

**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 I 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.



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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.



## **Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013**

Introduced into the House of Representatives on 14 March 2013  
Portfolio: Broadband, Communications and the Digital Economy

### **Background**

This bill is part of a package of six bills and responds to issues identified by the 2011 *Independent Inquiry into the Media and Media Regulation* and the 2012 *Convergence Review*.

This bill responds to matters raised in the Convergence Review in relation to the use of the sixth channel of television for commercial television broadcasting services and the provision of Australian content.

The bill also amends the Charters of the ABC and SBS to recognise their roles as providers of digital media content and, in the case of the ABC, its place as the only provider of Commonwealth-funded international broadcasting services. The bill requires the Minister to have regard to the need to ensure that the board of the SBS include at least one non-executive director who is an Indigenous person.

*The committee has no comment on this bill.*

## **Broadcasting Legislation Amendment (New Media Diversity) Bill 2013**

Introduced into the House of Representatives on 14 March 2013  
Portfolio: Broadband, Communications and the Digital Economy

### **Background**

This bill is part of a package of six bills and responds to issues identified by the 2011 *Independent Inquiry into the Media and Media Regulation* and the 2012 *Convergence Review*.

The bill amends the *Broadcasting Services Act 1992* by inserting a new Part 5A dealing with news media diversity. Under the new part, changes of control of significant news media voices will require approval by a Public Interest Media Advocate (PIMA) applying a new public interest test. The ACMA will maintain a register of the news media voices regulated by the new Part.

### **Merits Review**

#### **Schedule 1, item 20 (proposed Division 3)**

PIMA decisions to approve or not approve applications for transactions that would result in a *control event* occurring are not subject to merits review (*control event* is defined in proposed sections 78BA and 78BB). There is an explanation for this in the explanatory memorandum at page 20:

The process, which will involve elements of both an inquiry with substantial public consultation and potentially a negotiation, has been designed to ensure transacting parties reasonably engage with the PIMA during the assessment process. The Administrative Review Council Guidelines note that processes that would be time-consuming and costly to repeat on review—as would be the case with consideration of the proposed public interest test and any negotiation of associated undertakings—may be exempted from including a merits review process.

**In light of this explanation the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

## **Broad Discretionary Powers Schedule 1, item 20 (proposed Division 3)**

The criteria for making approval decisions (applied by PIMA under proposed Division 3) involve a consideration of whether the benefit to the public of a transaction going ahead would outweigh detriment to the public constituted by any lessening of diversity of control of media voices. The application of these criteria requires PIMA to make significant judgments about which reasonable minds may disagree. To this extent, the practical effect is analogous to the conferral of broad discretionary powers on PIMA relating to matters of national significance.

Although merits review is not available in relation to the exercise of these powers, the decision-making process does involve a number of accountability checks. First, proposed section 78CC requires a process of public consultation. Second, the PIMA is required to consider any submissions received in relation to a proposed decision. Last, the PIMA is required to publish its reasons for decision on the department's website. The committee notes that neither the bill nor the explanatory memorandum indicates what the intended consequence of non-compliance with these requirements will be.

Nonetheless, it is clear that PIMA's decisions are not subject to merits review and that the nature of the criteria being applied (insofar as they relate to the amorphous notion of the public benefit) means that the role judicial review might play is likely to be limited. It is also notable that standard means of political accountability (i.e. ministerial and parliamentary control) will be limited given that PIMA will be established as an independent statutory office.

Overall, the committee notes that the powers being exercised in the approval process are analogous to broad discretionary powers, but in light of the accountability measures included in the bill leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole. **However, the committee seeks the Minister's advice as to the intended consequence of non-compliance with any of the requirements relating to the decision-making process (such as public consultation, considering submissions and publishing reasons).**

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

**Strict liability**  
**Section 78ML**

Proposed section 78ML states that an offence against Division 12 (which sets out a number of notification requirements) is an offence of strict liability. The committee has consistently taken the view that fault liability is one of the most fundamental protections of the criminal law and that strict liability should only be introduced after careful consideration. The committee expects that the use of strict liability is in accordance with the *Guide to framing Commonwealth Offences* and the rationale for its use be described in the explanatory memorandum.

Unfortunately, in this instance there is no justification in the explanatory memorandum as to why strict liability is appropriate. **The committee therefore seeks the Minister's advice as to the rationale for applying strict liability.**

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

## **Environment Protection and Biodiversity Conservation Amendment Bill 2013**

Introduced into the House of Representatives on 13 March 2013

Portfolio: Sustainability, Environment, Water, Population and Communities

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to provide for the establishment of a new matter of national environmental significance in relation to the significant impacts or likely significant impacts of coal seam gas development and large coal mining development on a water resource.

*The committee has no comment on this bill.*

## **News Media (Self-regulation) Bill 2013**

Introduced into the House of Representatives on 14 March 2013

Portfolio: Broadband, Communications and the Digital Economy

### **Background**

This bill is part of a package of six bills and responds to issues identified by the 2011 *Independent Inquiry into the Media and Media Regulation* and the 2012 *Convergence Review*.

The bill allows the Public Interest Media Advocate to declare a specified body corporate to be a 'news media self-regulation body'.

### **Trespass on personal rights and freedoms—privacy and freedom of expression**

#### **Various**

This bill will allow the Public Interest Media Advocate (PIMA) to declare a specified body corporate - which meets minimum eligibility and other criteria - to be a 'news media self-regulation body'. In effect, the scheme creates what may be described as a system of 'enforced self-regulation' because although participation in a 'news media self-regulation scheme' remains voluntary, a news media organisation which has either failed to join or has been suspended will no longer qualify for the 'journalism' exemption from the privacy obligations imposed under the *Privacy Act 1988*. A news media self-regulation scheme must include standards relating to the right to privacy (among other things), but the clear assumption appears to be that news media organisations are likely to prefer being subject to such a scheme than being subject to the general requirements of privacy legislation.

The statement of compatibility accepts that it might be possible that a news media self-regulation body may give undue emphasis to freedom of expression in circumstances where it may be thought to conflict with the right to individual privacy. It is argued in the explanatory memorandum, at page 9, that this issue is addressed by requiring the PIMA to have regard to both sets of rights—privacy and freedom of expression—when making determinations as to whether a media self-regulatory body should be declared for the purposes of the bill. The PIMA is also required to consult with the Privacy Commissioner prior to making or revoking such a declaration.

On the other hand, the statement of compatibility notes that the regulatory approach taken in the bill may possibly be considered to compromise the right to freedom of expression and/or the right to take part in public affairs because media organisations that do not join a media self-regulatory body will be subject to the provisions of the Privacy Act. The explanatory memorandum argues that limitations of freedom of expression are nonetheless consistent with freedom of expression as they are ‘provided for by law and are necessary for respecting the rights or reputations of others’ (see the statement of compatibility at page 6). It is also noted that, to the extent to which the bill promotes self-regulation, the regulatory approach ‘will balance the rights of the news media to publish and the rights of individuals in relation to privacy and reputation’.

A key part of the scheme is that the PIMA must consider the extent to which the regulatory body has arrangements in place to review the need for freedom of expression and the need to protect individual privacy. If the PIMA formed the view that the right of freedom of expression or the right to privacy were impermissibly limited by the design or implementation of a news media self-regulation body it could revoke the news media self-regulation body’s declaration, having regard to the importance of both sets of rights (see the statement of compatibility at page 7).

Overall, the regulatory approach builds consideration for both privacy and freedom of expression into the decision-making of self-regulatory media bodies and the PIMA. **In the circumstances, the committee leaves the question of how well the proposed approach will achieve the goals of adequately balancing freedom of expression and the interests individuals have in privacy to 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.*

## **Judicial Review rights**

### **General**

Under the regulatory scheme envisaged by this bill, industry self-regulatory bodies will make decisions concerning news media organisations’ compliance

with standards of practice set out in self-regulatory schemes. Such bodies are likely to have a role in considering complaints and in issuing remedial actions (see paragraphs 7(3)(e) and (f)). The exercise of the likely significant functions and powers of such bodies would not be judicially reviewable under section 75(v) of the *Constitution* (or section 39B of the *Judiciary Act*), as the functions and powers are not likely to be considered to have been exercised by an ‘officer of the Commonwealth’. It is also probable that such decisions would not be reviewable under the *Administrative Decisions (Judicial Review) Act*, as there may be difficulty in characterising them as decisions ‘made under an enactment’.

Nevertheless, the role played by industry self-regulatory bodies is clearly part of a broader scheme of public regulation, and the ‘self-regulatory’ powers are clearly strengthened by the statutory scheme of enforced self-regulation being introduced by this bill. It is unclear, therefore, why judicial review should not be available under the new arrangements. **The committee therefore seeks the Minister's advice as to whether it is envisaged that decisions made by a news media self-regulatory body would be reviewable by way of judicial review and, if not, why that outcome is considered appropriate and whether consideration has been given to the inclusion of alternative forms of administrative oversight of these significant administrative decision-making bodies.**

*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.*

### **Legislative instruments – not disallowable Sections 7 and 10**

A declaration made under section 7 and a revocation decision (made under section 10) are legislative instruments, but they will not be disallowable. There is a detailed and persuasive justification for this in the explanatory memorandum (see pages 16 and 18). **In light of this explanation the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

## **News Media (Self-regulation)(Consequential Amendments) Bill 2013**

Introduced into the House of Representatives on 14 March 2013  
Portfolio: Broadband, Communications and the Digital Economy

### **Background**

This bill is part of a package of six bills and responds to issues identified by the 2011 *Independent Inquiry into the Media and Media Regulation* and the 2012 *Convergence Review*.

The bill amends the current exemption from the operation of the *Privacy Act 1988* that exists for certain acts and practices of media organisations that are publicly committed to observing standards that deal with privacy.

*The committee has no comment on this bill.*

## **Parliamentary Service Amendment (Parliamentary Budget Officer) Bill 2013**

Introduced into the House of Representatives on 14 March 2013

Portfolio: Treasury

### **Background**

This bill amends the *Parliamentary Service Act 1999* and the *Taxation Administration Act 1953* to:

- require the Parliamentary Budget Officer (the Officer) to prepare a report on designated Parliamentary parties' publicly announced policies by 30 days after a government forms following a general election; and
- ensure that the Australian Taxation Office will be able to provide taxpayer information to the Officer on a confidential basis to assist the Officer in performing or exercising his or her functions or powers.

*The committee has no comment on this bill.*

## **Public Interest Media Advocate Bill 2013**

Introduced into the House of Representatives on 14 March 2013  
Portfolio: Broadband, Communications and the Digital Economy

### **Background**

This bill is part of a package of six bills and responds to issues identified by the 2011 *Independent Inquiry into the Media and Media Regulation* and the 2012 *Convergence Review*.

This bill creates a new independent statutory office which will perform functions under the News Media (Self-regulation) Bill and the public interest test to be established in the new Part 5A of the *Broadcasting Services Act 1992*.

*The committee has no comment on this bill.*

## Television Licence Fees Amendment Bill 2013

Introduced into the House of Representatives on 14 March 2013  
Portfolio: Broadband, Communications and the Digital Economy

### Background

This bill is part of a package of six bills and responds to issues identified by the 2011 *Independent Inquiry into the Media and Media Regulation* and the 2012 *Convergence Review*.

This bill amends the *Television Licence Fees Act 1964* to provide a new annual licence fee scale for commercial television broadcasting licensees.

*The committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

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

*[Digest 1/13 – no comment]*

On 13 March 2013 the House of Representatives agreed to 14 Government amendments and the Special Minister of State (Mr Gray) tabled a supplementary explanatory memorandum. The committee has no comment on the additional material.

### **National Disability Insurance Scheme Bill 2012**

*[Digest 1/13 – awaiting response]*

On the 14 March 2013 the House of Representatives agreed to 77 Government amendments and the Minister for Disability Reform (Ms Macklin) tabled a supplementary explanatory memorandum. 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***

Nil

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

Nil