

**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 the Hon Ian Macdonald (Chair)

Senator C Brown (Deputy Chair)

Senator M Bishop

Senator S Edwards

Senator R Siewert

Senator the Hon L Thorp

## Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



## TABLE OF CONTENTS

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### **Commentary on bills**

- Australian Charities and Not-for-profits Commission Bill 2012 1
  - Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 9
  - Aviation Legislation Amendment (Liability and Insurance) Bill 2012 11
  - National Portrait Gallery of Australia Bill 2012 13
  - National Portrait Gallery of Australia (Consequential and Transitional Provisions) Bill 2012 14
  - Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 15
- Commentary on amendments to bills** 17

- Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012
- Cybercrime Legislation Amendment Bill 2011
- Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012
- Greenhouse and Energy Minimum Standards Bill 2012
- Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012
- Illegal Logging Prohibition Bill 2011
- Maritime Powers (Consequential Amendments) Bill 2012
- Public Service Amendment Bill 2012
- Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2012
- Tax Laws Amendment (2012 Measures No. 4) Bill 2012

### **Scrutiny of standing appropriations** 20

#### **Senate Standing Legislation Committee Inquiries**

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



## **Australian Charities and Not-for-profits Commission Bill 2012**

Introduced into the House of Representatives on 23 August 2012

Portfolio: Treasury

### **Background**

This bill establishes a new independent statutory office, the Australian Charities and Not-for-profits Commission which will be the Commonwealth regulator for the not-for-profit (NFP) sector. The exposure draft also establishes a new regulatory framework for the NFP sector.

### **Trespass on personal rights and liberties—natural justice Subclause 35-15(2) and Division 100**

This subclause provides that the requirement to issue a written ‘show cause’ notice prior to revoking registration does not apply if the Commissioner believes, on reasonable grounds and taking into account a number of relevant considerations, that it would be appropriate for revocation to occur without giving such a notice to the registered entity. Subclause 35-15(2) provides details about what a show cause notice must include and that 28 days is to be given for an entity to respond to a notice indicating why its registration should not be revoked.

Although subclause 35-15(3) clearly enables the show cause requirement (which facilitates a fair hearing) to be dispensed with in limited circumstances, the Committee expects that the common law requirements of natural justice would still be applicable. The explanatory memorandum does not suggest otherwise and the exclusion of the show cause statutory requirement in limited circumstances does not evince a sufficiently clear legislative intention to exclude the rules of natural justice, including the fair hearing rule. Thus, common law procedural fairness obligations would continue to be applicable even in circumstances where a show cause requirement was removed.

The same approach is also taken in relation to the suspension and removal powers under Division 100 of the bill, so the Committee again expects that the common law requirements of natural justice would still be applicable.

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

### **Delegation of legislative power**

#### **Clause 40-10**

This subclause enables the making of regulations to prescribe the inclusion of information or the removal of information from the ACN Register. The explanatory memorandum, at page 56, contains a detailed explanation for this approach. It is argued that certain types of information may adversely affect the privacy of individual donors and ‘could potentially reduce philanthropic engagement’ and that the regulation making power thus ‘provides an additional safeguard mechanism to ensure that inappropriate information would not be published on the ACN Register’. **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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.*

### **Delegation of legislative power**

#### **Clauses 45- 10 and 50-10**

These clauses provide, respectively, for the making of governance standards and external conduct standards by regulation. The bill thus sets up a framework for the making of the key accountability and conduct standards for not-for-profit entities, leaving the standards to be developed in regulations. Compliance with these standards is a condition of registration and breach of the standards may lead to enforcement action.

In relation to governance standards, the explanatory memorandum explains that the governance standards are envisaged as being grounded in a flexible system of principles-based regulation. One feature of the system is the capacity for the regulator to prescribe codes of conduct developed by particular groupings of regulated entities, thereby enabling a system of co-regulation with sections of the not-for-profit sector. It also is apparent that the wide range of registered entities is a reason why governance standards may not be applied (by the regulations) in a uniform way. There are, therefore,

some sound reasons why setting governance standards in regulations may be necessary to promote the approach to regulation which is taken in the Bill.

On the other hand, it is less clear why the ‘external conduct standards’ should not be provided for in the primary legislation. These standards will regulate behaviour in relation to matters external to Australia or which are closely related to such matters. The standards will bind *all* registered entities. The explanatory memorandum indicates, at page 64, that these standards are ‘expected to be based on the requirements of the Financial Action Task Force’s (FATF) Special Recommendation VIII, and help combat the terrorist and criminal activities covered in the FATF recommendation’. The explanatory memorandum also states, at page 65, that these standards will promote transparency and greater confidence in the sector, across the donor community and with the general public that charitable funds sent, and services provided, overseas are reaching legitimate beneficiaries and being used for legitimate purposes’.

The importance of the standards does not, however, explain why they should be developed in regulations rather than the primary legislation. Indeed, the importance of these standards is a strong reason for including them in the primary legislation, unless there are compelling considerations to the contrary. **The Committee therefore seeks the Treasurer’s advice as to whether the external conduct standards can be included in the bill rather than leaving the details to delegated legislation.**

*Pending the Treasurer'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.*

### **Undue trespass on personal rights and liberties—self-incrimination Clauses 70-25 and 75-40**

The Commissioner has a number of information gathering powers under Division 70 of the bill. The powers are exercisable if the Commissioner reasonably believes that an entity has information or documents which are reasonably necessary to obtain for the purpose of determining compliance with obligations arising under the Act or determining whether information subject to monitoring under the Act is correct. Subclause 70-25(1) provides that an entity is not excused from providing information (in documentary or

other form) on the ground that doing so ‘might tend to incriminate the entity or expose the entity to a penalty’. However, subclause 70-25(2) provides for both a ‘use’ and ‘derivative use’ immunity to protect the rights of individuals. Notably, the existing powers of the ATO in relation to penalties imposed in relation to its coercive information gathering powers do not include these protections against the use of information compulsorily gathered.

The explanatory memorandum, at pages 100 and 101, provides a lengthy justification for the approach, which is clearly based on a careful consideration of the principles raised in relation to this issue in the *Guide to Framing Commonwealth Offences*.

The same issue also arises in relation to the power under proposed clause 75-40 to require the provision of information when exercising monitoring powers under a warrant.

Given the relatively low penalty for not complying with a notice requiring the giving of information (20 penalty units), and the availability of use and derivative use immunities the Committee makes no further comment.

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

### **Undue trespass on personal rights and liberties—strict liability Subclause 100-25(4)**

A responsible entity (that is, a person such as a director of a registered entity—see clause 205-30) who has been suspended or removed may commit a number of offences specified in clause 100-25. These offences have the purpose of discouraging such a person (ie the responsible entity) from continuing to participate in or influence the operations of the registered entity in defined circumstances. The offences are offences of strict liability (subclause 100-25(4)). The offences carry maximum penalties of imprisonment for 1 year or 50 penalty units, or both.

The offences are said to ensure that ‘responsible entities are strictly liable for their actions that are taken to influence (directly or indirectly through other responsible entities) the whole or a substantial part of the registered entity’s business or financial standing (that is, liable regardless of fault)’ (see the explanatory memorandum at page 155). This approach is said to be necessary

to ‘compel responsible entities which have already been removed on the grounds of misconduct to refrain from influencing the activities of the registered entity in order to ensure the registered entity addresses the contravention or case of non-compliance’ (see the explanatory memorandum at pages 155 to 156 ).

Strict liability only applies to the element of the offence requiring that the entity has been either suspended or removed under the relevant provisions in the legislation. **Nevertheless, given that the offence is punishable by imprisonment the Committee seeks the Treasurer's further advice as to why strict liability is appropriate, taking into account the principles stated in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pages 23 and 24).**

**Furthermore, if the application of strict liability is considered necessary in relation to this element of the offences, the Committee also seeks the Minister's advice as to whether consideration has been given to placing an obligation on the Commissioner to communicate the serious consequences that may flow should a suspended or removed responsible entity continue to be involved in the operations of the registered entity.**

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

### **Undue trespass on personal rights and liberties—strict liability Subclause 100-70(1) and subclause 100-70(5)**

Subclause 100-70(1) provides that if the Commissioner makes a property vesting order to vest the property of a registered entity in an acting responsible entity, that the former trustee or former trustees are required to give the acting responsible entity all books relating to the registered entity's affairs that are in the former trustee's or former trustees' possession, custody or control. Failure to comply with this obligation within 14 days of the Commissioner making the order is an offence of strict liability.

The explanatory memorandum, at page 161, justifies the use of strict liability as being necessary to ‘compel former trustee(s) which have already been removed on grounds of misconduct to deal fairly with the trust's property

during the handover period'. **Given the brevity of this explanation the Committee seeks the Treasurer's further advice as to the justification for the application of strict liability by reference to the principles stated in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pages 23 and 24).**

**Furthermore, if strict liability continues to be considered necessary the Committee also seeks the Minister's advice as to whether consideration has been given to a requirement that the Commissioner specifically notify the former trustee(s) of their order, the obligations which thereby arise on the former trustee(s) and the consequences of a failure to comply.**

Subclause 100-70(5) also imposes strict liability offences for the breach of requirements that the former trustee or former trustees provide certain information or an explanation or take specified action in relation to an order vesting property in an acting responsible entity (subclauses 100-70(3) and (4)). In these cases, the required action is specified 'by notice in writing to the former trustee or former trustees' by the 'acting responsible entity' (subclause 100-70(3) and (4)). **The Committee seeks the Treasurer's advice as to the justification for the application of strict liability in these instances by reference to the principles stated in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pages 23 to 24). Given the nature of the strict liability offence, the Committee also seeks advice as to whether consideration has been given to requiring that the notice received by the former trustee(s) clearly specifies the consequences of a failure to comply.**

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

## **Adequacy of Merits review**

### **Part 7.2**

This Part provides for the review of a number of administrative decisions which affect a particular entity that may be applying for registration under the Bill or relate to the registration or regulation of a particular entity. The review model is as follows. First, an affected entity (ie the entity which has received notice of the administrative decision) may lodge an objection with the

Commissioner; second, that entity may either apply to the AAT for review or appeal against the objection decision to a designated court. The model is based on the Part IVC of the *Taxation Administration Act 1953*. The explanatory memorandum states, at page 195, that this approach will ensure ‘that whilst decisions of the ACNC Commissioner will be reviewed independently and separately from the processes in the tax law, the way in which the review and appeal process operate will be familiar to those NFP entities that operated prior to the establishment of the ACNC and were previously endorsed by the Commissioner of Taxation’. The approach also means that decisions of the ACNC Commissioner and the Commissioner of Taxation may be reviewed or appealed together where that is appropriate.

The details of this overall approach involve two significant departures from the standard model of merits review applicable under the AAT Act. First, section 27 of the AAT Act, which allows applications to be brought for review by or on behalf of any person or persons whose interests are affected by the decision, is excluded. The explanatory memorandum, at page 203, contains an explanation for excluding the operation of this provision of the AAT Act and limiting the right to apply for review to entities which are directly affected by reviewable decisions (see clause 165-10). The reason provided for this exclusion is that decisions concerning, for example, registration of an entity ‘could affect a large segment of the [NFP] sector...including donors and members’.

The conclusion reached is that any broadening of the right to bring an application would ‘be an inefficient use of government resources, as well as those of the registered entity’ and that indirectly affected persons ‘may not have access to private information’ relevant to the review of decisions. Although it is accepted that these points raise valid concerns, they are stated at a high level of generality which makes it difficult to assess their significance in this particular merits review context. **For this reason the Committee seeks the Treasurer's further advice as to a fuller explanation of the reasons why the default rule for standing (i.e. who is entitled to seek review) in the AAT is inappropriate.**

The second notable departure from the AAT Act (paragraph 165-40(b)) is that the applicant for review in the AAT ‘has the burden of proving that the administrative decision concerned should not have been made or should have been made differently’. The merits review function of the AAT has been described by the Federal Court as being to make the ‘correct or preferable’

decision. To this extent, the AAT is said put itself in the position of the original decision-maker when conducting its review. For this reason the Courts have resisted placing a formal onus or burden of proof on applicants before the AAT (though it has been recognised that a practical responsibility will often fall on applicants to build a persuasive case in relation to certain matters, particularly where facts or evidence are peculiarly within their knowledge).

The explanatory memorandum argues, at page 201, that placing a formal burden of proof on an applicant is appropriate as 'it is consistent with common law principles that the party bringing a law-suit or claiming that another entity's decision is wrong must prove that this is indeed the case'. Further, it is said that 'the facts and evidence relating to these disputes are peculiarly within the knowledge of dissatisfied entities'. However, given that the role of the AAT is merits review, and that this function often involves discretionary decision-making, it is not clear that the common law principles relevant to bringing a law suit are appropriate. Merits review involves administrative decision-making and rules associated with the exercise of judicial powers are not readily transferrable. Where the ACNC Commissioner exercises a discretionary power it is not clear what is required to prove that the decision is wrong or should have been made differently.

**In the circumstances the Committee also seeks the Treasurer's further advice as to the justification for the proposed approach to this matter.**

*Pending the Treasurer'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.*

## **Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012**

Introduced into the House of Representatives on 23 August 2012

Portfolio: Treasury

### **Background**

This bill accompanies the Australian Charities and Not-for-profits Commission Bill 2012. The bill makes changes to the Commonwealth statute book to give effect to the Australian Charities and Not-for-profits Commission.

The bill also provides transitional arrangements for entities to be transitioned to the new regulatory regime.

### **Exclusion of judicial review—ADJR Act Schedule 3, item 1**

The exclusion of the ADJR Act in relation to decisions which are reviewable under Part 7.2 of the proposed Australian Charities and Not-for-profits Commission Bill is justified on the basis that:

- the review and appeal rights provided for under Part 7.2 are adequate, and ‘cater for both internal and external merits review, and judicial review’ [it is unclear whether the reference to judicial review refers to the appeal to a court under Part 7.2 or to judicial review pursuant to s 39B of the *Judiciary Act*]; and
- it is desirable to exclude the ADJR Act given that ‘administrative decisions of the Commissioner of Taxation and the ACNC will in practice be interlinked and jointly considered’ and the fact that the ADJR Act is excluded in relation to such taxation decisions.

For these reasons, concern is expressed that access to the ADJR Act may ‘allow entities to initiate multiple judicial reviews in order to frustrate the implementation of ACNC decisions at significant expense and inconvenience to the relevant regulators, the AAT and Federal Courts’ (see the explanatory memorandum at page 260).

Although it may be noted that section 10 of the ADJR Act expressly empowers the court to refuse relief on the basis that other proceedings have been commenced or that alternative appeal or review rights are available, it is accepted that there are good policy reasons for harmonising the review and appeal process for administrative decisions made by the ACNC and the Commissioner of Taxation. Further, the availability of AAT Act review means that the effect of excluding the ADJR Act will not be that there is no right to obtain a statement of reasons for decision as this right also arises in relation to decisions which are reviewable by the AAT. **In the circumstances, the Committee leaves the question of whether the exclusion of the ADJR Act is appropriate to the consideration of the Senate as a whole.**

*The Committee draws Senators' attention to the provision, as it 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.*

## **Aviation Legislation Amendment (Liability and Insurance) Bill 2012**

Introduced into the House of Representatives on 22 August 2012

Portfolio: Infrastructure and Transport

### **Background**

The bill amends the *Civil Aviation (Carriers' Liability) Act 1959* and the *Damage by Aircraft Act 1999* to:

- increase the liability of aircraft operators for the death or injury of passengers on domestic flights and increase the corresponding level of insurance required; and
- implement a number of technical amendments to the framework in relation to the way liability is determined.

### **Undue trespass on personal rights and liberties**

**Schedule 1, item 1, section 28 Civil Aviation (Carriers' Liability) Act 1959**

**Schedule 1, item 5, subsection 10(2) of the Damage by Aircraft Act 1999**

Both of these items make amendments which limit the rights of persons under each Act to recover in respect of 'mental injuries'.

Item 1 replaces a reference to 'personal' injury with a reference to 'bodily' injury, so as to restrict the liability of an air carrier for the death or injury of a passenger. Item 5 narrows the scope of liability under the *Damage by Aircraft Act* so that 'mental injuries' are not compensable under the Act unless the person suffering those injuries has also suffered physical personal injuries or property damage or destruction. It is noted, however, that it may be possible for persons who suffer pure mental injuries to claim compensation under the State civil liability laws relating to negligence.

The Statement of Compatibility with Human Rights (SOC) accepts that these amendments engage the right to equality and non-discrimination and, in particular, the right not to be discriminated against on the basis of disability (including mental disability). The SOC contains a detailed explanation which

purports to justify the conclusion that the amendments are consistent with these rights as they aim to achieve a legitimate objective and are reasonable, necessary and proportionate to that objective. **The Committee draws the attention of the Senators to the explanation for this conclusion outlined at pages 14 to 15 of the explanatory memorandum, and 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.*

### **Parliamentary Joint Committee on Human Rights**

The Committee considers that it is appropriate to draw the question of whether the approach taken in this bill is reasonable, necessary and proportionate to the attention of the Parliamentary Joint Committee on Human Rights in light of the relevant human rights norms under the *International Convention on Civil and Political Rights* and the *Convention on the Rights of Persons with Disabilities*.

The Statement of Compatibility, at page 15, justifies the approach by reference to the need to ensure an appropriate ‘balance between the interests of air crash victims and aircraft operators’ and the fact that the ‘aviation industry has raised concerns about the potentially large groups of claimants, who as a result of having witnessed a major aviation disaster, could mount a claim under the DBA Act [on the basis of strict and unlimited liability] for ‘pure mental injury’ suffered as a result of having witnessed the crash’.

The question of whether the justification provided for the proposition that the line for compensating injury should be drawn by reference to the distinction between physical and mental injury is adequate in light of the relevant international law norms is a matter that may be of interest to the Parliamentary Joint Committee on Human Rights.

## National Portrait Gallery of Australia Bill 2012

Introduced into the House of Representatives on 23 August 2012

Portfolio: Regional Australia, Local Government, Arts and Sport

### Background

This bill establishes the National Portrait Gallery of Australia as a Commonwealth authority under the *Commonwealth Authorities and Companies Act 1997*, from 1 July 2013.

### Possible inappropriate delegation of legislative power

#### Clause 54

Clause 54 of the bill enables the regulations to prescribe penalties, not exceeding 50 penalty units for offences against the regulations. The explanatory memorandum states, at page 20, that it 'is expected that offences will primarily relate to regulations that are made regulating the conduct of persons at the Gallery and in relation to the land and buildings'.

In general, the Committee prefers to see important matters dealt with in primary legislation and it is of concern that the need to create offences through regulations is not justified in the explanatory memorandum. While it is acknowledged that the clause limits the penalties for offences against the regulations to 50 penalty units (consistent with the recommended maximum penalty for such offences in the *Guide to Framing Commonwealth Offences*), given the absence of an explanation for the proposed approach, **the Committee seeks the Minister's advice as to whether such matters can 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.*

## **National Portrait Gallery of Australia (Consequential and Transitional Provisions) Bill 2012**

Introduced into the House of Representatives on 23 August 2012  
Portfolio: Regional Australia, Local Government, Arts and Sport

### **Background**

This bill deals with transitional matters including transferring assets of the current National Portrait Gallery, which is a branch within the Department of Regional Australia, Local Government, Arts and Sport, to the new statutory authority.

The bill also provides for minor consequential amendments of the *Archives Act 1983*.

*The Committee has no comment on this bill.*

## **Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012**

Introduced into the House of Representatives on 23 August 2012

Portfolio: Treasury

### **Background**

This bill amends the law relating to taxation, and for related purposes to:

- re-state the ‘in Australia’ special conditions for income tax exempt entities, ensuring that they generally must be operated principally in Australia and for the broad benefit of the Australian community (with some exceptions);
- standardise the other special conditions entities must meet to be income tax exempt, such as complying with all the substantive requirements in their governing rules and being a ‘not-for-profit’ entity (with some exceptions);
- standardise the term ‘not-for-profit’, replacing the defined and undefined uses of ‘non-profit’ throughout the tax laws; and
- codify the ‘in Australia’ special conditions for DGRs ensuring that they must generally operate solely in Australia, and pursue their purposes solely in Australia (with some exceptions, such as overseas aid funds and some environmental organisations).

### **Reversal of burden of proof**

#### **Schedule 1, item 45, proposed subsection 363-30(6)**

Item 45 of Schedule 1 would insert subsection 363-30(6) into the *Taxation Administration Act 1953*. This subsection provides for two defences in relation to an offence for failing to provide the Commissioner with information requested for the purposes of determining an entity’s status as a prescribed entity. The defences are that the person did not aide, abet, counsel or procure the act or omission because of which the offence is taken to have been committed and that the person was not directly or indirectly a party to the act or omission because of which the offence is taken to have committed. The defendant must prove these offences, meaning that the person bears the

legal burden of proof and thus requires that the defendant positively prove the matter.

The Statement of Compatibility with Human Rights argues that the approach is appropriate because: (1) the information required for determining whether an entity is still meeting the conditions of prescription is necessary (and may affect the collection of revenue); and (2) the defendant will hold all of the evidence relevant to these defences as it is ‘uniquely in their possession’. It is also said, at page 38, that ‘it is common amongst Commonwealth revenue regimes to place the legal burden on the defendant where the defendant seeks to rely on an exception or defence to the general prohibition on disclosure of information (an offence-specific defence)’.

The committee also notes that the penalty for the offence (under section 8C of the Taxation Administration Act) for a first offence is 20 penalty units (see section 8E of that Act). **In light of the justification provided in the SOC 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

### **Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012**

*[Digest 6/12 – response in 9<sup>th</sup> Report]*

On 21 August 2012 the House of Representatives tabled an addendum to the explanatory memorandum and on the 22 August 2012 the bill was read a third time without amendment. The Committee has no comment on the additional material.

### **Cybercrime Legislation Amendment Bill 2011**

*[Digest 7/11 – no response required]*

On the 22 August 2012 the Senate agreed to 16 Government amendments and tabled a supplementary explanatory memorandum. The Committee has no comment on the additional material.

### **Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012**

*[Digest 8/12 – still awaiting response]*

On 23 August 2012 the House of Representatives agreed to two Government amendments and tabled a supplementary explanatory memorandum. The Committee has no comment on the additional material.

### **Greenhouse and Energy Minimum Standards Bill 2012**

*[Digest 6/12 – response in 8<sup>th</sup> Report]*

On 22 August 2012 the House of Representatives agreed to one Government amendment and tabled a supplementary explanatory memorandum. The Committee thanks the Minister for the action taken in response to its previous comment on the bill.

### **Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012**

*[Digest 6/12 – response in 8<sup>th</sup> Report]*

On 22 August 2012 the House of Representatives agreed to one Government amendment and tabled a supplementary explanatory memorandum. The

Committee thanks the Minister for the action taken in response to its previous comment on the bill.

**Illegal Logging Prohibition Bill 2011**

*[Digest 1/12 & 9/12 amendment – response in 6<sup>th</sup> Report]*

On 16 August 2012 the House of Representative agreed to nine Government amendments and on 20 August one Opposition amendment. On 22 August 2012 the Senate tabled a revised explanatory memoranda. The Committee has no comment on the additional material.

**Maritime Powers (Consequential Amendments) Bill 2012**

*[Digest 6/12 – no comment]*

On 20 August 2012 the House of Representatives tabled a replacement explanatory memorandum and the bill was read a third time. The Committee has no comment on the additional material.

**Public Service Amendment Bill 2012**

*[Digest 3/12 – response in 5<sup>th</sup> Report]*

On 20 August 2012 the House of Representatives agreed to 28 Government and three Opposition amendments and tabled a supplementary explanatory memorandum. On 22 August 2012 the Senate tabled a revised explanatory memorandum. The Committee has no comment on the additional material.

However, the Committee takes the opportunity to note a concern in relation to a provision proposed in the bill (this is in addition to the Committee's comment outlined in *Alert Digest 3 of 2012* and its *Fifth Report of 2012*).

**Retrospective effect**

**Schedule 1, item 44**

Item 44 of the bill seeks to make it a breach of the Code of Conduct for an APS employee to fail to 'behave honestly and with integrity' before being engaged as an APS employee in connection with the person's engagement. The proscribed conduct includes knowingly providing false or misleading information and wilfully failing to disclose relevant information.

While the policy justification for the proposed requirements is apparent to the Committee, it is concerned that the provision could have an unfair detrimental

retrospective effect. It appears that conduct that did not amount to a breach of the code at the time of a person's engagement as an APS employee may, by the operation of proposed 15(2A), be taken to be a breach of the code. Thus sanctions for breach of the code may be imposed on the basis of an obligation which was not part of the code at the time of the impugned behaviour.

The terms of this provision are significant, but its capacity to apply retrospectively is not addressed in the explanatory memorandum. **The Committee therefore seeks the Minister's advice as to the justification for applying this requirement retrospectively, particularly to those employees who were, or will be, engaged by the APS before the provision comes into effect.**

*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.*

### **Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2012**

*[Digest 14/11 – no response required]*

On 22 August 2012 the House of Representatives agreed to six Government and five Australian Greens amendments and tabled a supplementary explanatory memorandum. The Committee has no comment on the additional material.

### **Tax Laws Amendment (2012 Measures No. 4) Bill 2012**

*[Digest 8/12 – no comment]*

On 21 August 2012 the House of Representatives agreed to one Government amendment and tabled a supplementary explanatory memorandum. On 23 August 2012 the Senate tabled a revised explanatory memorandum to the bill. The Committee has no comment on the additional material.

## SCRUTINY OF STANDING APPROPRIATIONS

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

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

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

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

**Australian Charities and Not-for-profits Commission Bill 2012** — Chapter 5, Part 5-3, Division 125, subclause 125-5(1) (**SPECIAL ACCOUNT:** CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*)

### **Other relevant appropriation clauses in bills**

**National Portrait Gallery of Australia (Consequential and Transitional Provisions) Bill 2012** — Schedule 2, Part 5, subitem 12(3): special appropriation clause – for a finite amount and a finite period of time.