

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

Commentary on bills

• Australian Renewable Energy Agency Bill 2011	1
• Australian Renewable Energy Agency (Consequential Amendments and Transitional Provisions) Bill 2011	2
Classification (Publications, Films and Computer Games) Amendment (Online Games) Bill 2011	3
• Corporations Amendment (Future of Financial Advice) Bill 2011	4
Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011	5
Pay As You Go Withholding Non-compliance Tax Bill 2011	6
Personal Property Securities Amendment (Registration Commencement) Bill 2011	7
• Tax Laws Amendment (2011 Measures No.8) Bill 2011	8
Commentary on Amendments to Bills	10
Scrutiny of standing appropriations	12

Australian Renewable Energy Agency Bill 2011

Introduced into the House of Representatives on 12 October 2011

Portfolio: Resources and Energy

Background

This bill establishes Australian Renewable Energy Agency (ARENA) under the *Commonwealth Authorities and Companies Act 1997* and the statutory position of Chief Executive Officer of ARENA.

The bill also sets out ARENA's governance and financial arrangements.

Delayed commencement

Clause 2

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

In this bill, it is proposed that the Act commences on 1 July 2012. The explanatory memorandum at page 3 repeats the effect of this provision, but does not explain the reason for the timeframe. However, the second reading speech, at page 2, states that:

To ensure that momentum in the renewable energy industry is sustained and quickly built on in the future, AREAN is to commence operation from 1 July 2012.

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 the proposed commencement date.

Australian Renewable Energy Agency (Consequential Amendments and Transitional Provisions) Bill 2011

Introduced into the House of Representatives on 12 October 2011

Portfolio: Resources and Energy

Background

This bill provides for the transitional and consequential provisions required for the Australian Renewable Energy Agency to take over responsibility for funding and administration of existing renewable energy and related technology innovation projects that are administered by the Department of Resources, Energy and Tourism and the Australian Solar Institute Limited.

'Henry VIII' clause

Subitem 34(3)

Subitem 34(3) enables the making of regulations which provide 'that provisions of this Schedule [transitional provisions] are taken to be modified as set out in the regulations'. This is a so-called Henry VIII clause as it enables delegated legislation to change the effect of the primary statute under which it is made. The explanatory memorandum justifies this approach at page 16 as a response 'to the complexity of the transitional matters associated with the establishment of ARENA'. The purpose of the subitem 'is to provide a means of varying the operation of the Schedule in order to avoid any results that were not intended'. The purpose of the bill is to enable ARENA to take over responsibility for funding and administration of existing renewable energy and related technology innovation projects administered by other agencies. In these 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.

Classification (Publications, Films and Computer Games) Amendment (Online Games) Bill 2011

Introduced into the House of Representatives on 12 October 2011

Portfolio: Justice

Background

This bill amends the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act) to address uncertainty about the classification laws for mobile phone and online games. The bill inserts a new category of exempt online games into the Classification Act which removes the requirement for mobile phone and online games to be classified.

The Committee has no comment on this bill.

Corporations Amendment (Future of Financial Advice) Bill 2011

Introduced into the House of Representatives on 13 October 2011

Portfolio: Treasury

Background

This bill is in response to the 2009 *Inquiry into Financial Products and Services in Australia by the Parliamentary Joint Committee on Corporations and Financial Services*.

The bill amends the *Corporations Act 2001* to:

- sets up arrangements which require providers of financial advice to obtain client agreement to ongoing advice fees and enhanced disclosure of fees and services associated with ongoing fees; and
- extends the Australian Securities and Investments Commission's licensing and banning powers used to supervise the financial services industry.

'Henry VIII' clause

Subsections 962A(5), 962H(2) and (3), 962K(3) and 962S(2))

A number of proposed provisions in this bill (proposed subsections 962A(5), 962H(2) and (3), 962K(3) and 962S(2)) allow for the regulations to prescribe matters which would modify the applicability, or nature, of the obligations which would otherwise be imposed. In each case the explanatory memorandum gives the following general justification: that this degree of flexibility is required given the complexity of the financial services industry and that the regulation making power serves several functions, including keeping the legislation up to date, providing commercial certainty quickly and efficiently to industry participants, to prevent unintended outcomes and to provide efficacy to the legislation (see explanatory memorandum at pages 8, 9 12, and 15). 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 these provisions.

Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011

Introduced into the Senate on 13 October 2011

By: Senator Waters

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to provide for the emergency listing of threatened species and ecological communities where they are at risk from a significant and imminent threat.

The Committee has no comment on this bill.

Pay As You Go Withholding Non-compliance Tax Bill 2011

Introduced into the House of Representatives on 13 October 2011

Portfolio: Treasury

Background

This bill imposes a tax on directors and their associates of companies who have failed to pay to the Commissioner amounts withheld under pay as you go withholding arrangements.

The Committee has no comment on this bill.

Personal Property Securities Amendment (Registration Commencement) Bill 2011

Introduced into the House of Representatives on 12 October 2011

Portfolio: Attorney-General

Background

This bill will amend the *Personal Property Securities Act 2009* to ensure that the operative provisions will not automatically commence before the single national online register can be made available for public use.

The Committee has no comment on this bill.

Tax Laws Amendment (2011 Measures No.8) Bill 2011

Introduced into the House of Representatives on 13 October 2011

Portfolio: Treasury

Background

This bill amends various taxation laws as follows:

Schedule 1 amends the *Income Tax Assessment Act 1997* to provide the Commissioner of Taxation with discretion to disregard certain events that would otherwise trigger the assessment of certain income for a primary production trust in the year of the event.

Schedule 2 amends the *Petroleum Resource Rent Tax Assessment Act 1987* to clarify the location of the 'taxing point' for the purposes of the petroleum resource rent tax.

Schedule 3 amends the *Taxation Administration Act 1953* to allow the Commissioner of Taxation to commence proceedings to recover director penalties in certain circumstances without issuing a director penalty notice. The bill amends the *Income Tax Assessment Act 1997*, *Taxation Administration Act 1953* and *Taxation (Interest on Overpayments and Early Payments) Act 1983* to make directors and their associates liable to pay as you go withholding non-compliance tax in certain circumstances. The bill also provides for directors to be personally liable for their company's unpaid superannuation guarantee amount.

Schedule 4 amends the *Excise Act 1901* and *Fuel Tax Act 2006* to clarify taxation arrangements for gaseous fuels.

Retrospective application

Schedule 2

The amendments in Schedule 2 clarify what constitutes a 'marketable petroleum commodity' under the *Petroleum Rent Tax Assessment Act 1987* (PRRTAA). This clarification is said to confirm 'long established application' of the relevant provisions and to be consistent with the interpretation given to the provisions in a recent Federal Court decision. The explanatory

memorandum at page 17 notes that although the ‘narrow’ interpretation (rejected in the recent Federal Court case) may have reduced the PRRT payable on the Bass Strait project, ‘the impact on other PRRT taxpayers would have been less certain, and potentially increased their tax liability’.

The relevant provisions are complex, but the issue from a scrutiny perspective is that it is proposed that the amendments apply retrospectively from 1 July 1990, the date from which the application of the *PRRTAA* was extended to the Bass Strait project (see Schedule 2, item 3). The justification given at page 26 of the explanatory memorandum for the retrospective application of the amendments is that they: (1) will ‘remove any uncertainty regarding the long-established operation of the PRRT’ and (2) will not ‘impose any new tax burden, as they merely clarify and confirm the current application of the PRRT’.

Broadly, the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole. However, given that the proposed clarification of the law may have a detrimental effect on some taxpayers (insofar as the ‘narrow’ interpretation is thereby rejected) the Committee **seeks the Treasurer's further advice about whether the amendments are intended to apply to any cases or appeals which are currently pending before the courts and, if so, the justification for this approach.**

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

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COMMENTARY ON AMENDMENTS TO BILLS

Clean Energy Bill 2011

[Digest 11/11– response in 12th Report]

On 11 October a supplementary explanatory memorandum was tabled in the House of Representatives. On 12 October the House of Representatives agreed to 48 Government amendments. On 13 October 2011 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

Clean Energy (Consequential Amendments) Bill 2011

[Digest 11/11– response in 12th Report]

On 11 October a supplementary explanatory memorandum was tabled in the House of Representatives. On 12 October 2011 the House of Representatives agreed to 13 Government amendments. On 13 October 2011 a revised explanatory memorandum was tabled in the Senate. The Committee thanks the Minister for responding to the issue it raised about the delegation of legislative power in relation to refusing or suspending a registration by amending the primary legislation to make it clear that the regulations setting out the grounds for refusal must relate to whether the applicant is a fit and proper person. The Committee has no comment on the other amendments.

Clean Energy (Household Assistance Amendments) Bill 2011

[Digest 11/11– response in 12th Report]

On 11 October a supplementary explanatory memorandum was tabled in the House of Representatives. On 12 October 2011 the House of Representatives agreed to 22 Government amendments. On 13 October 2011 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

Clean Energy (Income Tax Rates Amendments) Bill 2011

[Digest 11/11– no comment]

On 13 October 2011 a correction to the explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

Clean Energy Regulator Bill 2011

[Digest 11/11 – no response required]

On 11 October a supplementary explanatory memorandum was tabled in the House of Representatives. On 12 October 2011 one Government amendment was agreed to in the House of Representatives. On 13 October 2011 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

Clean Energy (Tax Laws Amendments) Bill 2011

[Digest 11/11– no comment]

On 13 October 2011 a correction to the explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

[Digest 4/11– response in 6th Report]

On 13 October 2011 a replacement explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

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*

Australian Renewable Energy Agency Bill 2011 — clause 66

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

Nil