

Senate Standing Committee
for the
Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

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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.

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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.

Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Attorney-General

Background

This bill amends the *Australian Federal Police Act 1979*, *Crimes Act 1914*, *Crimes (Superannuation Benefits) Act 1989*, *Criminal Code Act 1995*, *Customs Act 1901*, and *Law Enforcement Integrity Commissioner Act 2006* to:

- ensure that the Commonwealth's serious drug offences framework can respond quickly to new and emerging substances;
- expand the scope of existing identity crime offences, as well as enact new offences for the use of a carriage service in order to obtain and/or deal with identification information;
- create new offences relating to air travel and the use of false identities;
- improve the operation of the *Law Enforcement Integrity Commissioner Act 2006*;
- clarify that superannuation orders can be made in relation to all periods of a person's employment as a Commonwealth employee, not only the period in which a corruption offence occurred; and
- increase the value of a penalty unit and introduce a requirement for the triennial review of the penalty unit.

Delegation of Legislative Power

Schedule 1

Schedule 1 of the bill is intended to facilitate flexibility in enabling the Commonwealth's serious drug offences framework to remain up to date and responsive by enabling the law to adapt to the evolving market in illicit drugs. Currently, the listings and quantities of drugs for the purposes of offences in Part 9.1 of the *Criminal Code* are contained within the *Criminal Code*.

A number of provisions proposed by item 16 of Schedule 1 of the bill enable prohibited drugs or plants to be proscribed by regulations. Item 16 of Schedule 1 also would insert a new section 301.7 into the *Criminal Code*. The effect of this provision is to ensure that only illicit substances may be listed in the regulations. Before a substance can be listed the Minister must be satisfied that the ‘substance or plant is likely to be taken without appropriate medical supervision’ and that one or more of five listed criteria are applicable (see the explanatory memorandum at page 25).

Regulations made for this purpose are legislative instruments and subject to disallowance. As the explanatory memorandum emphasises (at page 26), such regulations will be scrutinised by the Senate Standing Committee on Regulations and Ordinances.

The Committee generally prefers for important matters to be dealt with in primary legislation and it is a matter for concern that important elements of serious criminal offences are proposed to be dealt with in regulations. The explanatory memorandum, however, contains a detailed justification for the approach. This justification focuses on the need for the taking of swift action to proscribe new substances where this is needed to enable law enforcement agencies to respond to emerging drug threats. It is argued that ‘the legislative process may delay the timely listing of a substance as a controlled or border controlled substance in the Criminal Code, and this may be exploited by entrepreneurial criminals and organised crime groups’ (see the explanatory memorandum at page 24). It is also stated that the approach is consistent with a recommendation of the Model Criminal Code Officers Committee in 1998 and with that taken by other jurisdictions such as Queensland, New Zealand and the United States (see the explanatory memorandum at page 25).

The case for arguing that the legislative process is too slow to keep up with the evolving illicit drugs market is, however, partially undercut by the fact that the bill also provides (see Schedule 1, item 16, proposed sections 301.13–301.17) for the making of ‘emergency determinations’ which enable a substance to be listed for up to 12 months (which may then be extended to a maximum of an 18 month period). Whether the approach taken in the bill, i.e. that illicit substances will be listed in regulations rather than the primary legislation, is justified may thus depend upon the frequency with which the list of controlled substances needs to be updated. Although the explanatory memorandum argues that there is a general need for flexibility given ‘growing markets in new and emerging substances’ (see page 25) it does not explain the

extent of the problem, provide examples or information about the frequency with which the list of controlled substances needs to be updated or indicate why the problem cannot be dealt with through ‘emergency determinations’ (a similar facility exists in the current law, though such determinations are effective for a much shorter period than is proposed by the amendments). While a detailed explanation has been provided in the explanatory memorandum for the overall approach, this information would have been useful. However, in light of the explanation that is contained in the explanatory memorandum, **the Committee leaves the general question of the appropriateness of this delegation of power to the Senate as a whole.**

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

Delegation of Legislative Power

Schedule 1, item 16, proposed sections 301.13–301.17

As indicated above, proposed sections 301.13–301.17 deal with the power to make ‘emergency determinations’ for listing substances as controlled and border controlled drugs and plants. Such determinations are legislative instruments and subject to disallowance. However, before making such a determination the Minister must be satisfied that there is an ‘imminent and substantial risk’ that the substance or plant will be taken without appropriate medical supervision and that one or more of four listed conditions are met, conditions which reflect that there may be risks associated with the substance even if the risks have not yet been confirmed by evidence (see the explanatory memorandum at page 29).

The justification for ‘emergency determinations’ is essentially that the government have the power to ensure illicit substances are listed in cases that ‘require immediate action to control the substance’ (see the explanatory memorandum at page 30). It is argued in the explanatory memorandum that ‘the benefit of an emergency determination is that the Government can act quickly to prevent trade in potentially harmful substances’ (see page 32). Emergency determinations are effective for 12 months, though they may be extended by a further legislative instrument in ‘exceptional circumstances’ (though they may not be extended with the effect that the determination would

stay in force for longer than 18 months) (see proposed subsections 301.16(2) and (3)).

The 12 month period of effectiveness of emergency determinations is said to be consistent with temporary or emergency listing of substances in the United States and New Zealand. Further, it is argued that the current period of 28 days is insufficient time to ‘obtain enough information about the harms and effects of the substance in time to prevent their entry to the Australian market or their proliferation within Australia’ or to arrange for permanent listing (see the explanatory memorandum at page 32).

In evaluating the appropriateness of the overall approach to emergency determinations, it should also be noted that in addition to the determinations being registered on the Federal Register of Legislative Instruments, the Minister is required to publish the determination by way of a public announcement and to cause a copy of the announcement to be published on the internet and in a newspaper circulating in each State and the ACT and NT (see proposed section 301.17).

In the circumstances, and given the justification provided in the explanatory memorandum, the Committee leave the appropriateness of the delegation of legislative power to make emergency determinations to the Senate as a whole.

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

**Undue trespass on personal rights and liberties—absolute liability
Schedule 2, item 3, proposed subsections 372.1A(2) and 372.1A(4)**

Part 1 of Schedule 2 of the bill introduces a number of new identity crime offences to the *Criminal Code*. Subsection 372.1A(1) makes it an offence to deal in identification information *using* a carriage service (such as the internet or a mobile phone), with the intention that a person pass themselves off as another person for the purpose of committing or facilitating the commission of an indictable offence. Subsection 372.1A(3) makes it an offence to deal in identification information *obtained* using a carriage service with the intention

that a person pass themselves off as another person for the purpose of committing or facilitating the commission of an indictable offence.

Subsections 372.1A(2) and 372.1A(4) provide that absolute liability will apply to the elements of the offence relating to whether the person deals or obtains identification information ‘using a carriage service’ and whether the offence is an indictable offence against the law of the Commonwealth, a State or a Territory or is a foreign indictable offence. The application of absolute liability to these elements of the offence mean that the prosecution would not be required to prove that the defendant knew or was reckless as to whether a carriage service was used or whether the offence they were committing was a specified indictable offence. Although honest and reasonable mistake of fact is a defence for strict liability, this defence does not apply to elements of offences for which absolute liability applies.

The explanatory memorandum contains a detailed explanation for the application of absolute liability in relation to the above elements of the offences. The elements are ‘jurisdictional elements which do not relate to the substance of the offence or the culpability of the defendant, but mark a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and the States’ (see the explanatory memorandum at pages 40 and 41). As the explanatory memorandum notes, this justification is consistent with Commonwealth criminal law practice as set out in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

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

Undue trespass on personal rights and liberties—reversal of onus of proof

Schedule 2, item 3, proposed subsection 372.1A(5)

Schedule 2, item 9, proposed subsection 376.3(3)

This bill inserts a new presumption relating to proof of the element of the above offences that the relevant criminal conduct was engaged in using a carriage service. Proposed subsection 372.1A(5) provides that if ‘the prosecution proves beyond reasonable doubt that a person’ has dealt with or obtained identification information, ‘then it is presumed, unless the person proves to the contrary, that the person used a carriage service’ to deal with or

obtain that information. The result is that the defendant bears a legal burden of proof in relation to these matters. The presumption, as pointed out in the explanatory memorandum, is consistent with existing sections of the *Criminal Code* relating to telecommunications offences.

The explanatory memorandum contains a detailed justification of the provision, the purpose of which is to ‘address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the criminal conduct’ (see the explanatory memorandum at page 42). It is explained that ‘[i]n the context of identity crime, often the evidence that a carriage service was used to engage in the conduct is entirely circumstantial, consisting of evidence that the defendant’s computer had identification information of another person on the hard drive, that the computer was connected to the internet and that records show that the computer accessed particular websites with names suggesting an association with identity crime’ (see pages 42 and 43).

Given that the use of a carriage service is a ‘jurisdictional element’ of the offence (so as to ensure that the offences are within the Commonwealth’s telecommunications power under the *Constitution*) and does not relate to the substance of a defendant’s culpability, the explanatory memorandum argues that it is appropriate that the defendant bear a legal burden in relation to proving that he or she did not use a carriage service. The prosecution still needs to prove that the person has dealt with or obtained identification information.

Similar issues arise in relation to proposed subsection 376.3(3).

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

**Undue trespass on personal rights and liberties—strict liability
Schedule 2, item 8, proposed subsection 3UN(2)**

Proposed subsection 3UN(1) would make it an offence for a person to fail to comply with a request (under section 3UM) to provide identification information if requested to do so by a constable at an airport. An offence will not be committed unless a constable makes a valid request under subsection 3UM(3) and the constable complies with obligations imposed under subsection 3UM(4) when making the request. Subsection 3UN(2) states that

strict liability applies to these elements of the offence, namely, that a constable has made a request in accordance with subsection 3UM(3) and has not failed to comply with his or her duties in subsection 3UM(4). The effect of strict liability is that, although the prosecution will be required to prove that the constable did in fact make a request of information and that the constable complied with their duties, the prosecution would not need also to prove that the defendant knew that the request was in accordance with these requirements. Mistake of fact remains a defence for strict liability offences.

The explanatory memorandum justifies the imposition of strict liability in relation to these elements of the offence by arguing that the defendant's knowledge of whether or not the constable has complied with their duties and the request has been made in accordance with statutory requirements is 'not relevant to their culpability' (see page 49). In light of (1) this justification, (2) the fact that a constable's duties include (see paragraph 3UM(4)(b)) an obligation to inform a person that it may be an offence not to comply with a request, and (3) the fact that the penalty is well under the maximum penalty recommended by the *Guide to Framing Commonwealth Offences* for strict liability offences, the Committee makes no further comment on the issue.

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

**Undue trespass on personal rights and liberties—absolute liability
Schedule 2, item 9, proposed subsections 376.2(2), 376.3(4), and
376.4(3)**

Part 2 of Schedule 2 of the bill introduces a number of new offences relating to false identity and air travel. The above provisions apply absolute liability to elements of the offences. However, in each case the elements to which absolute liability applies are 'jurisdictional elements' and the explanatory memorandum argues that absolute liability is appropriate given that jurisdictional elements of the offences do not relate to the substance of the offence, but mark a jurisdictional boundary to ensure that the offences fall within the legislative powers of the Commonwealth. In addition, the approach is consistent with the principles in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (see pages 53, 57 and 60).

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

**Undue trespass on personal rights and liberties—possible retrospective effect
Schedule 3, items 14 and 15**

Part 3 of Schedule 3 of the bill amends the *Crimes (Superannuation Benefits) Act 1989* and the *Australian Federal Police Act 1979*. Those Acts provide for the forfeiture and recovery of employer funded superannuation benefits that are payable or have been paid to Commonwealth employees who have been convicted of corruption offences by a court and sentenced to more than 12 months imprisonment. The amendments in the bill provide that a superannuation order can be made in relation to employer funded contributions and benefits accrued during all periods of Commonwealth employment, regardless of whether an employee had a continuous period of employment or several separate periods of employment.

The explanatory memorandum states that the amendments ‘clarify’ that ‘the legislation applies equally to all...employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment’ (see page 68). Items 14 and 15 of Schedule 3 both provide that the amendments apply in relation to a superannuation order ‘applied for on or after the commencement of this item, whether an offence to which the order relates was committed before, on or after that commencement’. The effect of the provision is thus that some employees may suffer an increased financial detriment for convictions which occurred prior to the commencement of the bill.

Items 14 and 15 are not retrospective in the sense that they require an affected person to perform some act or omission prior to the commencement of legislation; rather a person is subjected to a detriment operating from the enactment of the law based on a past events (namely, the conviction for a corruption offence committed prior to commencement). Nevertheless, the result of the amendments will be to increase financial liabilities to be suffered by some employees in relation to offences which have been committed prior to commencement. The line between this situation and legislation which retrospectively raises the penalty for an offence is a fine one.

Although the explanatory memorandum does not address the question, the Statement of Compatibility with Human Rights argues that ‘Commonwealth employees convicted of a ‘corruption offence’ and sentenced to more than

12 months' imprisonment would have had an expectation that they would lose all their employer funded superannuation contributions under the existing scheme' because '[u]ntil recently, it was thought that the existing scheme applied equally to employees who have one continuous period of employment as well as to those who have had several separate periods of employment' (see page 13). It is also argued (at page 14) that employees engaged in continuous employment are not relevantly different to those who have had several separate periods of employment, and thus that the scheme should apply equally to the two categories of employees.

It is difficult for the Committee to assess the adequacy of this justification without more information as to the reasons why it is considered necessary to 'clarify' the existing law. More particularly, there is little information in the explanatory memorandum or the statement of compatibility to enable the Committee to consider the reasonableness of the claim that Commonwealth employees should be taken to have had a reasonable expectation that they would lose all of their employer funded superannuation contributions under the existing scheme, regardless of whether they were engaged for several separate periods as opposed to one continuous period. **The Committee therefore seeks the Attorney-General's advice in relation to these issues and the appropriateness of the approach.**

Pending the Attorney-General'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.

Fair Entitlements Guarantee Bill 2012

Introduced into the House of Representatives on 11 October 2012

Portfolio: Education, Employment and Workplace Relations

Background

This bill replaces the administrative General Employee Entitlements and Redundancy Scheme by establishing a legislative framework for advances to be paid to former employees whose employment has ended as a result of their employer's insolvency or bankruptcy and who have unpaid employee entitlements that cannot be obtained from another source; and provides for the Commonwealth to recover the advances through winding up or bankruptcy proceedings or from other payments employees receive for the entitlements from other sources.

Delegation of legislative power

Clause 50

This clause enables regulations to be made establishing further schemes for the assistance of workers who are not covered by the bill because they do not fall within the definition of 'workers'. The clause sets out various matters which a regulation providing for such a scheme may provide, matters which parallel the matters covered by the bill in relation to workers.

The justification for this delegation of legislative power to provide for significant new schemes whose details may, but need not, mirror those contained in the bill is so the 'evolving nature of employment relationships' do not result in a lack of assistance for persons who may be considered to be in situations analogous to employees when an employer is or is reasonably expected to be insolvent. The explanatory memorandum states that it 'is intended that this regulation making power would be used only when it is necessary to support the objects of this Bill' (see pages 31 and 32).

Although the evolving nature of employment and work suggests that it may be appropriate for further schemes to be created, the details of any such scheme will raise important issues which may be thought to be more appropriately contained in primary legislation. Although the explanatory memorandum indicates that the regulation power 'provides flexibility to cover employment relationships that extend beyond the traditional employee/employer paradigm'

(see page 32), the powers involved cannot be said to relate to matters of detail but raise core issues of eligibility, assessment and review rights under any new scheme for financial assistance. Noting that there is a standing appropriation in the bill (clause 51) to cover costs associated with the scheme set up by the bill and any further schemes established by regulations, **the Committee seeks the Minister’s advice in relation to the rationale for, and the appropriateness of, this significant delegation of legislative power.**

Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it 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—standing appropriation Clause 51

Clause 51 provides that the Consolidated Revenue Fund is appropriated for the purposes of payments under this bill.

In its *Fourteenth Report of 2005* (at page 272), the Committee stated that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee’s terms of reference relating to the delegation and exercise of legislative power.

In scrutinising standing appropriations, the Committee looks to the explanatory memorandum to the bill for an explanation of the reason for the standing appropriation. In addition, the Committee ideally likes to see:

- some limitation placed on the amount of funds that may be so appropriated; and
- a sunset clause that ensures the special appropriation cannot go on indefinitely without any further reference to the Parliament.

The justification provided in the explanatory memorandum for the appropriation in clause 51 is that it is ‘necessary as it is not possible to predict the number or value of entitlements that will be advanced in any particular

year'. It is also argued that the standing appropriation will 'provide certainty to claimants by ensuring that sufficient funds will be available to meet all eligible entitlements' (see page 32). The Committee notes this justification; however it **seeks advice as to whether consideration has been given to a sunset clause, especially in light of the capacity for entitlements payable under the bill to grow through the introduction of further schemes for financial assistance under clause 50.**

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

Fair Work Amendment (Transfer of Business) Bill 2012

Introduced into the House of Representatives on 11 October 2012

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Fair Work Act 2009* to provide for the transfer of employees' terms and conditions of employment from an old public sector employer to a national system employer where there is a connection between the two, and to enable Fair Work Australia to make orders that modify the general effect of the transfer of business rules in these circumstances.

The bill also makes consequential amendments to the *Fair Work Act 2009*, the *Fair Work (Registered Organisations) Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Delegation of legislative power—Henry VIII clause Schedule 1, item 1, proposed subsection 768CA(2)

Proposed subsection 768CA(2) would enable the making of regulations that 'may modify provisions of this Act or the Transitional Act'.

The Committee routinely raises concerns about so-called Henry VIII provisions that enable the executive government to modify the operation of primary legislation passed by the Parliament. The concern is that such provisions may subvert the appropriate relationship between the Parliament and the Executive branch of government.

As the explanatory memorandum does not indicate why this provision is necessary, **the Committee seeks the Minister's advice in relation to the justification for the proposed approach.**

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

Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Attorney-General

Background

This bill amends the *Freedom of Information Act 1982* to:

- provide an exemption for information held by departments and agencies that relates to a confidential request to the Parliamentary Budget Office;
- provide that the Administrative Review Tribunal may review a decision refusing to grant access to a document claimed to be exempt; and
- provide that an agency is not required to give information as to the existence or non-existence of a document.

The bill also makes a consequential amendment to the *Privacy Act 1988*.

Undue trespass on personal rights and liberties—Freedom of Information

Items 1-3

The purpose of this bill is to provide for a new FOI exemption for documents related to requests to the Parliamentary Budget Office (PBO). The PBO is currently an exempt agency and thus documents it holds are not subject to the FOI Act. However, documents relating to requests from the PBO that may be held by other agencies or departments are not specifically exempted from the operation of the Act. The bill provides that an agency is not required to give information that relates to a confidential request to the PBO (item 3), nor is it required to give information as to the existence or non-existence of a documents where it is exempt under the new exemption (items 1 and 2).

It is recognised in the Statement of Compatibility with Human Rights that the bill limits the right of individuals to receive information. This limitation is, however, argued to be reasonable, necessary and proportionate to the objective of protecting public order by enhancing public administration. It is argued that the objective of the bill is to protect ‘the integrity of the PBO’. As

the PBO has the purpose of providing Parliament with independent and non-partisan analysis of fiscal issues and the financial implications of policy proposals, it plays an important role in the development of public policy. It is further claimed that senators and members ‘may be reluctant to request such analysis from the PBO in the absence of certainty that information provided in response to confidential requests will not be released under the FOI Act’. It is also contended that the bill will have ‘minimal impact on the amount of government information withheld from the public’ and is intended to facilitate the effective working of the PBO which was set up for the benefit of the Parliament, not to provide advice to the government (see the explanatory memorandum at page 3).

It may be noted that the argument that the possibility proper advice will not be sought or given if it may be subject to the FOI Act is not, in the context of the creation of government documents, generally considered a sufficient reason to create an FOI exemption. Nevertheless, in light of the detailed justification provided in the statement of compatibility, the fact that the PBO is itself an exempt agency, and the special role the PBO plays in providing information to all members of the Parliament, **the Committee leaves consideration of whether the proposed approach is appropriate to the Senate as a whole.**

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

Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012

Introduced into the Senate on 10 October 2012

By: Senator Hanson-Young

Background

This bill amends the *Australian Security Intelligence Organisation Act 1979*, the *Migration Act 1951*, and the *Administrative Appeals Tribunal Act 1975* to:

- establish a requirement that ASIO review an adverse security assessment every 6 months or on referral from Department of Immigration and Citizenship;
- ensure that, unless statutory exceptions apply, refugees who received an adverse security assessment (ASA) are able to access the written reasons for their ASA;
- remove the exclusion of non-citizens from seeking merits review of ASAs in the Administrative Appeals Tribunal (AAT);
- establish a new role of Special Advocate who can appear in ASA review hearings in the AAT where the ASIO Director-General or Attorney-General assert there are national security reasons to exclude the refugee from accessing the written reasons for the ASA or general information as to the evidence upon which the reasons are based.

The Committee has no comment on this bill.

Regulatory Powers (Standard Provisions) Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Attorney-General

Background

This bill provides for a framework of standard regulatory powers exercised by agencies across the Commonwealth including:

- monitoring and investigative powers; and
- enforcement provisions such as civil penalties, infringement notices, enforceable undertakings and injunctions.

General

The purpose of this bill is to provide for standard regulatory powers exercised across Commonwealth agencies. The bill will not apply to any particular legislation unless its provisions are specifically triggered through amendment or the introduction of new legislation.

Given the nature of regulatory powers, the bill contains a number of coercive powers which do have the potential to have an impact on individual rights and liberties. However, as noted in the explanatory memorandum, the powers contained in the bill do appear to reflect standard powers commonly found across the statute book. The justification for a regulatory powers bill of general application is stated as being based on the Clearer Laws project, which aims to reduce complexity in Commonwealth legislation by reducing its volume and increasing consistency and coherence across the statute book.

The appropriateness of coercive regulatory powers will depend on the particular statutory context to which they are applied. Thus, although in general it does not appear that the bill departs in any significant detail from the broad principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, whether or not the approach taken to particular questions is appropriate is difficult to assess without reference to a particular statutory context and the nature of the regulatory regime. For example, the justification of placing an evidential burden on a person wishing to rely on any exception, exemption, excuse or justification provided in relation to the creation of a civil penalty provision (see clause 99)

cannot be assessed in the abstract. The explanatory memorandum recognises this issue insofar as it is emphasised that (1) it may not be appropriate to trigger the provisions of the bill in certain contexts and it may be appropriate that only some of the provisions be activated, and (2) future legislation which incorporates some or all of the provisions of the Bill will be subject to Parliamentary scrutiny.

Noting the above comments, **the Committee leaves the overall question of the appropriateness of enacting the bill to the Senate as a whole.** Clarity and consistency in the application of regulatory powers will in many situations facilitate the protection of rights and liberties, at least to the extent regulated entities may be in a better position to know the extent of their obligations and their legally protected rights and liberties. Nevertheless, **the Committee considers that where future legislation applies part or all of the powers in the bill, such bills should be accompanied by detailed consideration in the explanatory memorandum explaining the appropriateness of the standard provisions adopted. This will facilitate adequate Parliamentary scrutiny of such legislation.**

Delegation of legislative power

Multiple provisions

The provisions of the bill which provide that its powers may only be activated by a triggering Act also state that its provisions may be activated by regulation. The Committee in general expects to see important matters dealt with in primary legislation rather than regulations. Although the bill also provides that a legislative instrument may only provide that a provision activates a provision in this bill if the power to do so is given under another Act (see, for example, clause 18), it remains the case that the provisions of this Act can be triggered by regulations. **The Committee therefore seeks the Attorney-General's advice as to why it is considered appropriate to enable the application of the significant provisions in this bill through the enactment of regulations.**

Pending the Attorney-General's advice, 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

Clause 60

Clause 60 provides that an investigation warrant may continue to have effect even if the authorised person, and all persons assisting with the execution of the warrant, cease the execution and leave the premises. The continuation of the warrant is only allowable in limited circumstances, and the explanatory memorandum argues that ‘some flexibility is required to ensure that an authorised person can leave the premises if required, for example to fetch necessary equipment or avoid a dangerous situation’ (see page 19). Although it may be the case that flexibility is appropriate in some contexts, it is important to ensure (as the explanatory memorandum also recognises) that searches are undertaken in a ‘timely fashion and that a warrant does not authorise an authorised person to search a premises on multiple occasions from time to time’ (see page 19).

Noting that the importance of flexibility may vary depending on the details of a particular regulatory context and that this can be assessed case-by-case as relevant legislation is brought before Parliament, **the Committee leaves the appropriateness of this provision to the Senate as a whole.**

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

Social and Community Services Pay Equity Special Account Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill establishes a special account under section 21 of the *Financial Management and Accountability Act 1997* to administer the social and community services award funding adjustments for providers of certain Commonwealth programs that have been identified as having social and community services workers covered by the Fair Work Australia equal remuneration order granted on 1 February 2012.

Delegation of legislative power Subclauses 7(5) and 8(8)

Subclause 7(5) will enable the Minister to modify the schedules to the Act which list the programs that may be funded from monies from the relevant special account (to be established by the bill). The subclause provides that although an instrument made under subsection 7(4) is a legislative instrument, section 42 of the *Legislative Instruments Act 2003* (the LIA) does not apply. The result is that the Parliament's usual procedures for the disallowance of legislative instruments will not apply.

The explanatory memorandum justifies this approach by reference to two arguments. First, the power of the Minister to modify the relevant programs (i.e. programs which may be funded) that are set out in Schedules 1 and 2 of the bill is justified by reference to the need for flexibility. Although it is said to be desirable that the programs to receive financial assistance under this bill should be included in the primary Act and thus subjected to full parliamentary scrutiny, it is argued that there must be a flexible mechanism 'available to enable the Schedules to be updated to reflect common changes, including renaming programs, identification of additional in-scope programs and removal of programs' (see page 8). Secondly, clause 9 of the bill provides that either House of Parliament may, following a motion on notice, pass a resolution of disallowance. However, to be effective the resolution must be passed within five sitting days after the instrument was tabled under section 38 of the LIA. The result is the establishment of a shorter period for

disallowance than that available under the LIA (which is currently 15 sitting days). However, as the explanatory memorandum notes, clause 9 does ensure ‘that Parliament has active oversight of any proposed changes to the Schedules’ before they take effect (see page 12).

The LIA also specifies that if a disallowance motion is not resolved within the relevant number of sitting days then the regulation is automatically disallowed. However, this LIA approach will again not apply to these instruments. Subclause 9(3) specifies that if a resolution is not passed by a House of Parliament by the fifth sitting day, then the instrument takes effect the following day.

Similar issues also arise in relation to subclause 8(8).

The Committee notes that the explanatory memorandum does not provide a justification for these changes to the usual disallowance process, but as the approach retains the opportunity for Parliamentary oversight of any legislative instruments, **leaves the appropriateness of the approach to the consideration of the Senate as a whole.**

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

Social and Community Services Pay Equity Special Account (Consequential Amendments) Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill makes a consequential amendment to the *COAG Reform Fund Act 2008* on the creation of the Social and Community Services Pay Equity Special Account.

The Committee has no comment on this bill.

Superannuation Legislation Amendment (New Zealand Arrangement) Bill 2012

Introduced into the House of Representatives on 11 October 2012

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997*, the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*; and the *Taxation Administration Act 1953* to introduce an arrangement that allows individuals to move their retirement savings between Australia and New Zealand.

The Committee has no comment on this bill.

Tax Laws Amendment (Clean Building Managed Investment Trust) Bill 2012

Introduced into the House of Representatives on 10 October 2012

Portfolio: Treasury

Background

This bill amends the *Income Tax (Managed Investment Trust Withholding Tax) Act 2008*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to provide a final withholding tax rate of 10 per cent on fund payments from eligible Clean Building Managed Investment Trusts made to foreign residents in information exchange countries.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012 and related bills

[Digest 12/12 – no response required]

On 10 October 2012 the House of Representatives tabled a replacement explanatory memorandum to the bills. On 11 October 2012 the House of Representatives agreed to two Government amendments, tabled a supplementary explanatory memorandum to the Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012, and the bills were read a third time. The Committee has no comment on this additional information.

Customs Amendment (Smuggled Tobacco) Bill 2012

[Digest 8/12 – no comment]

On 11 October 2012 the Senate tabled a replacement explanatory memorandum. The Committee has no comment on this additional information.

National Portrait Gallery of Australia Bill 2012

[Digest 10/12 – response in 11th Report]

On 9 October 2012 the Senate tabled an addendum to the explanatory memorandum. **The Committee thanks the Minister for including information relating to the justification for the use of regulations to create offences as requested by the Committee.**

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*

Fair Entitlements Guarantee Bill 2012 — clause 51

Social and Community Services Pay Equity Special Account Bill 2012 — clause 5 (**SPECIAL ACCOUNT**: CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*)

Other relevant appropriation clauses in bills

Nil