

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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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

- **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.

Australian Broadcasting Corporation Amendment (International Broadcasting Services) Bill 2011

Introduced into the Senate on 10 November 2011

By: Senator Ludlam

Background

This bill amends the *Australian Broadcasting Corporation Act 1983*, specifying the Australian Broadcasting Corporation as the sole provider of Australia's publicly funded international broadcasting services.

The Committee has no comment on this bill.

Broadcasting Services Amendment (Review of Future Uses of Broadcasting Services Bands Spectrum) Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Broadcasting Services Act 1992* to:

- defer the conduct of a statutory review of whether to allocate one or more additional commercial television broadcasting licences; and
- widen the scope of the review to take into account alternative uses of broadcasting services band spectrum.

The Committee has no comment on this bill.

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

Introduced into the House of Representatives on 3 November 2011
Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

Background

The bill seeks to:

- abolish the Office of the Australian Building and Construction Commissioner and create a new agency, the Office of the Fair Work Building Industry Inspectorate (the Building Inspectorate) to regulate the building and construction industry;
- remove the existing building industry specific laws that provide:
 - higher penalties for building industry participants for breaches of industrial law, and
 - broader circumstances under which industrial action attracts penalties;
- include a capacity for the Director of the Building Inspectorate to obtain an examination notice authorising the use of powers to compulsorily obtain information or documents from a person whom the Director believes has information or documents relevant to an investigation;
- introduce the following safeguards in relation to the use of the power to compulsorily obtain information or documents:
 - use of the powers is dependent upon a presidential member of the Administrative Appeals Tribunal being satisfied a case has been made for their use and issuing an examination notice;
 - persons summonsed to interview may be represented by a lawyer of their choice and their rights to refuse to disclose information on the grounds of legal professional privilege and public interest immunity will be recognised;
 - people summonsed for examination will be reimbursed for their reasonable expenses, including reasonable legal expenses;

- all examinations are to be videotaped and undertaken by the Director or an SES officer;
 - the Commonwealth Ombudsman will monitor and review all examinations and provide reports to the Parliament on the exercise of this power; and
 - the powers will be subject to a three year sunset clause. The decision on whether the coercive powers will be extended after three years will be made following a review of their use and ongoing need;
- create an office, the Independent Assessor, who, on application from stakeholders, may make a determination that the examination notice powers will not apply to a particular project; and

The bill does not affect the provisions that establish the Office of the Federal Safety Commissioner and its related OHS Accreditation Scheme.

Possible trespass on personal rights and liberties

Item 55

Item 52 of Schedule 1 proposes to introduce a new Part 1 into the *Building and Construction Industry Improvement Act 2005* relating to powers to obtain information. Item 55 proposes a new section 55 making it an offence, subject to a 6 month term of imprisonment (though a court may impose a maximum fine of 30 penalty units in lieu of or in addition to imprisonment), if a person fails to comply with obligations arising from being given an ‘examination notice’ requiring the production of information, documents, or to answer questions at an examination. However, the bill also subjects the procedures relating to this offence to a number of accountability checks. First, the use of the powers is dependent on a presidential member of the AAT being satisfied a case for their use exists; second, legal representation is allowed; and third all examinations will be monitored and reviewed by the Ombudsman, who is required to make an annual report to the Parliament about examinations conducted during the previous financial year. It is also notable that the powers are subject to a three year sunset clause, that all interviews are to be video recorded and undertaken by the Director or an SES employee and that persons required to attend an interview must be reimbursed for their reasonable expenses. In these circumstances the Committee **leaves the question of whether these measures are appropriate to the consideration of 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.

Insufficiently defined administrative powers

Schedule 1, item 72, section 59

Item 72 of Schedule 1 proposes a new section 59 which provides for the appointment of Fair Work Building Industry Inspectors. Other than requiring inspectors to have been appointed or employed by the Commonwealth, by a State or Territory, or to hold an office or appointment under a law of a State or Territory, the only limitation on who may be appointed is that the Director must be satisfied that the person of good character (see proposed subsection 59(2)). The Committee generally prefers that as many guidelines as possible outlining qualifications and/or training procedures are included in primary legislation. Especially given that inspectors will have 'search and seizure' powers, the Committee **seeks the Minister's advice as to whether consideration has been given to whether any further qualifications should be required or the appropriateness of providing for the formulation of training procedures and guidelines for the exercise of these powers to be included in the primary legislation.**

Pending the Minister's reply, 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.

Retrospective effect

Schedule 2, item 3

Item 3 of Schedule 2 of the Bill allows for regulations dealing with transitional and consequential matters to be made with retrospective effect. The explanatory memorandum states at page 35 that this is 'necessary to prevent unforeseen difficulties that may arise in the transition from the system under the Act before it is amended to the system provided for by the Bill'. Subitem 3(2) also makes it clear that regulations cannot retrospectively subject a person to a civil liability and that a person cannot be convicted of an offence or ordered to pay a penalty in relation to conduct contravening a

regulation that occurred prior to registration. The explanatory memorandum emphasises that the purpose of the regulation making power is ‘to deal with any issues that have been overlooked in the Bill and not to penalise a person for any potential breaches of a regulation that may apply retrospectively’. In these circumstances the Committee **leaves the question of whether this approach is appropriate to the Senate as a whole.**

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

Business Names Registration (Application of Consequential Amendments) Bill 2011

Introduced into the Senate on 3 November 2011

Portfolio: Innovation, Industry, Science and Research

Background

This bill clarifies that consequential amendments to other Commonwealth Acts will not apply until the National Business Names Registration System commences.

The Committee has no comment on this bill.

Customs Amendment (Military End-Use) Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* to provide measures to prohibit the export of 'non-regulated' goods that may contribute to a military end-use that may prejudice Australia's security, defence or international relations.

Merits review

Parliamentary scrutiny

Paragraph 112BA

The purpose of this bill is to amend the *Customs Act* so as to confer on the Defence Minister a broad discretionary power to prohibit the export of 'non-regulated' goods if the Minister suspects that the 'goods would or may be for a military end-use that would prejudice the security, defence or international relations of Australia' (proposed new paragraph 112BA(1)(a)). The exercise of the power is not subject to merits review given the 'high political content' and the fact that it is to be exercised personally by the Minister (see the explanatory memorandum at page 5). The Minister is required to give reasons to a person who receives a notice preventing them from exporting particular goods (subsection 112BA(2)), but this is not required if the Minister believes that this would prejudice the security, defence or international relations of Australia.

The Committee has a long-standing interest in the availability of appropriate merits review and notes the explanation given for excluding it in this case. In the absence of merits review, the Committee is not aware of any scrutiny mechanisms for the exercise of the power. The Committee is therefore of the view that it would be appropriate for the Minister to report to Parliament on the use of the power. The Committee **requests that the bill be amended to require annual reporting to Parliament on the exercise of the discretionary power in paragraph 112BA and seeks the Minister's advice as to whether the bill can be amended to this effect.**

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.

Defence Trade Controls Bill 2011

Introduced into the House of Representatives on 2 November 2011
Portfolio: Defence

Background

This bill implements the *Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation*. The bill also amends Australia's controls over activities involving defence and dual-use goods, and related technology and services.

The explanatory memorandum contains a Regulation Impact Statement.

Delegation of legislative power

Clause 10

Clause 10 of the bill creates offences concerning the provision or supply of defence services in relation to the Defence and Strategic Goods List. The penalties (imprisonment for 10 years or 2500 units or both) are said to be consistent with 'the penalty in the *Customs Act 1901* for exporting goods listed in the DSGL without authorisation.' Subclauses 10(3)-(7) establish a number of defences to the offences. One of the subclauses (subclause 10(7)) provides that the offences do not apply in circumstances prescribed by the regulations. The explanatory memorandum states that the Government intends to propose regulations to cover a number of circumstances, but does not indicate why these matters cannot appropriately be dealt with in the primary legislation. As the Committee prefers that important matters are included in primary legislation as much as possible, the Committee's **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.

Reversal of onus Clauses 10 and 15

In relation to each of the defences in clause 10 (which creates offences relating to the provision or supply of defence services in relation to the Defence and Strategic Goods List) the defendant bears an evidential burden of proof. The explanatory memorandum states at page 47 that this approach is justified as:

...it is appropriate and practical to require the defendant to adduce or point to evidence that suggests the particular exception applies as these would be matters within the defendant's personal knowledge.

Importantly the circumstances which the Government intends to prescript pursuant to subclause 10(7) also appear to be matters within the defendant's personal knowledge.

The same issue arises in relation to clause 15, which relates to arranging supplies and provision of defence services in relation to the Defence and Strategic Goods List and the same justification is provided (see the explanatory memorandum at page 53).

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

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

Wide discretion Clauses 11, 14 and 16

Clause 11 of the Bill confers a wide discretionary power on the Minister to grant or refuse a permit to supply technology or provide services related to DSGL goods. Subclause 11(4) provides that the Minister may give the person a permit if satisfied that the 'activity would not prejudice the security, defence or international relations of Australia'. The explanatory memorandum at page 48 outlines a list of possible criteria as permissible considerations, but these are not reflected in the bill.

Clauses 14 and 16 also include a requirement for the Minister to consider whether the relevant activities will 'prejudice the security, defence or international relations of Australia'.

Although it is accepted that the nature of the decisions may necessitate the breadth of the discretionary powers provided in the bill, the Committee **seeks the Minister's advice as to whether consideration has been given to including the criteria listed as permissible considerations on pages 48 and 54 of the explanatory memorandum in the legislation to provide some guidance for the exercise of the power.**

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

Strict liability

Clauses 13 and 18

Clause 13 provides for a strict liability offence for breaching permit conditions. The explanatory memorandum at page 50 justifies this approach as being necessary to 'provide an adequate deterrent to breaching permit conditions which will attract a minor penalty of a maximum of 60 penalty units'. Further, it is stated that 'any permit issued...will clearly advise the conditions with which the permit holder will need to comply, including the potential consequences of non-compliance'.

The same issue arises in relation to clause 18 which also deals with circumstances relating to the breach of permit conditions. An identical explanation appears at page 56 of the explanatory memorandum.

Given that the approach is consistent with the *Guide* and that conditions will be clearly stated, the Committee **leaves the question of the whether the approach proposed in these clauses is appropriate to the consideration of the Senate as a whole.**

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

Strict liability

Clause 28

The provisions in Part 3 of the Bill implement the *Defense Trade Cooperation Treaty* between Australia and the United States of America. Clause 28 enables conditions to be placed on approvals granted for a person to be part of the 'Australian Community', the effect of which is to remove requirements for the obtaining of licences or permits for particular transactions. Subclause 28(5) makes a breach of a condition an offence of strict liability. The penalty set for a body corporate is 300 penalty units. The explanatory memorandum indicates at page 65 that, applying the corporate multiplier, this penalty is the equivalent of a penalty of 60 penalty units applied to an individual. The explanatory memorandum at page 51 justifies the imposition of strict liability as being necessary to provide an adequate deterrent and by stating that any approval issued under the clause will clearly advise of the conditions and the consequences of non-compliance. In the circumstances the Committee **leaves the question of the 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 approach.

Reversal of onus

Clause 31

Clause 31 introduces a number of offences with substantial penalties. These penalties are justified as being consistent with penalties for similar offences in other Commonwealth legislation (see the explanatory memorandum at page 67).

Subclause 31(7) provides that the regulations may prescribe exceptions in relation to the offences and defendants bear an evidential burden of proof in relation to these exceptions. The explanatory memorandum states at page 68 that:

...where a defendant seeks to raise the defence, it is appropriate and practical to require the defendant to adduce or point to evidence that suggests the particular exception applies as these would be matters within the defendant's personal knowledge'.

However, it is difficult to evaluate whether it is appropriate for a defendant to bear the evidential burden of proof without knowing the nature of the exceptions to be prescribed in the regulation. The Committee therefore **seeks further information from the Minister about the exceptions and whether they can be outlined in the primary legislation.**

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.

Abrogation of the privilege against self-incrimination Parts 4, 5 and 6

Part 4 of the bill deals with monitoring powers. These appear to be consistent with *A Guide to Framing Commonwealth Offences, Penalties and Enforcement Powers*. The requirement imposed on persons to produce documents and answer questions abrogates the privilege against self-incrimination, but it is subject to a use and derivative use immunity in relation to general criminal proceedings (see clause 44).

The explanatory memorandum states at page 78 that the approach in the bill is consistent with enforcement powers in other equivalent Commonwealth legislation and will enhance the ability to monitor and ensure compliance with the defence trade control regime and therefore assist in the effective administration of the regime, is a matter of major public importance and which raises issues of national security and international relationships.

The same issue in relation to self-incrimination arises in relation to the information gathering powers granted in Part 5 (see clause 57 and the explanatory memorandum at pages 80 to 81) and in relation to the record-keeping requirements in Part 6 of the Bill.

In the circumstances, the Committee **leaves the question of whether the proposed monitoring powers granted in Part 4, and the issue relating to privilege against self-incrimination in Parts 5 and 6, may be left to the consideration of the Senate as a whole.**

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

Deterring People Smuggling Bill 2011

Introduced into the House of Representatives on 1 November 2011
Portfolio: Home Affairs

Background

This bill amends the *Migration Act 1958* (the Act) to clarify the meaning of the words 'no lawful right to come to Australia' contained in the people smuggling offences in the Act commencing retrospectively from December 1999.

Retrospective effect Schedule 1, item 2

The purpose of this bill is to clarify the meaning of a key phrase in the offences for people smuggling contained in the *Migration Act*. The application of these offences depends on the interpretation of the statutory words 'no lawful right to come to Australia': a person who is involved in particular ways with bringing to Australia persons with no lawful right to come to Australia contravenes the offence provisions. Item 1 of Schedule 1 of the bill would introduce a new section 228B into the *Migration Act*. This provision provides that non-citizens seeking protection or asylum who do not have a valid visa have 'no lawful right to come to Australia' unless they fall into one of the listed exemptions. As the explanatory memorandum notes at page 6, the amendment is not designed to directly affect the rights of individuals seeking protection or asylum or Australia's obligations in relation to those persons. Rather the amendments relate to the operation of people smuggling offences in the *Migration Act*.

Schedule 1 would give retrospective effect to the proposed changes to the operation of the people smuggling offences. The proposed amendment would apply to offences committed or alleged to have been committed from 16 December 1999, the date when the words being clarified were originally introduced into the *Migration Act*. The stated purpose of giving the amendment retrospective effect is to 'address doubt that may be raised about convictions that have already been made under [the existing provisions]' (see the explanatory memorandum at page 1). Additionally, it is made clear that the amendments will apply in relation to proceedings commenced on or after the day the amendments will commence and also to proceedings which have

not been finally determined but were commenced prior to the day the amendment commences.

The justification provided for the retrospective application of the amendment appears to rest on the claim that the amendments are consistent with both the original intent of the Parliament (see explanatory memorandum at pages 4 and 5, discussing the legislative history) and the consistent interpretation given to the people smuggling offences since 1999 which assumes that the offences apply where a person does not meet the requirements for coming to Australia under domestic law. Based on these assumptions, the amendment is characterised as an 'avoidance of doubt provision' (see page 6 of the explanatory memorandum).

Although there are situations where retrospective legislation is justified (most notably when there have been other failings of the legal system that need to be corrected), liberal and democratic legal traditions have long expressed strong criticisms of retrospective laws that impose criminal guilt. Although in Australia there is no constitutional prohibition on the use of such laws, there are such provisions in other legal systems and retrospectivity is generally considered to compromise basic 'rule of law' values. The core objection to retrospective laws is straightforward: persons should not be punished for acts that were not illegal at the time they acted. Not only may individuals be unfairly surprised by the *ex post facto* nature of their legal obligations, such laws show a basic disrespect for citizens insofar as they undermine the idea that law is a system of rules designed to guide conduct. Further, given that breaches of the criminal law may lead to deprivations of liberty, retrospective *criminal* laws carry added opprobrium.

Although the principles that underpin the rule of law (including the general requirement of retrospectivity in legislation) are not absolute, it is submitted that the case for retrospective changes to laws creating criminal liability should establish that exceptional circumstances exist (this approach is also consistent with paragraph 6.18 of the *Legislation Handbook*). As the proposed amendments pre-empt judicial interpretation of the existing provisions they cannot be considered as a mere exercise in clarification of the existing offence provisions for the 'avoidance of doubt'. If the courts were to authoritatively interpret the existing offence provision in a way that is contrary to the proposed amendments then clearly the amendments would constitute a substantive change to the law, albeit as a matter of construction rather than as an amendment to the elements of the offence. For these reasons it appears to

the Committee that the justification for the retrospective operation of the amendments proposed in this bill, which are clearly intended to apply to proceedings which are already before the courts, requires further explanation. The Committee **expresses reservations about the use of retrospective legislation to confirm criminal guilt, and seeks the Minister's further explanation as to why it is considered that there are exceptional circumstances justifying retrospectivity to December 1999.**

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.

Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011

Introduced into the Senate on 1 November 2011

By: Senator Waters

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to require Commonwealth assessment and approval of mining operations likely to have a significant impact on water resources.

Possible severe penalties

Various

A number of clauses in the bill seek to impose civil and criminal penalties for specified conduct taken in the course of mining operations relating to water resources. The penalties include 5,000 penalty units for an individual and 50,000 penalty units for a body corporate and, in specified circumstances, imprisonment for 7 years or 420 penalty units, or both. The explanatory memorandum does not seek to justify the level of penalty to be imposed.

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4 of the *Guide* relates to 'framing an offence', and Part 5 contains a statement of the matters which should be considered in setting penalties. The Committee considers that penalties should be consistent across Commonwealth legislation, should take into account the principles outlined in the *Guide* and expects that reasons for the imposition of proposed penalties will be set out in the relevant explanatory memorandum. To ensure that there is no undue trespass on rights the Committee therefore **seeks the Senator's clarification as to why the level of penalties imposed by these provisions, which include imprisonment, are appropriate and whether they are consistent with similar penalties in other Commonwealth legislation.**

Pending the Senator'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 Subclause 24G(7)

Clause 24G proposes to introduce offences for specified conduct taken in the course of mining operations relating to water resources. The offences do not apply in circumstances outlined in subsection 24G(7), but the defendant bears the evidential burden in relation to these defences. The Committee expects that the explanatory memorandum to a bill should explain why the reversal of onus is appropriate, and this is also consistent with the *Commonwealth Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* (see especially Part 4.6). As the explanatory memorandum does not comment on the reasons why the defendant should bear an evidential burden, the Committee **seeks the Senator's advice as to the justification for the proposed approach.**

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

Retrospective commencement Clause 2

The amendments proposed by the Bill would commence on the day the Bill was introduced into the Senate, 1 November 2011. The explanatory memorandum at page 1 states:

Under normal circumstances commencement on Royal Assent would apply, however this retrospective commencement is required to ensure approvals for mining operations are not fast-tracked following introduction of this Bill. The intention is to ensure all mining operations commencing after the day this Bill is introduced are subject to Commonwealth assessment and approval where these operations are likely to have a significant impact on Australia's water resources.

The Committee notes these justifications for the proposed approach. However, given that the amendments impose a number of new offences and civil penalties the Committee **seeks the Senator's further advice as to the need for the retrospective operation of the amendments.**

Pending the Senator'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.

Livestock Export (Animal Welfare Conditions) Bill 2011

Introduced into the House of Representatives on 31 October 2011

By: Mr Wilkie

Background

This bill amends the *Australian Meat and Live-stock Industry Act 1997* to require that Australian livestock slaughtered overseas be slaughtered in accordance with the Australian standard for the hygienic production and transportation of meat and meat products for human consumption.

The Committee has no comment on this bill.

Minerals Resource Rent Tax Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill is part of a package of five bills and imposes a minerals resource rent tax on miner's mining profits, less its mining allowances, at a rate of 22.5 per cent.

The Committee has no comment on this bill.

Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill is part of a package of five bills relating to the imposition of the minerals resource rent tax.

The bill amends a range of acts and also provides for transitional matters relating to the enactment of the Minerals Resource Rent Tax.

Retrospective effect

Schedule 4, items 1 and 11

Item 1 of Schedule 4 of this bill states that the ‘MRRT law extends to matters and things whether occurring before or after 1 July 2012 (except where a contrary intention appears)’. Although this application provision is general, the only (brief) reference in the explanatory memorandum to it refers specifically to the general anti-avoidance rule (in Division 210 of the Mineral Resource Rent Tax Bill). The explanatory memorandum states at page 334 that this general anti-avoidance rule—which applies if an entity gets an MRRT benefit from a scheme and the sole or dominant purpose of that entity or another party to the scheme was to achieve that MRRT benefit—applies to schemes entered into on or after 2 May 2010, the date the MRRT was announced. The provision is framed in general terms (ie is not limited to the anti-avoidance rule) and the appropriateness of treating the anti-avoidance rule as being applicable from the date of the announcement of the MRRT is not explained in the explanatory memorandum.

In addition, item 11 of Schedule 4 provides that the general anti-avoidance rule also applies to a scheme entered into before 2 May 2010, but the explanatory memorandum merely repeats the effect of the provision and does not provide reasons for the proposed approach.

In the circumstances the Committee seeks the Minister's fuller explanation of the justification for the approach proposed in these items.

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.

Minerals Resource Rent Tax (Imposition-Customs) Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill is part of a package of five bills relating to the imposition of the minerals resource rent tax.

The bill imposes minerals resource rent tax, as it is a duty of customs, at a rate of 30 per cent, less a 25 per cent extraction allowance to reflect the contribution of miners' expertise in extracting the resources.

The Committee has no comment on this bill.

Minerals Resource Rent Tax (Imposition-Excise) Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill is part of a package of five bills relating to the imposition of the minerals resource rent tax.

The bill imposes minerals resource rent tax, as it is a duty of excise, at a rate of 30 per cent, less a 25 per cent extraction allowance to reflect the contribution of miners' expertise in extracting the resources.

The Committee has no comment on this bill.

Minerals Resource Rent Tax (Imposition-General) Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill is part of a package of five bills relating to the imposition of the minerals resource rent tax.

The bill imposes minerals resource rent tax, so far as that tax is neither a duty of customs nor a duty of excise, at a rate of 30 per cent, less a 25 per cent extraction allowance to reflect the contribution of miners' expertise in extracting the resources.

The Committee has no comment on this bill.

Paid Parental Leave and Other Legislation Amendment (Consolidation) Bill 2011

Introduced into the House of Representatives on 3 November 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *Paid Parental Leave Act 2010* (the Act) to:

- refine provisions which permit ‘keeping in touch days’; and
- clarify the operation of a number of provisions, including debt recovery provisions, notice provisions, and the provision relating to delegation of the Secretary’s powers under the Act.

The bill also amends the *Fair Work Act 2009* to clarify unpaid parental leave arrangements where there is a stillbirth or infant death to enable early commencement of unpaid parental leave, and to enable employees who are on unpaid parental leave to perform permissible paid work for short periods for the purposes of ‘keeping in touch’.

The Committee has no comment on this bill.

Petroleum Resource Rent Tax Assessment Amendment Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill amends the *Petroleum Resource Rent Tax Assessment Act 1987* to expand its coverage to onshore petroleum projects and the North West Shelf project. From 1 July 2012, the Petroleum Resource Rent Tax (PRRT) will be extended and apply to all oil and gas production in Australia. The PRRT will not apply to the Joint Petroleum Development Area in the Timor Sea.

The Committee has no comment on this bill.

Petroleum Resource Rent Tax (Imposition-Customs) Amendment Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill imposes a tax in respect of the profits of certain petroleum projects, so far as that tax is a duty of customs and sets that rate at 40 per cent from 1 July 1986.

The Committee has no comment on this bill.

Petroleum Resource Rent Tax (Imposition-Excise) Amendment Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill imposes a tax in respect of the profits of certain petroleum projects, so far as that tax is a duty of excise and sets that rate at 40 per cent from 1 July 1986.

The Committee has no comment on this bill.

Petroleum Resource Rent Tax (Imposition-General) Amendment Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill imposes a tax in respect of the profits of certain petroleum projects, so far as that tax is neither a duty of customs nor excise and sets that rate at 40 per cent from 1 July 1986.

The Committee has no comment on this bill.

Public Accounts and Audit Committee Amendment (Ombudsman) Bill 2011

Introduced into the Senate on 1 November 2011

By: Senator Bob Brown

Background

This bill amends the *Public Accounts and Audit Committee Act 1951* to expand the role of the Public Accounts and Audit Committee to provide similar duties in relation to the Commonwealth Ombudsman as it currently has in relation to the Auditor General. In particular, this Bill would enable the Joint Parliamentary Committee of Public Accounts and Audit to consider the operations and resources of the Ombudsman, including funding and staff numbers.

The Committee has no comment on this bill.

Superannuation Guarantee (Administration) Amendment Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill amends the *Superannuation Guarantee (Administration) Act 1992* to increase the age of an employee at which the superannuation guarantee (SG) no longer needs to be provided from 70 to 75, and to gradually increase the SG charge percentage from 9 per cent to 12 per cent.

The Committee has no comment on this bill.

Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011

Introduced into the House of Representatives on 3 November 2011

Portfolio: Treasury

Background

This bill amends the *Superannuation Guarantee Administration Act 1992* and the *Superannuation Industry (Supervision) Act 1993*. The bill establishes the core framework for MySuper products including:

- defining a MySuper product;
- limiting a regulated superannuation fund to offering only one MySuper product, except in certain circumstances;
- allowing registrable superannuation entity licensees to apply to the Australian Prudential Regulation Authority for authorisation to offer a MySuper product;
- setting out rules on the payment of contributions and account transfers for MySuper products; and
- setting out the fees that can be charged and the basis on which those fees can be charged to members of a MySuper product.

Strict liability

Schedule 1, item 9, subsections 29W(2) and 29WA(3)

Proposed subsection 29W(2), to be inserted into the *Superannuation Industry (Supervision) Act 1993* by item 9 of Schedule 1, would make the offence of offering a product as a MySuper product when not authorised to do so an offence of strict liability. The explanatory memorandum argues at page 28 that this is necessary:

...as the consequences of an RSE licensee contravening this provision could inadvertently cause an employer contributing superannuation benefits for their employees to the fund to be in breach of its requirements under the SG Act, which may cause that employer to incur a superannuation guarantee shortfall charge'.

The penalty (60 penalty units) is consistent with the approach to strict liability offences set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. Further, although the explanatory memorandum does not raise the point, it would be reasonable to expect the licensee to be in a position to guard against the possibility of a contravention of this offence.

The same issue also arises in relation to proposed subsection 29WA(3) with a similar explanation at page 13 of the explanatory memorandum.

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

Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill provides for amendments relating to taxation and superannuation.

Schedule 1 repeals ‘Subdivision 61-J – 25% entrepreneurs’ tax offset’ of the *Income Tax Assessment Act 1997*, abolishing the entrepreneurs’ tax offset.

Schedule 2 amends the *Income Tax Assessment Act 1997* by:

- increasing the small business instant asset write-off threshold from \$1,000 to \$6,500; and
- consolidating the long life small business pool and the general small business pool into a single pool to be written off at one rate.

Schedule 3 amends the *Income Tax Assessment Act 1997* to allow small business entities to claim an accelerated initial deduction for motor vehicles acquired in the 2012-13 and subsequent income years.

Schedule 4 amends the *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003* to provide for the low income superannuation contribution.

The Committee has no comment on this bill.

Telecommunications (Industry Levy) Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill is part of a package of three bills relating to the delivery of universal service and other public interest services.

The bill imposes a levy on certain persons to fund the Telecommunications Universal Service Management Agency (TUSMA) in relation to:

- payments made by TUSMA to contractors or grant recipients under clause 13 of the Telecommunications Universal Service Management Agency Bill 2011 (the TUSMA Bill), and
- TUSMA's administrative costs.

The Committee has no comment on this bill.

Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill is part of a package of three bills relating to the delivery of universal service and other public interest services.

The bill amends the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *Australian Communications and Media Authority Act 2005*.

The bill makes consequential amendments and includes provisions which, if specified pre-conditions are met, would enable the progressive removal of the current USO for standard telephone services and payphones.

The Committee has no comment on this bill.

Telecommunications Universal Service Management Agency Bill 2011

Introduced into the House of Representatives on 2 November 2011

Portfolio: Treasury

Background

This bill is part of a package of three bills relating to the delivery of universal service and other public interest services. This bill provides:

- for the establishment of the Telecommunications Universal Service Management Agency (TUSMA) as the statutory agency that will have the responsibility for the effective implementation and administration of service agreements or grants that deliver universal service and other public policy telecommunications outcomes;
- for the setting out of TUSMA's corporate governance structure and reporting and accountability requirements;
- power for the Minister to, by legislative instrument, set the standards, rules and minimum benchmarks for TUSMA's contracts and grants; and
- for the setting out of arrangements for consolidating the two current Universal Service Obligation and National Relay Service industry levy regimes into a single regime to contribute funding towards TUSMA's costs.

Determination of important matters by delegated legislation

Various

This Bill introduces reforms designed to change the regulatory approach in relation to 'public interest telecommunications services', including universal service obligations (USOs). Currently such obligations are enforceable by ACMA through standard regulatory enforcement mechanisms. The fundamental change in regulatory approach is that under the arrangements proposed in this Bill, Ministerial determinations (made by legislative instruments) will be enforceable through contract law. The explanatory memorandum explains that the need for change is driven by a change in the structure of the market associated with the rollout of the NBN.

The Bill establishes a new statutory agency (TUSMA) whose main role will be to enter into and administer contracts or grants of financial assistance (on the behalf of the Commonwealth) for the USO and other public interest services. Under this arrangement, policy objects associated with public interest requirements will be set out in regulations and these will then be deemed to be conditions of the universal service components of the existing agreement with Telstra and any future contracts and grants entered into by TUSMA. By subclause 15(11) of the bill, TUSMA would be required to take all reasonable steps to ensure that a contractor or grant recipient complies with such requirements.

The explanatory memorandum states at page 7 that it is the ‘Government’s intention that, as USO regulatory obligations are progressively lifted from Telstra under the measures in the Universal Service Reform Bill, the existing USO safeguards will form the basis of contract standards in relation to the provision of standard telephone services and payphones. However, the Bill gives the Minister a broad power to make contract standards, rules or performance benchmarks to enable the Government to set requirements in relation to all future TUSMA contracts and grants’ (described at page 7 of the explanatory memorandum).

The Committee is concerned that this enables important matters to be determined by a legislative instrument. However, the explanatory memorandum (also at page 6) states that this approach provides flexibility where there is a need for TUSMA to cover future public interest requirements in the terms of contracts and grants and emphasises that the requirements of the *Legislative Instruments Act* (which include arrangements for publication, Parliamentary scrutiny and possible disallowance) will apply. Given the change in regulatory approach, which is based on enforcing public interest obligations through contract, the Committee **leaves the question of whether this delegation of legislative power is appropriate to the consideration of the Senate as a whole.**

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

Merits review

Various

The Bill imposes a number of ‘planning and reporting obligations’ on TUSMA and these enable the Parliament, industry and consumers to remain informed of its activities (see the explanatory memorandum at page 8). In relation to the performance of contractors and grant recipients, reports must detail any notifications of breaches and actions taken in relation to breaches. However, the fact that public interest requirements are to be enforced through contract law raises a question about whether persons aggrieved by a breach of public interest requirements (who are not privy to the contract) are able to have these obligations enforced or decisions concerning them reviewed. For example, decisions taken to enter into contracts or pursuant to existing contracts are unlikely to be considered as having been ‘made under an enactment’ for the purposes of *ADJR* Act review. Given that the terms in the contracts and grant agreements will include matters which are considered to be in the public interest, the Committee **seeks the Minister's advice as to what review mechanisms are available to consumers and others who may be aggrieved by an alleged breach of the public interest requirements or a failure by TUSMA to adequately enforce these obligations through contract law.**

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.

Strict liability

Part 6, Division 7, clause 120

Clause 120 proposes to introduce a strict liability offence of failing to lodge an eligible revenue return. As a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

In this case there is no explanation of the application of strict liability to this offence in the explanatory memorandum. The Committee therefore **seeks the Minister's advice about the justification for this 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.

COMMENTARY ON AMENDMENTS TO BILLS

Crimes Legislation Amendment Bill (No.2) 2011

[Digest 4/11– no response required]

On 31 October 2011 an addendum to the explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

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

[Digest 8/11– no comment]

On 3 October 2011 the House of Representatives agreed to 10 Government amendments and one Australian Greens amendment and passed the bill. On 10 November 2011 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the amendments or the revised explanatory memorandum.

Social Security Amendment (Student Income Support Reforms) Bill 2011

[Digest 12/11 – no comment]

On 31 October 2011 a correction to the explanatory memorandum was tabled in the House of Representatives. The Committee has no comment on the additional material.

Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill 2011

(Previous citation: Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010)

[Digest 8/10 & 9/11 [amendments] – no comment]

On 31 October 2011 a revised explanatory memorandum was tabled in the House of Representatives. The Committee has no comment on the additional material.

Tobacco Plain Packaging Bill 2011

[Digest 8/11 – response in 10th Report]

On 10 November 2011 three Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the Senate. The

amendments to clause 2 propose that the commencement of provisions creating offences and civil penalties will be deferred from May 2012 until October 2012 'to ensure that there is sufficient time for the industry to comply before the penalty provisions commence' (see paragraph 2, page 2 of the Supplementary Explanatory Memorandum). In light of the explanation provided the Committee **leaves the question of whether a delay in commencement of more than 6 months is appropriate to the consideration of the Senate as a whole.** The Committee has no comment on the other material.

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 |
|---|--------------------|--|---|
| Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 | Item 55 | Failure to comply with obligations arising from receipt of an 'examination notice' requiring the production of information, documents or to answer questions | 6 months imprisonment or 30 penalty units or both |
| Defence Trade Controls Bill 2011 | Part 4 | This part establishes monitoring powers, which include requirements to produce documents and answer questions and a failure to comply constitutes an offence | 6 months imprisonment |

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*

Telecommunications Universal Service Management Agency Bill 2011 — clause 84 (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 43rd Parliament since the previous *Alert Digest*

Nil