

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.

Access to Justice (Federal Jurisdiction) Amendment Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Attorney-General

Background

This bill amends the *Administrative Appeals Tribunal Act 1975*, *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, *Federal Magistrates Act 1999* and the *Judiciary Act 1903*. The bill also makes consequential amendments to the *Australian Crime Commission Act 2002*.

Schedule 1 enhances the Federal Court's powers concerning discovery, following the Australian Law Reform Commission's March 2011 report, *Managing Discovery: Discovery of Documents in Federal Courts*.

Schedule 2 implements in all four federal courts the model bill of the Standing Committee of Attorneys-General (SCAG) concerning suppression orders and non-publication orders.

Schedule 3 implements, in all four federal courts, the SCAG model bill concerning vexatious proceedings.

Schedule 4 aligns the jurisdictional limit for matters heard by the Family Law Magistrates in Western Australia with that of Federal Magistrates Court.

Schedule 5 provides the Administrative Appeals Tribunal with more flexibility when dealing with the payment of fees.

Trespass on personal rights and liberties

Schedule 2

Schedule 2 of the Bill makes amendments in relation to the powers of specified federal courts to make suppression and non-publication orders. As the explanatory memorandum explains, the nature of these powers is not intended to be different from implied and express statutory powers already held by the relevant courts. In particular, the explanatory memorandum notes at page 2 that the new express statutory basis for the exercise of these powers is intended to be consistent with the current jurisprudence which demands that

an order must be ‘necessary’ and should not be made lightly, bearing in mind the recognition of open justice as a fundamentally important interest which must be considered. **The committee leaves the question of whether the proposed approach, which implements the model Bill of the Standing Committee of Attorneys-General (SCAG), is appropriate to the consideration of the Senate as a whole.**

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

Trespass on personal rights and liberties

Schedule 3, Part 2, Division 2

Schedule 3, Part 2, Division 2 of the Bill implements the SCAG model bill relating to vexatious proceedings. Taken as a whole the proposed provisions clearly limit the access to justice (to the courts) of persons who have a vexatious proceedings order made against them. Nevertheless, there is a clear public interest in protecting the judicial process against genuinely vexatious proceedings. One notable aspect of the provisions is a power for the courts to dismiss an application for leave to institute proceedings by a person who is subject to a vexatious proceedings order without an oral hearing. The court may choose to afford an oral hearing but is entitled to dismiss an application on the basis of written submissions. This is a means for providing ‘procedural fairness’ which also gives ‘the court flexibility to determine applications by a person subject to a vexatious proceedings order on the papers’ (see the explanatory memorandum at page 9). **In the circumstances, the committee leaves the question of whether the proposed approach relating to vexatious proceedings is appropriate to the consideration of the Senate as a whole.**

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

Antarctic Treaty (Environment Protection) Amendment Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Sustainability, Environment, Water, Population and Communities

Background

This bill amends the *Antarctic Treaty (Environment Protection) Act 1980* (the Act). The bill implements Australia's international obligations under three Measures adopted under Article IX of the *Antarctic Treaty* [1961] ATS 12 and Article 9 of the *Protocol on Environmental Protection to the Antarctic Treaty* [1998] ATS 6.

The bill implements the following amendments:

- provides the ability for the Minister to grant a safety approval, an environmental protection approval, and to impose conditions on such approvals;
- implements new offences and civil penalties regarding unapproved activities, activities carried on in contravention of the conditions imposed by an approval, and offences and civil penalties related to environmental emergencies;
- establishes a liability regime for environmental emergencies that occur in the Antarctic;
- establishes an Antarctic Environmental Liability Special Account to receive payments from operators for the costs of response action to an environmental emergency caused by their activities in the Antarctic;
- implements new offences and civil penalties applicable to tourist vessels operating in the Antarctic;
- makes minor and technical amendments to the Act; and
- amends the long title of the Act to extend the scope of the legislation.

Commencement
Clause 2

This item provides for commencement of the Act to be linked to the day on which Measure 15 comes into force in Australia. Measure 15 was adopted by the XXXIInd Antarctic Treaty Consultative Meeting at Baltimore on 17 April 2009. The explanatory memorandum provides information about the commencement process at page 4.

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

Reversal of onus
Schedule 1, item 8
Schedule 2, items 21 and 22; and
Schedule 3 item 3

Item 8 of Schedule 1 inserts a new Division 5 into the *Antarctic Treaty (Environment Protection) Act 1980*. The Division imposes offences and civil penalties relating to safety approvals. The penalties are consistent with existing penalties and are set to deter non-compliance. A person wishing to rely on a defence under the provisions inserted by this item bears an evidential burden of proof. The explanatory memorandum gives the following justification for this approach at page 13:

This is because the facts in issue in relation to each contravention remain wholly within the knowledge of the person who has allegedly committed the contravention. In addition, the feasibility and expense of adducing evidence in relation to an alleged contravention within the Antarctic is excessively prohibitive due to the remote locality and limited access.

The same issue arises in relation to the provision proposed to be introduced by items 21 and 22 of Schedule 2; and it also arises in relation to item 3 of Schedule 3.

In the committee's view the approach is consistent with that set out in the *Guide to Framing Commonwealth Offences*.

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

Australian Research Council Amendment Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Innovation, Industry, Science and Research

Background

This bill amends three existing financial year funding figures for indexation and extends the forward estimate period to include the financial year starting on 1 July 2014, resulting in additional spending of \$885.335 million over the four financial years.

The Committee has no comment on this bill.

Broadcasting Services Amendment (Regional Commercial Radio) Bill 2011

Introduced into the Senate on 24 November 2011

Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends various provisions in the *Broadcasting Services Act 1992* that relate to obligations imposed on regional commercial radio broadcasting licensees in relation to local content, local presence and local news and information.

The Committee has no comment on this bill.

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011

Introduced into the House of Representatives on 24 November 2011

Portfolio: Treasury

Background

This bill sets up a framework for the provision of financial advice. These reforms represent the Government's response to the 2009 *Inquiry into Financial Products and Services in Australia* by the Parliamentary Joint Committee on Corporations and Financial Services.

Poor explanatory memorandum

It is regrettable that the explanatory memorandum for this Bill does not contain an index. In the Committee's view particular care should be taken to ensure that an explanatory memorandum which adopts a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order) includes an index that is accurate and cross-references every provision in the bill. Unfortunately, the explanatory memorandum to this bill did not include an index. The Committee therefore **seeks the Treasurer's advice as to whether an amended explanatory memorandum that includes an index can be issued.**

Delegation of legislative power

Schedule 1, item 23

Schedule 1, item 23, inserts a new Division which provides for the introduction of a 'best interests' of the client obligation to be imposed upon providers of financial services. The regulations (see proposed subsection 961B(3)) can add or remove particular steps, and a provider must prove they have complied with the steps if they wish to rely on subsection 961B(2) to establish that the best interests obligation has been fulfilled. That subsection provides that a provider will be taken to satisfy the duty to act in the best interests of the client if the specified actions have been undertaken.

The justification for allowing these central elements of the statutory obligation to be dealt with by regulation is (1) because the diversity and complexity of the financial services industry justifies a 'degree of flexibility around the more

detailed aspects of the best interests obligation' and (2) that this will enable the legislation to be updated in a timely manner where evidence reveals certain aspects of what may be shown to satisfy the best interests requirement result in undesirable consequences (see the explanatory memorandum at page 16). **The committee leaves the question of whether the 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 this matter.

Delegation of legislative power Subsection 963C(3)

Although the explanatory memorandum does not expressly deal with the point, similar justifications appear to underlie the need for regulations (see proposed new subsection 963C(3)) to specify what will not count as 'conflicted remuneration' for the purposes Division 4, inserted by item 24 of Schedule 1. As the explanatory memorandum (at pages 31 and 32) does give examples of the sorts of regulations which - after consultation - will be made, that **the committee leaves the question of whether the 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 this matter.

Crimes Amendment (Fairness for Minors) Bill 2011

Introduced into the Senate on 23 November 2011

By: Senator Hanson-Young

Background

This bill amends the *Crimes Act 1914* by defining timeframes and establishing evidentiary procedures for the age determination and prosecution of non-citizens who are suspected or accused of people smuggling offences under the *Migration Act 1958* and who may have been a child (under 18) at the time of allegedly committing the offences.

The Committee has no comment on this bill.

Crimes Legislation Amendment (Powers and Offences) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Justice

Background

This bill amends a range of key Commonwealth law enforcement legislation relating to the effective investigation and enforcement of Commonwealth laws.

Schedule 1 implements recommendations from the *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* (Crimes Act) Review (the DNA Review) governing the collection and use of DNA forensic material in Part 1D of the Crimes Act.

Schedule 2 amends the *Australian Crime Commission Act 2002* (ACC Act) in relation to ways in which the Australian Crime Commission (ACC) can share and disclose information and material in its possession to combat serious and organised crime.

Schedule 3 also makes amendments to the ACC Act that introduce rules about the use, sharing and retention of things seized under the ACC Act.

Schedule 4 amends the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) regarding the ability of the Australian Commission for Law Enforcement Integrity (ACLEI) to investigate corruption. Other amendments to the LEIC Act amend the operation of provisions relating to arrest warrants, search warrants, and notices to produce and summon, and provide consistency between non-disclosure regimes in the *Privacy Act 1988* and the LEIC Act.

Schedule 5 includes amendments to Part 9.1 of the Criminal Code relating to illicit substances and quantities that are temporarily prescribed in the *Criminal Code Regulations 2002* so that they will remain subject to Commonwealth serious drug offences in the longer term. Amendments will be made to the Customs Act relating to the powers of the Australian Customs and Border Protection Service regarding its role in seizing illicit substances unlawfully entering Australia.

Schedule 6 amends the *Proceeds of Crime Act 2002* and the DPP Act to allow a court to restrict publication of certain matters to prevent prejudice to the administration of justice and enable Australian Federal Police employees and secondees to become ‘authorised officers’.

Schedule 7 amends Part 1B of the Crimes Act to implement recommendations arising out of the *Australian Law Reform Commissions 2006 Report: Same Crime, Same Time: Sentencing of Federal Offenders*. The amendments will ensure that all parole decisions are able to be made at the Attorney-General’s discretion and that adequate parole, licence and supervision periods are applied to federal offenders as required.

Schedule 8 amends section 15A of the *Crimes Act* to enable State and Territory fine enforcement agencies to take non-judicial enforcement action to enforce Commonwealth fines without first obtaining a court order, and to make related amendments to the *Crimes Act*.

Trespass on personal rights and liberties **Schedule 1, items 4 and 5**

Schedule 1 of the bill has the purpose of implementing a number of recommendations from the *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914*. The taking by consent and force of DNA samples and the procedures associated with such actions require interests associated with law enforcement and the rights and interests of individuals to be balanced or otherwise reconciled.

Items 4 and 5 of Schedule 1 of the Bill have the effect of reclassifying procedures as non-intimate (as opposed to intimate) forensic procedures, namely, a finger prick and a sample of saliva or a sample by buccal swab. (Item 6 is a related measure.) The effect is that a senior constable is able to order such procedures be conducted after considering specified matters. Currently such procedures cannot occur without consent or an order from a judge or magistrate. The explanatory memorandum at page 8 notes that the approach is appropriate in light of the nature of the procedures and implements recommendations of the DNA Review (in relation to item 4) and aligns the Commonwealth position with that in five State and Territory jurisdictions (in relation to item 5). **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 matter.

Strict liability

Item 32

Item 32 provides that a person (an ‘attendee’), who is observing the testing of a sample on the behalf of a suspect, commits an offence of strict liability if they refuse to comply with a direction to leave the premises, having failed to comply with instructions. In justification of this approach, the explanatory memorandum at page 19 points to the risk of forensic samples being tampered with and the affect this may have on confidence in the use of the DNA testing regime. The provisions require that the attendee be informed of the consequences of non-compliance with a direction and the approach reflects the recommendations of the DNA Review. **In the circumstances, the committee leaves the matter to the consideration of the Senate as a whole.**

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

Delegation of legislative power

Items 76-79

Items 76-79 enable the making of regulations to prescribe the manner in which information is given to persons from whom DNA samples may be taken. It is not envisaged that the measures introduced by these items would reduce the nature of the information but rather that a more appropriate and streamlined method of conveying information can be developed. The explanatory memorandum at pages 42 to 44 explains that consultations with relevant stakeholders (including the Office of the Information Commissioner) will be undertaken and that the items are designed to implement a recommendation of the DNA Review which suggested that matters of which persons must be informed could be prescribed in a set of written and oral notifications that aimed to more easily convey the relevant information. **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 matter.

Trespass on personal rights and liberties
Schedule 2, item 27

This item deals with the circumstances in which the ACC is able to provide information to Commonwealth, State, Territory and foreign bodies. According to the explanatory memorandum the existing provisions are complicated and subject to a number of interpretive difficulties. For this reason the purpose of the proposed provisions is to clearly set out the bodies with which the ACC will be able to share information and the requirements that must be met for such sharing to occur. The explanatory memorandum at page 56 justifies the inclusion of paragraphs 59AA(1)(d) and (e), which allow for the prescription of further international bodies and for international judicial bodies with whom information may be shared, by giving examples (such as INTERPOL and the International Criminal Court) and noting that the prescription of such bodies will be the subject of full parliamentary scrutiny as regulations are disallowable instruments. **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 matter.

Trespass on personal rights and liberties
Schedule 2, item 28

In recognition of the importance of public-private partnerships in combating organised crime, item 28 makes express provision for the dissemination of information outside government. The ACC Act currently makes no express provision for the dissemination of information outside of government other than through public meetings and bulletins issued by the Board. Building on a number of reviews, which examined the question of the sharing of information between government agencies and the private sector, proposed section 59AB will set out the circumstances in which the ACC can share information with the private sector.

Proposed subsection 59AB(1) provides that the ACC can share information with a body corporate prescribed in regulations, or within a prescribed class of bodies. The explanatory memorandum lists as examples of classes of bodies that will be able to be prescribed: banks, financial institutions, telecommunications companies, internet service providers, insurance

companies, or companies in a specified location of type of location (eg ports and airports).

The circumstances in which disclosure of information is allowed and the limitations and accountability mechanisms which are associated with disclosure to private bodies are detailed in the explanatory memorandum at pages 57 to 64. It is noted that proposed paragraph 59AB(2)(a) limits sharing information unless the CEO of the ACC considers it necessary for preventing or detecting criminal offences (or activities which might constitute criminal offences) or for facilitating the collection of criminal information and intelligence. The explanatory memorandum notes at page 61 that sharing information for these purposes is consistent with the National Privacy Principles. Although the committee understands the rationale for the proposed approach, in light of the importance of the right to privacy and the significance of sharing personal information with the private sector the committee **seeks the Minister's advice as to whether the provisions could be limited to apply only to more serious offences, such as those attracting a minimum period of imprisonment (for example, 12 months).**

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.

Trespass on personal rights and liberties

Schedule 3

Schedule 3 of the Bill will introduce rules governing the use, sharing and retention of material which has been coercively obtained by the ACC. Currently the legislation does not set out clear rules governing what can be done with such material. The regime to be introduced in relation to such matters ('returnable items') is distinct from provisions relating to the sharing of ACC information and is modelled on the regime introduced into the *Crimes Act (Cth) in 2010* (see *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010*). The explanatory memorandum at page 69 notes that it is desirable that there 'is consistency between Commonwealth regimes governing the seizure and production of things and documents' and that it is desirable that the same rules which govern how things seized under the Crimes Act are used, shared and retained also apply to other seizure and production regimes'. **The committee leaves the question of whether,**

overall, 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 issue.

**Reversal of onus
Schedule 4, items 10 and 11**

Items 10 and 11 of Schedule 4 contain provisions which place an evidential burden of proof on defendants (subsection 77B(2), subsection 77B(4), subsection 78(2)). The explanatory memorandum at pages 86 to 87 and 89 justifies each by reference to the matters being peculiarly within the knowledge of the defendant.

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

**Trespass on personal rights and liberties
Schedule 4, item 29**

This item inserts new provisions relating to contempt of the Australian Commission for Law Enforcement Integrity. The explanatory memorandum at page 94 notes that the provisions ‘mirror the amendments made in 2010 to the *Australian Crime Commission Act 2002*’. Given that the ACLEI may be charged with investigating allegations of corruption against the ACC, the explanatory memorandum argues it should ‘have at least the same powers as that body’. The proposed changes would mean that the ACLEI could refer an uncooperative witness to a superior court to be deal with as if the witness was in contempt of that court, thus encouraging cooperation by providing a threat of detention that is ‘real and immediate’ (unlike the current arrangements which are based on the threat of criminal charges being pursued in the future). **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 matter.

Retrospective effect Schedule 6

Schedule 6 proposes to make amendments to enhance the proceeds of crime regime and facilitate the operation of a new Criminal Assets Confiscation Taskforce. The main amendment will be to allow a court to make an order restricting or prohibiting the publication of matters relating to applications for freezing orders and restraining orders if it appears necessary to prevent prejudice to the administration of justice. The key amendments will apply in relation to applications made after commencement but may relate to conduct that occurred prior to commencement (item 11 of Schedule 2). As the explanatory memorandum states, at page 121, this does not create any retrospective criminal liability. The ‘retrospective application of the provisions will provide clarity’ as to whether the old or new provisions apply. The conduct on which an order may be based may not be discovered for some time and the explanatory memorandum suggests at page 121 that it is appropriate for the new provisions to apply to all applications occurring after commencement. **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 matter.

Retrospective operation Schedule 8, items 5 and 7

Item 5 of Schedule 8 gives the amendment made by item 4 retrospective operation. Item 4 clarifies that if a court makes an order imposing a penalty for failure to pay a fine, then a person or authority other than a court may take action to enforce the penalty without making a further application to a court under the relevant provision of the Crimes Act. The explanatory memorandum states at page 154 that: ‘This retrospective application is considered necessary because the amendment made by Item 4 merely clarifies the operation of the existing law, and does not modify any person’s accrued rights under the law’.

Related to this, item 7 confers retrospective authority on persons who previously enforced Commonwealth fines through non-judicial enforcement actions without a court order. The scope of this amendment is limited to ‘a bare conferral of authority for the actions taken, and does not extend to

treating an invalid action as a valid action' (see the explanatory memorandum at page 155).

The committee leaves to the consideration of the Senate as a whole the question of whether the approach proposed in these items is appropriate.

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.

Customs Amendment (Anti-dumping Improvements Bill (No.2) 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* to:

- establish a new appeals process to replace the existing appeals mechanism;
- establish the International Trade Remedies Forum which will be a stakeholder body of representatives from manufacturers, producers and importers, as well as industry associations, trade unions and relevant Government agencies;
- provide for flexible extensions to timeframes for an investigation, review of measures, continuation inquiry or duty assessment to enable:
 - robust analysis where investigations involve particularly complex arrangements, or involve large numbers of countries or interested parties; and
 - consideration of a response to critical new information that could not reasonably have been provided earlier.

The Committee has no comment on this bill.

Customs Amendment (Reducing Business Compliance Burden) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* to permit ‘small business entities’ to defer the settlement of excise-equivalent customs duties from a weekly cycle to a monthly cycle. Additionally, the bill clarifies administrative arrangements for periodic settlement permissions.

Strict liability Schedule 1, item 4

This Bill concerns administrative arrangements relating to periodic settlement permissions that are granted under the *Customs Act* (and the *Excise Act*). Schedule 1, item 4 subsection 69(10) imposes a strict liability offence for failure to comply with a condition to which a permission is subject. The explanatory memorandum justifies the approach at page 11 on the basis that:

The strict liability offence in subsection 69(10) of the Customs Act amendments, replicates an existing strict liability offence in current subsection 69(5). Strict liability is considered appropriate in this circumstance because the purpose of the conditions to which a permission is subject is to ensure the proper accounting of goods that are dutiable at a high rate of customs duty and the timely payment of this duty to the government. These conditions will ensure that the integrity of this regime is maintained and that the revenue is protected. The offence is punishable by a penalty of 50 penalty units.

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 matter.

Electoral and Referendum Amendment (Maintaining Address) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Special Minister of State

Background

This bill amends the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*. The bill implements the Government response to Recommendation 10 of the Joint Standing Committee on Electoral Matters report entitled *Report on the conduct of the 2007 federal election and matters related thereto*.

The bill contains provisions that will:

- allow the Electoral Commissioner to directly update an elector's enrolled address following the receipt and analysis of reliable and current data sources from outside the Australian Electoral Commission that indicate an elector has moved residential address;
- require the Electoral Commissioner to inform an elector that the Electoral Commissioner is proposing to update the elector's address on the electoral Roll;
- require the Electoral Commissioner to inform an elector that the Electoral Commissioner has updated the elector's enrolled address;
- enable objection action under Part IX of the Electoral Act to be discontinued and the elector's enrolled address updated so that the elector is not removed from the electoral Roll;
- make a number of consequential amendments to the Electoral Act and Referendum Act;
- standardise references to the Electoral Commissioner; and
- provide for the Electoral Commissioner to delegate the power to seek information.

The Committee has no comment on this bill.

Excise Amendment (Reducing Business Compliance Burden) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Treasury

Background

This bill amends the *Excise Act 1901* to permit ‘small business entities’ to defer the settlement of excise duties from a weekly cycle to a monthly cycle. Additionally, these Bills clarify administrative arrangements for periodic settlement permissions.

The Committee has no comment on this bill.

Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

Introduced into the Senate on 24 November 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill will amend the *Fair Work Act 2009* (FW Act) to:

- extend the operation of most provisions of the FW Act to contract outworkers in the textile, clothing and footwear industry;
- provide a mechanism to enable textile, clothing and footwear outworkers to recover unpaid amounts up the supply chain;
- extend specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more broadly , with an exception for the principal place of business of a person with appropriate accreditation (to which the standard right of entry rules would apply); and
- enable a textile, clothing and footwear outwork code to be issued.

The Committee has no comment on this bill.

Government Investment Funds Amendment (Ethical Investments) Bill 2011

Introduced into the Senate on 24 November 2011

By: Senators Di Natale and Ludlam

Background

This bill amends the *Future Fund Act 2006* and the *Nation-building Funds Act 2008* to require Ministers responsible for Australian sovereign funds to develop ethical investment guidelines for each fund and directs the Future Fund Board to have regard to these guidelines when making investment policies.

Delegation of legislative power – legislative instrument

Various

This bill has the purpose of imposing a requirement for the Future fund and various other nation building funds to make their investments according to a set of ethical investment guidelines. From a scrutiny perspective, the issue which arises is whether the approach of requiring the guidelines to be developed by legislative instrument is justified. As this matter is not addressed in the explanatory memorandum and the committee prefers that important matters be included in primary legislation whenever this is appropriate, the committee **seeks the Senators' advice as to the rationale for the proposed approach.**

Pending the Senators' 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.

Higher Education Support Amendment (VET FEE-HELP and Other Measures) Bill 2011

Introduced into the Senate on 24 November 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Higher Education Support Act 2003* to:

- provide that the minister retains the power to decide an application for approval as a higher education provider although the required timeframe may have expired;
- require VET providers to notify the minister in writing of events which may affect their ability to comply with quality and accountability requirements;
- provide for the authorisation of certain uses and disclosures of information;
- allow the secretary to revoke or vary any determination made to pay an advance to a VET provider in certain circumstances;
- clarify that a VET provider must provide statistical and other information although an approved form of provision has not been specified; and
- make administrative arrangements relating to the assessment of an individual's higher education loan program debt.

The Committee has no comment on this bill.

Illegal Logging Prohibition Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill seeks to:

- prohibit the importation of all timber products that contain illegally logged timber and the processing of domestically grown raw logs that have been illegally harvested;
- require importers of regulated timber products and processors of raw logs to undertake due diligence to mitigate the risk of products containing illegally logged timber; and
- establish a monitoring, investigation and enforcement regime.

Trespass on personal rights and liberties

Delegation of legislative power

Clauses 2 and 9

Clause 9 of the Bill creates an offence for importing illegally logged timber in regulated timber products. The fault element for one of the elements of the offence (that ‘the thing is made from, or included, illegally logged timber’) is negligence. The explanatory memorandum at page 12 states that ‘due diligence requirements will be prescribed by regulations [see clause 14] to facilitate importers due care in reasonably mitigating the risk of importing illegally logged regulated timber products’. There is a delayed commencement of this provision to enable appropriate consultation and to enable importers to develop and test their due diligence procedures. Nevertheless the committee expects the explanatory memorandum to address the factors set out in the *Guide to Framing Commonwealth Offences* (at pages 23 to 24) in justifying the use of negligence as the standard of fault. The committee therefore **requests the Minister’s advice as to whether the proposed approach is consistent with the *Guide*.**

The committee further notes that another element of the offence—that ‘the thing is a regulated timber product’—is a matter to be prescribed by the regulations. The explanatory memorandum states at page 13 that work is still

being undertaken to determine which timber products will be prescribed based on ongoing consultations and economic analysis and risk assessment. Nevertheless, given the heavy penalty for contravention of the offence (five years imprisonment or 500 penalty units) the committee remains concerned that important information should be included in primary legislation whenever possible. In the circumstances, **the committee leaves the question of whether the proposed approach is 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.

Reversal of onus Subclauses 15(2) and 17(2)

Subclause 15(2) includes a note which states that a defendant bears an evidential burden in relation to the exception to the offence stated in subclause 15(1). The justification is that the matter relates to information which is known 'particularly to the defendant' (see the explanatory memorandum at page 21). The same issue arises in relation to subclause 17(2). The committee notes that the explanations are consistent with the *Guide*.

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

Coercive powers Part 4

Part 4 of the Bill deals with monitoring, investigation and enforcement and appears to adopt a standard approach which is consistent with the principles in the *Guide to Framing Commonwealth Offences*. However, given that inspectors (appointed under clause 19) may exercise coercive powers (including the use of force against persons, see clause 53), the Committee **seeks the Minister's advice as to whether consideration has been given to the inclusion of a clause which requires the development of guidelines for the implementation of the coercive powers by inspectors and for adequate training of such officers. Consideration might also be given to requiring**

such guidelines to be tabled in Parliament and published on the Department's website.

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 Clauses 73 and 74

The effect of clauses 73 and 74 is to make civil penalty provisions apply on the basis strict liability. This means that mistake of fact is a defence but there is an evidential burden on a person who wishes to rely on it. This is an approach which is often taken in relation to civil penalty provisions. Nevertheless the committee usually expects that the explanatory memorandum should explain the reasons for the proposed approach rather than simply repeating the effect of the provisions.

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

Insurance Contracts Amendment Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Treasury

Background

This bill amends the *Insurance Contracts Act 1984* to:

- provide a legislative framework so that regulations can be made to establish a standard definition of flood for home building, home contents, small business and strata title insurance policies; and
- require insurance providers to provide a key facts sheet in relation to home building and home contents insurance policies.

Delegation of legislative power

Schedule 1, item 1

The purpose of this bill is to implement a number of proposals contained in the Government's consultation paper *Reforming flood insurance: Clearing the waters*. The bill seeks to provide for greater consumer clarity in relation to insurance contracts by providing for a standard definition of the meaning of 'flood' and specifying what sort of events are covered. The bill also would impose an obligation on insurers to give consumers a Key Facts Sheet (KFS), a document outlining the key information in relation to home building and contents policies.

From a scrutiny perspective the issue that arises is the bill's reliance on delegated legislation to achieve these objectives. Item 1 of Schedule 1 proposes to insert a new section 37A into the *Insurance Contracts Act 1984*. This section provides that the new definition of flood will apply in relation to contracts which are prescribed in the regulations (after a two year transition period so as to minimise compliance costs for insurers).

The explanatory memorandum at page 10 makes it clear that the two key types of insurance contract which will be covered are those relating to home building and home contents, and that the regulations will prescribe these contracts. Further, other contracts that directly impact consumer, namely, those covering small business and strata titles, will also be prescribed.

The committee's expectation is that important information will be included in primary legislation whenever possible. As the explanatory memorandum does not suggest that there may be other categories of contracts in relation to which it may be desirable to extend the coverage of the definition of flood, **the Committee seeks the Minister's advice as to why it is not possible for these matters to be dealt with in the primary legislation.**

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.

Delegation of legislative power Schedule 1, section 37B

Schedule 1 also proposes a new section 37B, which provides that the 'regulations must define the meaning of flood'. The explanatory memorandum at page 10 states that the definition is expected to be consistent with the wording proposed in the Government's consultation paper (which is described), but that the precise wording will be subject to consultation. However, it is unclear why the definition cannot be included in the primary legislation or why the consultation could not precede enactment of the new law. **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 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.

Delegation of legislative power Schedule 2

Schedule 2 of the bill introduces amendments which impose an obligation on insurers to produce a key fact sheet (the contents and requirements of which will be prescribed by regulations—see proposed section 33B). The explanatory memorandum at page 14 states that the content, format and provision requirements for the KFS will 'be determined in regulations after extensive public consultation to ensure appropriate consumer and industry outcomes can be achieved'. The information that should be provided in such a

document may be appropriately revised in light of experience and industry and consumer feedback. In addition, the KFS does not alter in any way obligations of the parties to an insurance contract.

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

**Reversal of onus
Subsection 33C(3)**

Proposed subsection 33C(3) enables exceptions to be prescribed by regulations to the offence of failing to provide a lawful Key Fact Sheet where that is required. The note to this provision states that the defendant bears an evidential burden in relation to establishing that an exception prescribed in the regulations can be made out. The explanatory memorandum at page 18 states that this approach is justified as the matters that will be prescribed are within insurers' knowledge and or their control. The explanatory memorandum lists three circumstances where it may be considered that an exemption to the KFS requirement is warranted (and may be prescribed in the regulations) at pages 17 to 18. The justification given for placing an evidential burden on the defendant is consistent with the suggested exceptions. However, as the power to prescribe exceptions is not limited to circumstances about which the defendant will have knowledge or will relate to matters under their control, **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 matter.

National Health Amendment (Fifth Community Pharmacy Agreement Initiatives) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Health and Ageing

Background

The bill amends the *National Health Act 1953* to enable pharmacists to claim pharmaceutical benefits where the following supply has occurred:

- enable pharmacists to use a standardised medication chart when supplying and claiming medicines for persons in residential care services;
- enable pharmacists to supply a pharmaceutical benefit to a patient, in accordance with specific conditions, who is unable to present a valid prescription; and
- make technical changes which will support efficient prescribing practices for certain authority required medicines, and determination of rules for decisions about increased quantities and repeats.

The Committee has no comment on this bill.

Nuclear Terrorism Legislation Amendment Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Attorney-General

Background

This bill amends the *Nuclear Non-Proliferation (Safeguards) Act 1987* (the Act) to create new offences for specific conduct that is prohibited by the *International Convention for the Suppression of Acts of Nuclear Terrorism*.

The bill also makes minor technical amendments to the Act consequential on the *Legislative Instruments Act 2003* and amending an incorrect reference in the definition of 'Australian aircraft'.

Trespass on personal rights and liberties

Schedule 1, item 7

Item 7 of Schedule 1 proposes to introduce a new section 38J. This provision would enable the Foreign Affairs Minister and Immigration Minister to issue certificates in relation to various matters. The certificates would constitute prima facie evidence of matters in the certificate (proposed subsection 38J(3)). The explanatory memorandum at pages 13 and 14 contains a detailed explanation of this provision. It is emphasised that the matters in evidentiary certificates 'will be limited to formal or technical matters that are not likely to be in dispute...but would be difficult to prove under the normal evidence rules'. Further, it is said that this approach is consistent with existing provisions in the Criminal Code. Finally, the explanatory memorandum emphasises that the certificates would be subject to challenge by a defendant as they are merely prima facie evidence of the matters they stipulate. **The Committee leaves the question of whether these provisions unduly encroach on personal rights and liberties 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.

Personally Controlled Electronic Health Records Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Health and Ageing

Background

This bill establishes the national personally controlled electronic health record system ('PCEHR system') and provides its regulatory framework, including an entity that will be responsible for the operation of the PCEHR system.

The bill also implements a privacy regime specific to the PCEHR system which will generally operate concurrently with Commonwealth, state and territory privacy laws.

Wide discretion

Clause 20

Clause 20 of the Bill gives the Commonwealth Minister and the head of the Health Department of a State or Territory the discretion to terminate the appointment of a member who represents their interests on the 'jurisdictional advisory committee'. The explanatory memorandum at page 17 repeats the effect of the clause and notes that the Bill does not prescribe 'any criteria' on which such decisions should be made. Given the width of this discretionary power and the clear affect it may have on the interests of an affected individual—although it is not envisaged that members of the committee will be remunerated (clause 22), the regulations may provide for remuneration and termination of appointment may affect reputational interests. **Therefore, the Committee seeks the Minister's advice as to why such a broad discretionary power is justified in the circumstances. The advice and recommendations given by the jurisdictional advisory committee are not binding on the System Operator in performing functions under the Act and it is not clear why, in these circumstances, such a broad discretionary power is warranted.**

Trespass on personal rights and liberties

Part 3, Division 3

Division 3 of Part 3 of the Bill deals with the registration of repository operators, portal operators and contracted service providers. All of these entities are crucial to the secure operation of the PCEHR system and the maintenance of its integrity. The explanatory memorandum states at page 27 that the participation of such entities will therefore be subject to ‘stringent requirements’. Understandably, the security requirements will be specified in the Rules (eg paragraph 48(a)) and there is also scope for the Systems Operator to impose specific requirements on particular entities.

The committee accepts that it may be difficult for such technical requirements to be specified in the primary legislation. All entities that are involved in the management of the repositories that underpin the PCEHR system will be bound by the National Privacy Principles under the *Privacy Act* (see the explanation at pages 28 to 29 of the explanatory memorandum). In the circumstances, despite the obvious threat which a breach of security of the PCEHR system would constitute to privacy, **the Committee leaves the question of the appropriateness of the design of the system in this respect to the consideration of the Senate as a whole.**

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

Trespass on personal rights and liberties

Part 4, Division 2

Division 2 of Part 4 of the Bill creates a new and specific privacy regime in terms of authorizing collections, uses and disclosures of health information in the PCEHR system. The explanatory memorandum at page 38 states that the approach draws on the Privacy Act’s National Privacy principles but in a number of instances the regime includes increased protections. This is a deliberate policy choice given the ‘fact that the PCEHR will create a new, relatively rich data source’. Clearly for the PCEHR system to operate there must be a level of sharing of private information. Therefore, **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 matter.

Penalties

Clause 78

Clause 78 provides that a person who is, or has at any time been, a registered repository operator or a registered portal operator, is subject to a civil penalty of 80 penalty units if they contravene a PCEHR Rule that applies to them. This sort of penalty provision, which applies a single penalty to a number of as yet unspecified obligations should be avoided. Such provisions make it difficult for the relevant penalty to be identified and fail to differentiate between more and less serious obligations. As the committee generally takes the view that penalties of more than 50 penalty units required a sound justification if they are in subordinate legislation, **the Committee seeks the Minister's advice as to the justification for the 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.

Delegation of legislative power

Paragraph 98(1)(c)

Paragraph 98(1)(c) of the Bill enables the Systems Operator to delegate one or more of his or her functions and powers to 'any...person with the consent of the Minister'. This power supplements the power to delegate to APS employees in the Department and to the Chief Executive of Medicare. The explanatory memorandum justifies the need to delegate on grounds of administrative necessity but does not indicate why the power to delegate must be framed so broadly. The committee prefers that delegates be confined to the holders of nominated offices, persons with particular qualifications or experience, or to members of the SES. 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 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.

Delegation of legislative power

Clause 112

Clause 112 provides that the regulations can prescribe penalties for offences and civil penalties for contraventions of the regulations. Although the maximum limit of penalties that may be set is consistent with the limits in the *Guide to Framing Commonwealth Offences* (not more than 50 penalty units for a criminal offence) the Committee is of the view that it is appropriate to include the details of offences in primary legislation unless a persuasive justification for the use of subordinate legislation exists. In this instance the explanatory memorandum merely repeats the effect of the provisions. **The committee therefore seeks the Minister's advice as to the rationale 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.

Personally Controlled Electronic Health Records (Consequential Amendments) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Health and Ageing

Background

This bill amends the *Healthcare Identifiers Act 2010* to allow healthcare identifiers to play a central role in the integrity, security and safety of the personally controlled electronic health record (PCEHR) system.

The bill also makes amendments to the *Health Insurance Act 1973* and the *National Health Act 1953* to allow a range of health records created by Medicare to be included in a consumer's PCEHR, where a consumer wants that information to be included.

The Committee has no comment on this bill.

Police Overseas Service (Territories of Papua and New Guinea) Medal Bill 2011

Introduced into the House of Representatives on 21 November 2011

By: Mr Morrison

Background

This bill requires a minister to seek the Queen's in-principle agreement to establish The Police Overseas Service (Territories of Papua and New Guinea) Medal as part of the Australian honours system to be awarded for service undertaken by members of Australian police forces who served as part of the Australian administration of the Territories of Papua and New Guinea between 1 July 1949 and 30 November 1973.

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.**

Protecting Children from Junk Food Advertising (Broadcasting and Telecommunications Amendment) Bill 2011

Introduced into the Senate on 21 November 2011
Senators Bob Brown and Di Natale

Background

This bill amends the *Broadcasting Services Act 1992* to encourage healthier eating habits among children by restricting the broadcasting of advertisements for junk food.

The Committee has no comment on this bill.

Road Safety Remuneration Bill 2011

Introduced into the House of Representatives on 23 November 2011
Portfolio: Education, Employment and Workplace Relations

Background

This bill establishes the Road Safety Remuneration Tribunal which will be empowered to inquire into sectors, issues and practices within the road transport industry and, where appropriate, determine mandatory minimum rates of pay and related conditions for employed and self-employed drivers.

The bill will also establish a compliance regime for the enforcement of Road Safety Remuneration Orders, safe remuneration approvals and any orders arising out of the arbitration of a dispute.

Trespass to personal rights and liberties Subdivision C, clause 69

Proposed subdivision C of the Bill allows for a small claims procedure, enabling applicants to choose to have relatively small claims dealt with in a less formal matter. Subclause 69(5) provides that a party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court. Subclause 69(6) enables the court to grant any such leave subject to 'conditions designed to ensure that no other party is unfairly disadvantaged'. Unfortunately, the explanatory memorandum does not justify this approach. However, as the common law rules of procedural fairness would bind the Remuneration Tribunal, the committee **leaves the question of whether the balance struck between the rights of parties to legal representation and individual and collective interests in the efficient and expeditious resolution of small claims by the magistrates court to the consideration of the Senate as a whole.**

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

Reversal of onus Clause 89

Clause 89 of the Bill establishes offences for failing to attend before the Remuneration Tribunal, refusing to be sworn or to make an affirmation as required, and refusing to answer questions or to produce a document. The penalties (6 months imprisonment) are in line with similar provisions in the *Fair Work Act*. Although the defendant bears an evidential burden in relation to establishing the ‘reasonable excuse’ defence to these offences, the explanatory memorandum states at page 39 that this is because ‘the particular circumstances that will need to be relied on to establish the existence of a reasonable excuse will be peculiar to the knowledge of the defendant’. It is noted, however, that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at page 52 cautions against using ‘reasonable excuse’ defences on account of them being ‘too open-ended’. **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 matter.

Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Administrative Decisions (Judicial Review) Act 1977* to make a consequential amendment and enable transitional arrangements.

Merits review

Item 1

Item 1 of the Bill has the effect of excluding decisions made under the *Road Safety Remuneration Act 2011* from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. This is achieved by listing the *Road Safety Remuneration Act* in Schedule 1 of the *ADJR Act*.

The explanatory memorandum notes at page 2 that decisions made under the *Fair Work Act* and related legislation are also excluded from *ADJR Act* review in this way. Further, it is said that Decisions of the Road Safety Remuneration Tribunal and the Fair Work Ombudsman ‘will, however, be subject to judicial review by means of prerogative writ’. In other words there is an alternative source of judicial review jurisdiction for the review of such decisions, namely, section 39B(1) of the *Judiciary Act*.

The committee understands the positions argued, but is interested to better understand why the operation of the *ADJR Act* has been excluded.. In most instances of Commonwealth decision-making, s 39B(1) review jurisdiction will be available even if the *ADJR Act* cannot be relied upon. However, the *ADJR Act* was enacted as a remedial statute and seeking judicial review under it has a number of important advantages. Potential applicants are entitled to a statement of reasons, there is a single test for standing, and the availability of remedies proceeds on a comparatively straightforward basis. It is also the case that applicants may succeed on the basis of establishing errors that would not justify a prerogative writ (or ‘constitutional’ writ). Given these advantages, and the fact that the enactment of the *ADJR Act* was intended to become the primary means for the review of commonwealth administrative decisions (due to its comparative simplicity and the absence of technicality), the Committee

looks for compelling reasons before accepting that jurisdiction under the Act should be excluded. The availability of alternative sources of judicial review jurisdiction does not explain the justification for excluding the ADJR Act, and the fact that similar exclusions exist in Schedule 1 of the *AJDR Act* does not substantively address the reason for further exclusions. **The committee therefore seeks the Minister's advice as to the rationale for excluding ADJR Act review.**

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 non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Social Security Legislation Amendment Bill 2011

Introduced into the House of Representatives/Senate on 23 November 2011
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

The bill amends the *Social Security Act 1991* and *Social Security (Administration) Act 1999* to:

- enable income management to be triggered by referrals from state and territory agencies;
- enable the minister to specify states, territories or areas in which the vulnerable, long-term welfare payment and disengaged youth income management measures will apply;
- provide that income management continues despite a change in residence; and
- provide that certain parents may be required to enter into a school attendance plan and may have income support payments suspended if the plan is not complied with.

The Committee has no comment on this bill.

Stronger Futures in the Northern Territory Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill implements three measures relating to Aboriginal people in the Northern Territory by:

- providing for alcohol management plans to be approved by the Minister for Indigenous Affairs, and for the minister and the relevant Northern Territory minister to undertake a review within three years on whether alcohol-related harm among aboriginal people has reduced;
- enabling the Commonwealth to amend Northern Territory legislation by regulation relating to community living areas and town camps to enable private ownership in town camps and flexible long term leasing arrangements for business in community living areas; and
- providing for a community store licensing scheme to operate for a ten-year period to provide food security for Aboriginal communities.

The bill also requires the Minister for Indigenous Affairs to facilitate an independent review of the operation of the Act after seven years.

Trespass on personal rights and liberties

Part 2

Part 2 of the Bill has the object of enabling special measures, for the purposes of the *Racial Discrimination Act*, to reduce alcohol-related harm to Aboriginal people in the Northern Territory. Although special measures necessarily single out a particular group in the community, they are intended to benefit members of that group. **The committee leaves the question of whether the overall approach is justified to the consideration of the Senate as a whole.**

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

Penalties

Item 8, subsections 75(1) and 75B(1)

Clause 8 of the Bill inserts a new Division 1AA of Part VIII into the *Liquor Act* (NT). Proposed subsection 75B(1) raises the maximum penalty for the offence of bringing, possessing or consuming liquor in an ‘alcohol protected area’ to 100 penalty unity. The explanatory memorandum states at page 4 that it is intended that having alcohol within an alcohol protected area be treated as a serious offence and notes that there are alternative processes available under which minor offences may be dealt with. There is also an option to refer an offender to the Substance Misuse Assessment and Referral for Treatment Court.

Similar circumstances arise in relation to the offence in proposed subsection 75(1) relating to the supply and transportation of liquor

In the circumstances the committee leaves the question of whether the level of penalty is appropriate to the consideration of the Senate as a whole.

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

Reversal of onus

Item 1, subsections 75B(2), 75B(4), 75B(5), 75B(7) and 75(C)1

Proposed subsection 75B(2) provides for a defence to a prosecution for an offence against subsection 75B(1) where the defendant was in a boat that was on waters and engaged in recreational boating or commercial fishing activities. The *Guide to Framing Commonwealth Offences* states (at pages 28 to 29) that a matter should be included in a defence, thereby placing an evidential burden of proof on the defendant, ‘only where the matter is peculiarly within the knowledge of the defendant’ and ‘is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish’. The explanatory memorandum does not address why it is considered that each element of the defence falls within these criteria.

A similar issue arises in relation for the reversal of the onus of proof in relation to the defences in proposed subsections 75B(4), 75B(5) and 75B(7).

In addition, identical issues arise in relation to the defences attached to the offence in proposed subsection 75C(1).

In relation to the approach to these defences, it is noted that the explanatory memorandum states at page 8 that, while the approach ‘seems contrary to usual principles, it is consistent with similar provisions in the Liquor Act.’ Further, ‘that it is not intended that it should be easier or harder, for a person to raise defence to the offences in new Division 1AA of Part VIII than it is for similar offences already existing in the Liquor Act.’ However, in the context of the overall purpose of the Bill to introduce what are considered special measures for the purposes of the RDA, it would be helpful for the explanatory memorandum to set out why the factors which are generally thought to justify placing an evidential burden on defendants (as set out in the *Guide to Framing Commonwealth Offences*) apply or why other factors justify the approach. It is suggested that the fact that a similar approach is taken in existing provisions of the *Liquor Act* is not, of itself, a complete justification for the approach. **Therefore, the committee seeks the Minister’s advice as to the further justification for the reversal of onus 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.

Insufficiently defined administrative powers Subclauses 12(4), 12(5) and 13

These clauses provide that the Commonwealth Minister can prohibit the sale of alcohol by a person holding an NT liquor licence and may vary the conditions of such a licence. The provisions do not elaborate any criteria by reference to which such decisions may be made—they are very broadly framed discretions. Similar issues also arise in relation the modification of NT liquor permits pursuant to clause 13.

As the explanatory memorandum merely repeats the effect of the provisions and does not provide guidance as to guidelines or examples the committee **seeks the Minister’s advice about how it is intended such provisions be administered and whether criteria can be included in primary or subordinate 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.

Delegation of legislative power
Insufficiently defined administrative powers
Clauses 17 and 23

Clause 17 requires the Minister to determine whether to approve or refuse an alcohol management plan after an application has been lodged. Although clause 17(2) sets out considerations that must be taken into account, they lack precision and it appears that it is intended that the relevant matters that must be considered will be prescribed in the rules. A similar issue also arises in relation to clause 23, which provides for approvals in relation to applications for alcohol management plans to be varied.

As there are no statements explaining why these delegations of legislative power are appropriate, **the committee seeks the Minister's advice as to the justification for the proposed approach.**

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

Trespass on personal rights and liberties
Delegation of legislative power
Part 3, clauses 34 and 35

Part 3 of the Bill implements land reform measures which give the Commonwealth power to make regulations to amend NT legislation relating to community living areas and town camps to facilitate voluntary dealings in land, including the granting of individual rights or interest and the promotion of economic development. The explanatory memorandum at page 20 explains that this Part also constitutes a special measure for the purposes of the RDA,

affording ‘Aboriginal people opportunities for home ownership and economic development’.

Clause 34 gives the Commonwealth the power to make regulations that would amend various relevant NT laws. The purpose of the power is to overcome restrictions and impediments relating to dealing, planning and developing land in town camps for the benefit of Aboriginal people. The need to achieve this purpose through a regulation making power (rather than primary legislation) is not explicitly addressed in the explanatory memorandum. It is noted that any ‘future models’ for the stated purposes would be developed in consultation with relevant stakeholders (see the explanatory memorandum at page 21)—though failure to consult will not result in the invalidity of any regulations which are made (subclause 34(9)). The explanatory memorandum also notes at page 22 that it may not be necessary for regulations to be made if the NT reforms its own laws in a manner consistent with the Commonwealth’s commitment to more flexible land tenure arrangements.

The same issues also arise in relation to clause 35, which confers a regulation-making power to modify NT laws in relation to ‘community living areas’.

The committee notes the discussion in the explanatory memorandum about the provisions, but prefers that important information is contained in primary legislation as much as possible. The committee therefore seeks the Minister's advice as to the justification for the use of regulations.

Pending the Minister's reply, the Committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Penalties

Part 4

Part 4 provides for a licensing scheme for ‘community stores’ and is designed to promote food security for Aboriginal communities in the Northern Territory. It is also considered to be a special measure for the purposes of the RDA. The explanatory memorandum provides a justification for the civil penalties for operating without a licence (50 penalty units for each day), and notes that the secretary may issue an infringement notice for an amount of no more than one fifth of the maximum penalty. **The committee leaves the**

question of whether the penalties are appropriate to the consideration of the Senate as a whole.

In the circumstances, the Committee makes no further comment on this matter

Trespass on personal rights and liberties

Clause 54

Clause 54 provides that it is a condition of all community store licences that the owner and the manager of the store must allow authorised officers to enter the premises for the purposes of auditing or monitoring compliance with licence conditions, to inspect things on the premises. Further, the owner and manager must give authorised officers documents relevant to auditing and compliance. Although, it may be accepted that a person who obtains a licence can be taken to accept entry to their licensed premises for the purpose of ensuring compliance with licence conditions, authorised officers should be accountable for the exercise of such powers (see the *Guide* at page 79), be appropriately qualified (see the *Guide* at page 80), and be subject to appropriate internal guidelines and training procedures relating to the implementation of such powers (*Guide* at 77).

Although the powers to be exercised by authorised officers do not include seizure powers, clause 69 enables the Secretary to appoint ‘any other persons’, in addition to APS employees, ‘engaged by the Department, under contract or otherwise, to exercise powers, or perform duties or functions’, including to enter premises, inspect things and require information and documents. The explanatory memorandum does not address these matters. **Therefore, the Committee seeks the Minister’s further advice as to why the Bill does not require guidelines for the exercise of these powers to be developed and whether these can be subjected to Parliamentary scrutiny (either by inclusion in the primary legislation or by their inclusion in subordinate legislation). Further, the Committee seeks advice as to how the Minister will ensure that persons who exercise the powers will be appropriately qualified, especially given that they need not be APS employees.**

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.

Penalties

Strict liability

Subclause 72

Subclause 72(2) empowers authorised officers to require, in the course of undertaking an assessment of whether a store must be licensed, the production of documents ‘as are reasonably necessary...to make the assessment’. Failure to comply with this requirement attracts a criminal penalty of 60 penalty units. The penalty is commensurate with a similar provision other Commonwealth legislation (see the explanatory memorandum at 54).

Further, the offence in this subclause and that contained in subclause 72(4) (relating to a requirement to provide assistance during an assessment) are offences of strict liability (subclause 72(5)). The appropriateness of strict liability in the circumstances is comprehensively addressed in the explanatory memorandum at pages 54 to 55. **The committee leaves the question of whether the proposed approach in these subclauses is appropriate to the consideration of the Senate as a whole.**

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

Trespass on personal rights and liberties

Clause 73

Clause 73 confers a power to compel information relating to assessments of community stores in relation to licensing. Subparagraph 73(2)(a) provides that a person must give compellable information to the Secretary within ‘a specified period of time’. As the *Guide to Framing Commonwealth Offences* suggests that a person should generally ‘be given at least 14 days to produce information or documents’ **the Committee seeks the Minister’s advice as to whether this minimum period can be included in the Bill.**

Pending the Minister’s advice, 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 72(3) and clause 73

Failure to comply with the requirement in clause 73 to produce information is an offence. There are, however, defences if a person has a ‘reasonable excuse’ or in relation to self-incrimination. The defendant has an evidential burden in relation to both defences. The same issue also arises in relation to subclause 72(3). The explanatory memorandum does not address the justification for the proposed approach, including whether it is consistent with the *Guide to framing Commonwealth Offences*. **The committee therefore seeks the Minister’s advice as to the rationale 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.

Strict liability

Clauses 88 and 89

These clauses have the effect of imposing strict liability in relation to civil penalties under the Bill. Clause 88 provides for a defence in relation to a mistake of fact, but subclause 88(3) places an evidential burden on a person who wishes to rely on that defence. The explanatory memorandum does not address the justification for the proposed approach, including whether it is consistent with the *Guide to framing Commonwealth Offences*. **The committee therefore seeks the Minister’s advice as to the rationale 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.

Trespass on personal rights and liberties

Clause 105 and 106

Clauses 105 and 106 authorise the disclosure of information, including personal information, to the Secretary or by the Secretary to certain government agencies. It is intended that these provisions permit the disclosure

of personal information for the purposes of the *Privacy Act 1988*. The explanatory memorandum suggests at page 74 that these provisions are necessary to enable judgments to be made about compliance with other legislation and to enable the Secretary to monitor responses where other agencies have been asked to address issues relating to stores within their areas of responsibility. The explanatory memorandum notes at page 75 that where a disclosure is made under clause 106 that records will be kept ‘consistent with best practice record keeping and Information Privacy Principle 11.3 under the *Privacy Act 1988*’.

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

Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill makes savings and transitional provisions and also amendments to existing principal legislation which include:

- repealing the *Northern Territory National Emergency Response Act 2007*;
- savings provisions in relation to the land measures, consequential upon the repeal of the *Northern Territory National Emergency Response Act 2007*;
- savings provisions in relation to the transitioning of areas, declarations, liquor licences, and permits for the tackling alcohol abuse measure;
- transitional provisions in relation to the community stores licences in place under the *Northern Territory National Emergency Response Act 2007* immediately prior to its repeal;
- consequential amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* in relation to the repeal of the provisions for the grant of leases for five years in the *Northern Territory National Emergency Response Act 2007* and other matters;
- amending the *Classification (Publications, Films and Computer Games) Act 1995* to add a sunset and review date to the provisions in Part 10 of that Act, amongst other things;
- amending the *Crimes Act 1914* to insert certain exceptions to the rules that prevent consideration of customary law or cultural practices in bail and sentencing for certain offence provisions (relating to entering, remaining on or damaging cultural heritage, or damaging or removing a cultural heritage object) for both Commonwealth and Northern Territory offences; and

- making minor consequential amendments to Part 3B of the *Social Security (Administration) Act 1999* (income management regime), to remove references to the *Northern Territory National Emergency Response Act 2007*.

Trespass on personal rights and liberties

Schedule 3

Schedule 3 of the bill makes amendments to the *Classification (Publications Films and Computer Games) Act 1995*. The purpose of the amendments is to allow for special measures to be taken to protect children living in Aboriginal communities in the Northern Territory from being exposed to material that is or may be refused classification or be classified as X18+. Although the amendments obviously restrict freedom of expression (at least on some interpretations of that right) they are designed to ‘address specific Aboriginal disadvantage and help Aboriginal people to enjoy their human rights equally with others in the Australian community’ (see the explanatory memorandum at page 12). **The committee leaves the question of how the relevant rights are balanced or otherwise reconciled to the consideration of the Senate as a whole.**

In the circumstances, the Committee makes no further comment on the matter.

Tax Laws Amendment (2011 Measures No.9) Bill 2011

Introduced into the House of Representatives on 23 November 2011

Portfolio: Treasury

Background

This bill proposes amendments to various taxation laws..

Schedule 1 amends the *Superannuation Industry (Supervision) Act 1993* and the *Retirement Savings Accounts Act 1997* to permit the Australian Taxation Office (ATO) to operate a scheme that is intended to make it easier for superannuation fund member and retirement savings account holders to consolidate their benefits.

Schedule 2 amends the capital gains tax provisions relating to the ability for businesses to restructure.

Schedule 3 amends the *A New Tax System (Goods and Services Tax) Act 1999* to implement three of the seven recommendations agreed to by the Government arising out of Treasury's *Review of the GST financial supply provisions*.

Schedule 4 amends the *A New Tax System (Goods and Services Tax) Act 1999* to ensure that sales or long-term leases of new residential premises by a registered entity are taxable supplies and that sales or long-term leases of residential premises (other than new residential premises) are input taxed supplies.

Schedule 5 amends the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients (DGRs) by adding one entity as a DGR, and changing the name of another entity previously listed.

Schedule 6 makes technical corrections and other minor and miscellaneous amendments to the taxation laws.

Retrospective operation Schedule 2, Parts 1, 2 and 3

Part 1 of Schedule 2 of the bill makes amendments in relation to certain capital gains tax roll-overs. The changes take effect retrospectively (from 11 May 2010, the date on which the proposal was announced). The explanatory memorandum states at page 3 that the ‘amendments are either beneficial to taxpayers or do not disadvantage them’. The explanatory memorandum at page 24 offers a technical explanation for the conclusion that the amendments are not expected to disadvantage taxpayers.

The amendments proposed in Part 2 of Schedule 2 apply retrospectively (from 11 May 2010), but these are described in the explanatory memorandum at page 4 as being ‘beneficial to taxpayers’; and changes made by Part 3 of Schedule 2 are also retrospective ‘so that taxpayers can benefit from the measure’ (see the explanatory memorandum at page 5).

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

Retrospective operation Schedule 4

Schedule 4 of the Bill makes amendments to ensure that sales or long-term leases of new residential premises by a registered entity are taxable supplies and that sales or long-term leases of residential premises...are input taxed supplies’ (see the explanatory memorandum at page 6). The amendments take effect from the date the proposal was announced, 27 January 2011. The suggested justification for this retrospective application is to ‘reduce the risk to revenue that might otherwise arise from behaviour change’ (see page 6 of the explanatory memorandum). It is also the case that transitional provisions are included so that ‘developers who were ‘commercially committed’ to arrangements to develop premises before 27 January 2011 are not disadvantaged by the measure’. In addition, a more detailed justification is offered at page 67 of the explanatory memorandum. **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 matter.

COMMENTARY ON AMENDMENTS TO BILLS

Aviation Transport Security Amendment (Air Cargo) Bill 2011

[Digest 4/11– no comment]

On 22 November the Senate agreed to one Government amendment and tabled a supplementary explanatory memorandum. On 23 November the House of Representatives agreed to the Senate amendment and the bill was passed. The committee makes no comment on the amendments.

Deterring People Smuggling Bill 2011

[Digest 14/11 – response required]

On 25 November 2011 the Senate tabled a replacement explanatory memorandum and passed the bill without amendment. The committee makes no comment on the amendments.

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

[Digest 4/11 – response in 6th Report]

On 22 November 2011 the Senate agreed to six Government amendments and tabled a supplementary explanatory memorandum. On 24 November 2011 the House of Representatives agreed to the Senate amendments and the bill was passed. The committee makes no comment on the amendments.

Minerals Resource Rent Tax Bill 2011

[Digest 14/11– no comment]

On 23 November 2011 the House of Representatives agreed to five Independent (Mr Wilkie) amendments and passed the bill. The committee makes no comment on the amendments.

Personal Property Securities Amendment (Registration Commencement) Bill 2011

[Digest 13/11 – no comment]

On 24 November 2011 the Senate tabled an addendum to the explanatory memorandum and passed the bill without amendment. The committee makes no comment on the amendments.

Social Security Legislation Amendment (Family Participation Measures) Bill 2011

[Digest 12/11 – no comment]

On 21 November 2011 the Senate agreed to two Opposition amendments and the bill was read a third time. On 23 November 2011 the House of Representatives tabled a revised explanatory memorandum and passed the bill without amendment. The committee makes no comment on the amendments.

Superannuation Guarantee (Administration) Bill 2011

[Digest 14/11 – no comment]

On 22 November 2011 the House of Representatives agreed to one Government amendment and tabled a supplementary amendment. The committee makes no comment on the amendments.

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

[Digest 13/11 – response in 14th Report]

On 21 November 2011 the House of Representatives agreed to 2 Government amendments and tabled a supplementary explanatory memorandum and passed the bill. On the 22 November 2011 the Senate tabled a revised explanatory memorandum and on 23 November 2011 passed the bill without amendment.

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

[Digest 14/11 – no comment]

On 22 November 2011 the House of Representatives agreed to two Government amendments and tabled a supplementary explanatory memorandum. The committee makes no comment on the amendments.

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*

Antarctic Treaty (Environment Protection) Amendment Bill 20112009 — Schedule 2, Part 2, item 22, section 13CJ (**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