 124 of the new Credit Code. The effect of the section 124 amendments is to increase the remedies available to consumers

for a contravention, and also to allow ASIC to have legal standing in relation to conduct in contravention of the Code. Item 8 provides that these amendments apply in relation to applications made on or after the commencement of section 124, whether the contraventions occurred before, on or after the commencement date. Thus, contraventions of the code occurring prior to the amendments taking effect may give rise to an increase in remedies available to consumers. The explanatory memorandum at page 96 justifies this approach by noting that ‘the effect of the amendment to section 124 is not to make conduct that was previously not a contravention of the Code a contravention’, but ‘is to increase the remedies available’ and to give ASIC standing.

It is stated at page 28 that there is no retrospectivity in regards to what constitutes a contravention’. The Committee agrees with this statement, however, the clear result is that entities contravening the code may be liable for ‘a more comprehensive remedy’ in relation to conduct that occurred prior to the commencement of these provisions. The effect of the provision by reference to past events in relation to remedies will be beneficial to consumers, but it also appears likely to have an adverse affect in some circumstances. The Committee therefore **seeks the Minister’s advice as to why it is necessary for these provisions to apply in relation to breaches which occurred prior to the commencement of the provisions.**

*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.*

### **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.

## **Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Bill 2011**

Introduced into the House of Representatives on 22 September 2011  
Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill is part of a package of three bills to establish a tuition protection service and is the second phase response to recommendations from the review of the Education Services for Overseas Students.

The bill amends the *Education Services for Overseas (Registration Charges) Act 1997* to make amendments consequent on the proposed *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2011*.

*The Committee has no comment on this bill.*

## **Education Services for Overseas Students (TPS Levies) Bill 2011**

Introduced into the House of Representatives on 22 September 2011

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill is part of a package of three bills to establish a tuition protection service and is the second phase response to recommendations from the review of the Education Services for Overseas Students. The bill implements the new annual TPS Levies framework.

*The Committee has no comment on this bill.*

## **Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011**

Introduced into the Senate on 22 September 2011

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill is part of a package of three bills to establish a tuition protection service and is the second phase response to recommendations from the review of the Education Services for Overseas Students.

The bill amends the *Education Services for Overseas Students Act 2000* (ESOS Act) to establish a universal single layer Tuition Protection Service which provides a flexible and streamlined approach to student placement and refund arrangements in the event a defaulting provider does not meet its refund obligations under the ESOS Act.

### **Strict liability**

**Schedule 1, items 1, section 46E, and section 47F; and Schedule 3, item 32**

Proposed section 46E, to be inserted by item 1 of Schedule 1, creates an offence for failing to discharge obligations associated with a default in the provision of a course. The offence is one of strict liability and carries with it a penalty of 60 penalty units. The explanatory memorandum comprehensively deals with the appropriateness of strict liability. Given that a number of related proposed offences in the bill are also strict liability offences it is convenient to set out the justification for this approach in some detail (as discussed at pages 13 and 14 of the explanatory memorandum):

This conduct concerns obligations on providers to place a student or refund fees in accordance with the legislation within 14 days. The first principal object of the Act is to provide tuition assurance to overseas students for courses for which they have paid. These obligations are therefore central to the protection of international students' interests. Strict liability is also appropriate as the regulatory is able to readily assess that a breach has taken place.

This is one of a number of strict liability offences introduced by this bill which are related to the refund obligations of providers under the Act. A key concern raised during ESOS review consultations was about the effectiveness of ESOS enforcement provisions and the review recommended that ESOS be made stronger by introducing financial penalties for a broader range of non-compliant behaviour as well as recommendations simplifying and strengthening the tuition protection framework, including refunds. The policy intent of the amendments introducing a number of strict liability offences therefore is to better enforce compliance with the provider refund obligations under the ESOS Act.

In relation to this particular offence the explanatory memorandum also emphasises, at page 14, the importance of strict liability for enforcing refund obligations and the fact that the penalty does not involve imprisonment ‘and is quite low’.

Other strict liability offences are similarly explained: see proposed section 47F, explanatory memorandum at page 18; section 47G, explanatory memorandum at page 18; and item 32 of Schedule 3, explanatory memorandum at pages 72-73.

In light of the detailed explanation provided the Committee **leaves to the Senate as a whole the question of whether the proposed approach is appropriate.**

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

## **Higher Education Support Amendment Bill (No.2) 2011**

Introduced into the House of Representatives on 22 September 2011

Portfolio:

### **Background**

This bill amends the *Higher Education Support Act 2003* to implement 2011–12 Budget measures and update maximum payment amounts to provide for increases in enrolments of Commonwealth supported students and indexation. The bill also clarifies the eligibility for Commonwealth supported places and the Higher Education Loans Program (HELP) for Australian citizens studying primarily at overseas campuses of Australian providers.

*The Committee has no comment on this bill.*

## Maritime Legislation Amendment Bill 2011

Introduced into the House of Representatives on 22 September 2011  
Portfolio: Infrastructure and Transport

### Background

This bill amends the *Navigation Act 1912* and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to:

- require the master of a ship in Australian waters not to operate the ship in a manner that causes pollution or damage to the marine environment;
- require the master of any ship in Australian waters to ensure the ship is operated in a manner that does not cause pollution or damage to the marine environment;
- require the master of an Australian ship anywhere on the high seas not to operate a ship in a manner that causes pollution or damage to the marine environment;
- require the master of an Australian ship anywhere on the high seas to ensure that the ship is operated in a manner that does not cause pollution or damage to the marine environment;
- to create criminal and civil penalties for contraventions of these requirements;
- create an offence where the master of a ship fails to report in accordance with the regulations, for example, in relation to an incident in a mandatory reporting area such as the Great Barrier Reef Marine Park; and
- increase the level of penalties for reckless or negligent discharge of oil or oil residues by ships.

### Offences and penalties

#### Various

This bill seeks to strengthen the regulatory system relating to unsafe and irresponsible actions at sea, particularly near sensitive marine ecosystems. The bill introduces new offences related to negligent or reckless actions which

causes pollution or damage to the marine environment. The penalties imposed are significant, especially in relation to aggravated contraventions of the civil penalty provisions. In relation to the offence for discharging oil or oily mixture into the sea the maximum penalty is increased from 500 to 20000 penalty units. The explanatory memorandum at page 8 points to the importance of discouraging non-compliance with the obligations given the levels of cost saving that shipping operators may achieve through breaking the law and the perceived likelihood of non-compliance being detected.

Further, the explanatory memorandum at page 1 gives emphasis to the seriousness with which Australia takes its responsibility to protect the marine environment and the magnitude of potential harm (which may not be easily repaired). The Committee also notes that the bill is designed to better implement the International Convention for the Prevention of Pollution from Ships (MARPOL) and to bring Commonwealth legislation into line with complementary State legislation and penalties.

In light of the detailed explanation provided the Committee **leaves to the Senate as a whole the question of whether the proposed nature and level of the various offences is appropriate.**

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

## **Delegation of legislative power**

### **Strict liability**

#### **Schedule 1, item 4**

Item 4 of Schedule 1 would insert a new 269E into the *Navigation Act 1912*. The proposed section creates a strict liability offence where the master of a ship fails to make a report in accordance with regulations dealing with ships in a prescribed area. The explanatory memorandum states at page 5 that the Great Barrier Reef Particularly Sensitive Sea Area is prescribed for this purpose. Although the explanatory memorandum does not address the question of why it is necessary for prescribed areas to be specified in regulations rather than in the primary legislation, it seems to the Committee that the likely reason is that it is not possible to list comprehensively in advance areas which should be subject to reporting requirements under this provision. Although the offence is one of strict liability and the penalty is substantial (240 penalty units), in the circumstances the Committee **leaves the**

**question of whether the delegation of legislative power (to determine areas prescribed by the regulations in relation to which the obligation to report is specified) is appropriate to the consideration of the Senate as a whole.**

The adoption of strict liability is said to be justified as the ‘defendant is the best placed person to provide evidence on whether any culpability should be attached to the physical offence’ and ‘it will be easier and less costly for the defendant to disprove an unjust charge than for the prosecutor to make out fault elements of an unjust charge, such as the location of the ship’ (see the explanatory memorandum at page 5). In the circumstances the Committee **leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

## **Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011**

Introduced into the House of Representatives on 21 September 2011

Portfolio: Immigration and Citizenship

### **Background**

This bill amends the *Migration Act 1958* (the Migration Act) and the *Immigration (Guardianship of Children) Act 1946* (the IGOC Act) to:

- replace the existing framework in the Migration Act for taking offshore entry persons to another country for assessment of their claims to be refugees as defined by the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees*; and
- clarify that provisions of the IGOC Act do not affect the operation of the Migration Act, particularly in relation to the making and implementation of any decision to remove, deport or take a non-citizen child from Australia.

### **Broad delegation**

#### **Schedule 1, item 25**

This bill has the purpose of giving the Government the power to allow for offshore processing of protection claims following the High Court of Australia's judgment in *Plaintiff M70/2011*. Item 25 of Schedule 1 contains the main provisions which seek to empower the taking of actions to facilitate the transfer of 'offshore entry persons' to an 'offshore processing country'.

Proposed new section 198AB empowers the Minister to designate a country an 'offshore processing country'. The power to make such a designation is framed in very broad terms, with few criteria structuring or confining the discretionary power. Proposed subsection 198AB(2) provides that 'the *only* condition for the exercise of the power...is that the Minister thinks that it is in the *national interest*' to make the designation. Although there are two mandatory relevant considerations (contained in proposed paragraphs 198A(3)(a) and 198A(3)(b)), these relate to whether or not assurances have been given concerning how the third country will process and protect persons

transferred to an offshore processing country. In particular, the relevant matters do not concern the existence or otherwise of legal obligations on a country to process or protect persons in the ways specified (see proposed subsection 198A(3)). It is also the case that the Minister is entitled to consider any other matter which, in his or her opinion, relates to the national interest (paragraph 198(3)(b)). As the explanatory memorandum notes, ‘the term national interest has a broad meaning and refers to matters which relate to Australia’s standing, security and interests’ (see page 14).

It is sometimes suggested that there is no such thing as completely unfettered discretions because the scope, structure and general purposes of a statute will lead to the implication of some limits to the exercise of statutory powers. Nevertheless, the power granted by proposed section 198AB is conferred in extremely broad terms. There are examples in Commonwealth legislation where statutory powers are conditioned on whether a Minister *is satisfied* of particular matters or forms a particular *belief*. The effect of such statutory formulations is not to remove judicial supervision as the decision-maker must reach their state of satisfaction on the basis of a correct understanding of the law. Conditioning the power on what the Minister *thinks* may be considered to import more subjectivity into the assessment than do these more common formulations. Thus, insofar as the *only* condition for the exercise of this power is whether the Minister *thinks* a designation of a country is in the *national interest*, the practical effect is likely to be that judicial review, while available in theory, would in practice be unlikely to play a meaningful role in regulating the exercise of the power.

The existence of broad discretionary powers—particularly in relation to matters which impact on important individual interests such as are relevant in this context—is a matter of concern to a scrutiny committee. However, in this case the policy intention of the bill is very clear (see proposed section 198AA, which sets out the ‘reason for subdivision’, including that ‘it is a matter for the Minister to decide which countries should be designated as offshore processing countries’). In addition, proposed section 198AC requires the Minister to table his reasons and further documents related to a designation before Parliament and can be understood as expressing a policy preference to substitute legal forms of accountability with political accountability. Subject to the comment below in relation to proposed section 198AC, the Committee therefore **leaves to the consideration of the Senate as a whole the question of whether or not this approach overcomes concerns about the breadth of discretionary power.**

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

### **Insufficient Parliamentary scrutiny Subsection 198AC(5)**

Proposed section 198AC imposes an obligation on the Minister to lay before each House of the Parliament (within 2 sitting days of making a designation that a country is an offshore processing country) the following: a copy of the designation; a statement of reasons referring to the matters the Minister is obliged to consider; a copy of any written agreement between Australia and the country relating to the taking of persons to that country; a statement concerning consultations with the Office of the UNHCR; a summary of advice received from that office; and a statement about any arrangements in place for the treatment of persons in the designated country. Subsection 198AC(5) provides that the validity of the designation is not affected by a failure to comply with these requirements. Given that (1) the clear intention for the exercise of the broad discretionary power to make a designation be subject to Parliamentary scrutiny, (2) the limited effectiveness of legal forms of accountability, and (3) the procedural nature of the requirements imposed by proposed section 198AC, the Committee **seeks the Minister's further information as to why subsection 198AC(5) is considered necessary.**

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

### **Trespass on personal rights and liberties Subsections 198AB(7), 198AD(9), and 198E(3)**

Proposed subsections 198AB(7), 198AD(9), and 198E(3) all state that 'the rules of natural justice do not apply' to an exercise of the power or to the performance of the duty to which each provision refers. The first relates to the Minister's power to make or revoke a designation of a country as an offshore processing country; the second to the Minister's obligation to direct an officer to take an offshore entry person (or class of such persons) to a particular

offshore processing country where there are two or more such countries; and the third relates to the power to determine that section 198AD does not apply to an offshore entry person. The explanatory memorandum merely states, in relation to each of these provisions, that the Minister is not required to give a right to be heard to affected individuals in relation to the power or duty being exercised (see pages 14, 17 and 19). The Committee therefore **seeks the Minister's further advice in relation to the type of natural justice obligations which are thought to be associated with these provisions and why it is considered necessary to specifically exclude them.**

*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 2**

The purpose of amendments in Schedule 2 of the bill is to overcome that part of the High Court's decision in *Plaintiff M70* which held that an unaccompanied minor who is subject to the *Immigration (Guardianship of Children) Act 1946* cannot be removed from Australia under the *Migration Act* unless the Minister, in the exercise of a separate statutory power as guardian of that minor, gives written consent to the removal or taking from Australia of the minor, having regard to the minor's interests. The explanatory memorandum states at page 29 that the High Court's decision 'does not align with the Government's policy intention, namely, that the Minister's consent under the *IGOC Act* is not required for a non-citizen child to be removed from Australia under the *Migration Act*.

However, other than stating that prior to the High Court's decision the law was understood such that the *Migration Act* is not subject to the *IGOC Act*, the explanatory memorandum does not say anything to further explain the reasons for the amendments or explain why they should not be considered as unduly restricting rights of children to have their individual interests considered prior to them being removed from Australia.

The second reading speech does state that 'a blanket inability of the government of the day to transfer unaccompanied minors to a designated country provides an invitation to people smugglers to send boatloads of

children to Australia’ and that ‘no government can stand for the gaming of the system and risking children’s lives in this way’.

Thus, although the amendments may be thought to diminish protection to the rights of children extended by the IGO Act, the Minister’s argument that children’s lives may be protected by implementing the amendments is noted. Further, the second reading speech notes that the Minister will retain the power to personally intervene to determine that a minor should not be taken to a designated processing country. This is said to be ‘an important safety valve to be used in individual cases’.

Given the importance of this issue and the absence of an explanation for the approach in the explanatory memorandum which accompanies the bill, the Committee seeks the Minister's advice as to **whether the proposed amendments, including the discretionary ‘safety valve’ power, unduly encroaches upon a child’s right to have their best interests considered in making decisions which affect them.**

*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.*

## **Offshore Petroleum and Greenhouse Gas Storage Amendment (Significant Incident Directions) Bill 2011**

Introduced into the House of Representatives on 21 September 2011

Portfolio: Resources and Energy

### **Background**

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to specifically enable the National Offshore Petroleum Safety and Environmental Management Authority to issue a direction to a petroleum titleholder in the event of a significant offshore petroleum incident occurring within the title area that has caused, or might cause, an escape of petroleum. The direction would require the titleholder to take an action or not take an action in relation to the escape or possible escape of petroleum and its effects, and may apply either within or outside the titleholder's title area.

### **Reversal of onus**

#### **Section 576D**

The purpose of this bill is to enable the regulatory authority (NOPSEMA) to issue a direction to a petroleum titleholder in the event of a significant offshore petroleum incident. Failure to comply with a direction is an offence of strict liability and carries with it a penalty of 100 penalty units (Schedule 1, item 10, proposed section 576D). Although it is a defence in a prosecution against section 576D that the defendant took all reasonable steps to comply with the direction, section 578 of the *Offshore Petroleum and Greenhouse Gas Storage Act* provides that the defendant bears a legal burden of proof in relation to matters relevant to establishing this defence (this is a provision creating a general defence in relation to other offences in the legislation).

The explanatory memorandum at pages 8 and 9 deals with each of these issues comprehensively. The high-risk nature of the industry, the complex and remote nature of operations, and the serious risks to human health and safety and the environment are all given emphasis. In relation to the reversal of onus of proof for establishing whether all reasonable steps to comply with a direction have been taken, the explanatory memorandum states that 'only the defendant will have knowledge of the steps taken to comply with the

direction, particularly given the remote nature of offshore petroleum operations'. It is also the case that, although the burden of proof is a *legal* burden, the standard of proof that must be discharged is the balance of probabilities (not beyond reasonable doubt).

In the circumstances the Committee **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

## **Social Security Amendment (Student Income Support Reforms) Bill 2011**

Introduced into the House of Representatives on 21 September 2011

Portfolio: Education, Employment and Workplace Relations

### **Background**

The bill amends the *Social Security Act 1991* to remove the distinctions between Inner Regional and other regional and remote students for independent Youth Allowance as well as providing additional support for students from regional Australia who need to relocate to study.

*The Committee has no comment on this bill.*

## **Social Security Legislation Amendment (Family Participation Measures) Bill 2011**

Introduced into the Senate on 21 September 2011

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* for trials to be implemented in ten disadvantaged locations across Australia for teenage parents and jobless families.

*The Committee has no comment on this bill.*

## **Tax Laws Amendment (2011 Measures No.7) Bill 2011**

Introduced into the House of Representatives on 21 September 2011

Portfolio: Treasury

### **Background**

This bill amends various taxation laws to implement a range of changes to Australia's tax laws.

Schedule 1 to this Bill amends the *Income Tax Assessment Act 1997* to remove income tax barriers that impede families from making financial contributions to a special disability trust.

Schedule 2 amends the *Income Tax Rates Act 1986* to reduce the lowest marginal tax rate for workers participating in the Pacific Seasonal Worker Pilot Scheme from 29 per cent to 15 per cent. This change only applies to non-residents who hold a Special Program Visa and who are employed by an 'Approved Employer' under the Scheme.

Schedule 3 to this Bill amends the *Taxation Administration Act 1953* so that instalment income of a taxpayer who is required to apply Division 230 of the *Income Tax Assessment Act 1997* to their financial arrangements also includes their net gains from their Division 230 financial arrangements as worked out under the taxation of financial arrangements provisions.

Schedule 4 amends the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* to give the Commissioner of Taxation a limited discretion to extend the time for a taxpayer to notify the Commissioner of the making of the transitional election to apply Division 230 of the *Income Tax Assessment Act 1997* and related consequential and transitional amendments to its existing financial arrangements.

Schedule 5 amends the *Income Tax Assessment Act 1997* and the *Banking Act 1959* to make changes to farm management deposits.

Schedule 6 amends the *Tax Laws Amendment (2009 Measures No. 6) Act 2010* to extend the end date of the temporary loss relief for complying

superannuation fund mergers by three months from 30 June 2011 to 30 September 2011.

Schedule 7 ensures the ongoing validity of certain director penalty notices.

Schedule 8 amends the *Income Tax Assessment Act 1997*, the *Taxation Administration Act 1953* and the *A New Tax System (Australian Business Number) Act 1999* relating to the integrity of public ancillary funds.

Schedule 9 amends the *Income Tax Assessment Act 1997* to make a number of changes to the film tax offsets.

## **Retrospective application**

### **Schedule 7**

Schedule 7 of the bill is designed to respond to a recent decision of the Court of Appeal of the New South Wales Supreme Court. The decision overturned an earlier case, decided in 2007, that had held that director penalty notices were taken to have ‘been given’ from the date they were posted. The recent decision held, rather, that the notice is ‘given’ on the date it is delivered. Once such a notice is given, a director has 14 days to take action having the result that the penalty would be remitted.

The effect of the amendments is to ensure that all notices issued on the basis that the law was correctly stated in the 2007 decision should be treated as not being invalid because of the change in understanding as to when a notice is to be treated as having been ‘given’. The explanatory memorandum at page 8 accepts that the amendments will ‘technically’ have ‘an adverse impact on those directors who would otherwise seek to challenge the validity of their director penalty notices in light of the [recent court decision]’. In justification of this result, it is said that ‘no taxpayers will [in substance] be adversely affected because these amendments merely restore the precedential view on the issue during this period’. It is also emphasized that the amendments ‘do not affect the rights or liabilities of parties to a proceeding which may be determined by a court on or before the commencement of these amendments, insofar as these rights or liabilities were affected by a director penalty notices issued’ on the basis of the previous understanding of the relevant law. It is also notable that the director penalty notices that were issued on the basis of the 2007 decision explicitly stated that the director had 14 days from the date of postage to act so as to have the penalty remitted. 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.*

## **Telecommunications Amendment (Enhancing Community Consultation) Bill 2011**

Introduced into the House of Representatives on 19 September 2011

By: Mr Wilkie

### **Background**

This bill amends the *Telecommunications Act 1997* relating to community consultation about the development of certain telecommunication facilities.

### **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. The Committee therefore **requests that the Private Member** provides an explanatory memorandum.

## **Veterans' Affairs Legislation Amendment (Participants in British Nuclear Tests) Bill 2011**

Introduced into the House of Representatives on 22 September 2011

Portfolio: Veterans' Affairs

### **Background**

This bill enables the Repatriation Commission to determine, by legislative instrument, additional eligibility criteria for 'British nuclear test defence service' under the *Veterans' Entitlements Act 1986* and a 'nuclear test participant' under the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*.

*The Committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Auditor-General Amendment Bill 2011**

*[Digest 3/11 & 11/11 [amendments] – response required]*

On 15 September 2011 the House of Representatives agreed to one Government amendment. On 22 September 2011 a revised explanatory memorandum was tabled in the Senate. These amendments were discussed in *Alert Digest No. 11 of 2011*.

### **Environment Protection and Biodiversity Conservation Amendment (Mining, Petroleum and Water Resources) Bill 2011**

*[Digest 11/11 – response required]*

On 20 September 2011 an explanatory memorandum was tabled in the House of Representatives. The Committee had commented in *Alert Digest No. 11 of 2011* about this bill including the (at that stage) lack of an explanatory memorandum. The Committee notes the provision of the explanatory memorandum, which addresses one of its concerns. However, there are other comments in the *Alert Digest* about which the Committee would appreciate receiving further information.

### **Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011**

*[Digest 8/11– response in 12<sup>th</sup> Report]*

On 19 September 2011 the House of Representatives agreed to six Government amendments and tabled a supplementary explanatory memorandum. On 21 September 2011 a revised explanatory memorandum was tabled in the Senate. The Committee has commented on other aspects of the Bill (see its *Eighth Report* and *Twelfth Report*), but has no comment on these amendments.

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

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

On the 19 September 2011 one Government and one Opposition amendment was agreed and a supplementary explanatory memorandum was tabled in the Senate. On 20 September 2011 the House of Representatives agreed to the

Senate amendments and the bill was passed. The Committee has no comment on these amendments.

**Navigation Amendment Bill 2011**

*[Digest 5/11 – no response required]*

On 20 September 2011 the House of Representatives agreed to one Australian Greens amendment. On 22 September a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on these amendments.

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

*[Digest 5/11 and 8 & 9/11 [amendments] – response in 7<sup>th</sup> Report]*

On 14 September 2011 the Senate agreed to one Australian Greens amendment. On 15 September the House of Representatives agreed to the Senate amendment and the bill was passed. The Committee has no comment on the amendment.

## Provisions of bills which impose criminal sanctions for a failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

Bill/Act	Section/Subsection	Offence	Penalty
<b>Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2011</b>	Subclause 52A(6)	Failure to comply with a notice to produce information or documents.	Civil penalty

## 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***

**Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011** — Schedule 1, Part 1, item 1, section 52A (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*)

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

Nil