

**Senate Standing Committee**  
**for the**  
**Scrutiny of Bills**

**Alert Digest No.7 of 2013**

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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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**Scrutiny of standing appropriations**

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**Senate Standing Legislation Committee Inquiries**

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

- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.  
Any Senator who wishes to draw matters to the attention of the  
Committee under its terms of reference is invited to do so.

## **Competition and Consumer Amendment (Strengthening Rules About Misuse of Market Power) Bill 2013**

Introduced into the House of Representatives on 17 June 2013

By: Mr Oakeshott

### **Background**

This bill amends the *Competition and Consumer Act 2010* to extend existing provisions relating to the test for restrictive trade practices to supply chains.

*The committee has no comment on this bill.*

## **Fair Trade (Workers' Rights) Bill 2013**

Introduced into the Senate on 20 June 2013

By: Senator Madigan

### **Background**

This bill seeks to ensure that minimum standards about workers' rights are included in certain international agreements.

*The committee has no comment on this bill.*

## **Primary Industries (Customs) Charges Amendment Bill 2013**

Introduced into the House of Representatives on 19 June 2013

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill is part of a package of bills and amends the *Primary Industries (Customs) Charges Act 1999* to remove maximum research, development and marketing charge rates from the Act.

The bill also makes several technical amendments to remove redundant provisions.

### **Delegation of legislative power—charges in delegated legislation Various**

This bill will make a number of amendments that:

- (1) remove maximum rates for research and development charges and marketing charges from the legislation (that can be imposed by the regulations); and
- (2) provide for a consultative process to be implemented before operative charge rates are specified in the regulations.

The explanatory memorandum has a detailed explanation of why the changes are considered desirable. The basic rationale is that these charges are generally imposed at the request of relevant industry bodies to allow the ‘relevant primary producers to manage their own investment in R&D and marketing’ and that the current process is cumbersome, costly and slow (it involves the need for legislative change where the proposed charge is above the maximum rate specified in the relevant Act) (at 2).

The explanatory memorandum argues that removing provisions specifying maximum charges will not lead to any arbitrariness in the setting of charge rates or for amounts to be ‘increased in an excessive or undue manner’ (at 2). This is said to be because the bill strengthens existing consultation requirements, specifically ‘to safeguard against the arbitrary imposition of charges, each schedule is amended to restrict the regulations from setting an

R&D or marketing charge rate higher than the rate recommended by the relevant industry body' (at 2). The explanatory memorandum also points to other Commonwealth Acts which allow levy and charge rates to be set in regulations where the 'process of setting the rate is transparent' (2-3).

It may be noted that the relevant items require that the relevant industry body (ie the industry body which makes a recommendation which in effect places a 'cap' on the charges that the regulations may prescribe) is required by the amendments to 'consult with the persons who are required to pay the charge concerned'.

The committee leaves to the Senate the *general* question of whether the proposed approach to the setting of these charges is appropriate. However, the committee has specific scrutiny concerns because:

- (1) there is no detail concerning the nature of the consultation process between relevant industry bodies and the payer of the charges must undertake; and
- (2) there is no legislative requirement for the results of such consultations to be reported to the Minister prior to regulations being imposed.

**In light of these concerns the committee seeks the Minister's advice as to:**

- (1) whether more detail can be included in the primary legislation about the required consultation process;**
- (2) whether consideration has been given to including a provision in the bill so that the Minister must consider concerns that have been raised in that consultation process as well as the recommendation made by the relevant industry body; and**
- (3) what legal consequences would follow from a failure by the relevant industry body to consult with the persons who are required to pay the charge.**

*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.*

## **Primary Industries (Excise) Levies Amendment Bill 2013**

Introduced into the House of Representatives on 19 June 2013

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill is part of a package of bills and amends the *Primary Industries (Excise) Levies Act 1999* to remove maximum research, development and marketing levy rates from the Act.

The bill also makes several technical amendments to remove redundant provisions.

### **Delegation of legislative power—charges in delegated legislation Various**

Similar to the above bill, this bill also seeks to make a number of amendments that:

- (1) remove maximum rates for research and development levies and marketing levies from the legislation (that can be imposed by the regulations); and
- (2) provide for a consultative process to be implemented before operative levy rates are specified in the regulations.

The explanatory memorandum has a detailed explanation of why the changes are considered desirable. The basic rationale is that these levies are generally imposed at the request of relevant industry bodies to allow the ‘relevant primary producers to manage their own investment in R&D and marketing’ and that the current process is cumbersome, costly and slow (it involves the need for legislative change where the proposed levy is above the maximum rate specified in the relevant Act) (at 2).

The explanatory memorandum argues that removing provisions specifying maximum levies will not lead to any arbitrariness in the setting of levy rates or for amounts to be ‘increased in an excessive or undue manner’ (at 2). This is said to be because the bill strengthens existing consultation requirements, specifically ‘to safeguard against the arbitrary imposition of levies, each

schedule is amended to restrict the regulations from setting an R&D or marketing levy rate higher than the rate recommended by the relevant industry body' (at 2). The explanatory memorandum also points to other Commonwealth Acts which allow levy and charge rates to be set in regulations where the 'process of setting the rate is transparent' (2-3).

It may be noted that the relevant items require that the relevant industry body (ie the industry body which makes a recommendation which in effect places a 'cap' on the levies that the regulations may prescribe) is required by the amendments to 'consult with the persons who are required to pay the levy concerned'.

The committee leaves to the Senate the *general* question of whether the proposed approach to the setting of these levies is appropriate. However, the committee has specific scrutiny concerns because:

- (1) there is no detail concerning the nature of the consultation process between relevant industry bodies and the payer of the levies must undertake; and
- (2) there is no legislative requirement for the results of such consultations to be reported to the Minister prior to regulations being imposed.

**In light of these concerns the committee seeks the Minister's advice as to:**

- (1) whether more detail can be included in the primary legislation about the required consultation process;**
- (2) whether consideration has been given to including a provision in the bill so that the Minister must consider concerns that have been raised in that consultation process as well as the recommendation made by the relevant industry body; and**
- (3) what legal consequences would follow from a failure by the relevant industry body to consult with the persons who are required to pay the levy.**

*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.*

## Reducing Supermarket Dominance Bill 2013

Introduced into the House of Representatives on 17 June 2013

By: Mr Katter

### Background

The bill reduces the market share of Australia's supermarket oligopoly by reducing the market share of supermarket businesses to 20% (via enforced progressive divestiture where necessary across a 6 year period).

The bill also establishes a Commissioner for Food Retailing to administer the limits on market share for supermarket businesses and to promote the competition and fairness principles, which include, inter alia:

- the promotion of competition between supermarket business in the best interests of consumers and suppliers;
- stopping supermarket businesses and household retail businesses from engaging in predatory practises that harm other businesses (whether or not supermarket businesses); and
- stopping supermarket businesses, household retail businesses and intermediaries from engaging in unfair practices that harm suppliers.

### Penalties

#### Various

The committee routinely looks to the explanatory memorandum for an explanation as to the rationale for the levels of penalty proposed and particularly whether they have been set taking into account the Attorney-General's *Guide to framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. If the bill proceeds to further stages of debate the committee intends to seek the Senator's advice as to the justification for the proposed level of penalties.

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

**Delegation of legislative power—charges in delegated legislation  
Subclause 6(3)**

This clause provides that the commissioner must, by legislative instrument, publish a definition of two terms that are relevant to determining whether a person has committed offences, namely, ‘national supermarket market’ and ‘national household retail market’. The explanatory memorandum does not address why it is appropriate for these important definitions to be dealt with by legislative instrument rather than be included in the primary legislation. If the bill proceeds to further stages of debate the committee intends to seek the Senator's advice about this matter.

*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.*

**Trespass on personal rights and liberties—liability of directors and reversal of onus of proof  
Clause 7 and subclauses 12(4) and 17(2)**

Clause 7 raises the appropriateness of imposing personal liability on directors for corporate fault and, also, of placing an evidential burden on defendants under subclauses (3) and (4). The issue of placing an evidential burden on defendants also arises in subclauses 12(4) and 17(2). The explanatory memorandum merely repeats the effect of these provisions. If the bill proceeds to further stages of debate the committee intends to seek the Senator's advice about this matter.

*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.*

**Broad discretionary power  
Clause 10**

This clause provides that ‘in deciding whether and how to exercise powers under this Division,’ the commissioner ‘is to act in the Commissioner’s absolute discretion according to the Commissioner’s own judgment’. The

committee notes that the law has moved away from the acceptance that administrative powers can be completely unfettered, therefore, in this context it is not clear how this provision is intended to operate. In the absence of information in the explanatory memorandum addressing this matter, if the bill proceeds to further stages of debate the committee intends to seek the Senator's advice about it.

*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.*

### **Trespass on personal rights and liberties—privilege against self-incrimination**

#### **Clause 11 and subclause 16(3)**

Clause 11 provides that a person commits an offence if they fail to adhere to a written notice requiring the person to provide information or documents specified in a notice. If the bill proceeds to further stages of debate the committee intends to seek clarification as to whether it is intended that this provision abrogate the privilege against self-incrimination.

In addition, subclause 16(3) abrogates the privilege against self-incrimination in relation to the exercise of information gathering powers pursuant to clause 16. The explanatory memorandum notes there is a use and derivative use immunity and the provision is based on the *Australian Sports Anti-Doping Authority Amendment Bill 2013*. Nevertheless, there is no justification provided for the abrogation of the privilege. As the Committee does not accept that the abrogation of the privilege is always appropriate so long as a use and derivative use immunity is included if the bill proceeds to further stages of debate the committee intends to seek the Senator's advice about this matter.

*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.*

## **Broad discretionary power Clause 19**

The commissioner may direct a person to take or cease to take any action if satisfied that the action would be consistent with a competition and fairness principle (as defined paragraph 9(b)). These principles are defined at a high level of abstraction. For example, one principle is that competition between supermarket businesses should be promoted in the best interests of consumers and suppliers. The result is that this provision confers a very broad discretionary power on the Commissioner. Given that failure to comply with a direction is an offence (penalty: \$100,000), the power has significant consequences. The Commissioner's directions are not subject to any form of merits review. In this context it is regrettable that the explanatory memorandum does not justify the necessity to confer such a broad discretionary power on the commissioner or indicate how it will be ensured that the power will be exercised appropriately. If the bill proceeds to further stages of debate the committee intends to seek the Senator's advice about this matter.

*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.*

## **Trespass on personal rights and liberties—Privacy Clause 31**

This clause relates to the disclosure of information given to the Commissioner 'in confidence in relation to the performance of the Commissioner's functions' ('controlled information'). Subclause 31(2) provides that the Commissioner may disclose such information if satisfied that doing so will enable or assist the person or authority to whom disclosure is made to perform their functions or exercise their powers. Although the Commissioner can impose conditions on the further use and disclosure of controlled information (subclause 31(3)) and breach of these conditions is an offence (subclause 31(4)), there is no discussion as to whether clause 31 provides adequate protection against the disclosure of personal information. For example, controlled information may not include information that is required to be given under clause 16 of the bill. Given the information gathering powers under this bill, if it proceeds to further stages of debate the committee

intends to seek the Senator's advice about whether personal privacy will be adequately protected.

*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.*

## **Reserve Bank Amendment (Australian Reconstruction and Development Board) Bill 2013**

Introduced into the House of Representatives on 17 June 2013

By: Mr Katter

### **Background**

This bill amends the *Reserve Bank Act 1959* to establish an "Australian Reconstruction and Development Board", with the capacity to reconstruct debilitating financial arrangements, and to provide suitably tailored funds and capital arrangements that enable the sustainability and development of at-risk Australian agriculture and its associated industries and infrastructures.

*The committee has no comment on this bill.*

## **Rural Research and Development Legislation Amendment Bill 2013**

Introduced into the House of Representatives on 19 June 2013

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill amends eight Acts in the agriculture, fisheries and forestry portfolio to:

- allow statutory rural research and development corporations (RDCs) to undertake marketing at the request of industry;
- enable government matching funding for voluntary contributions to all RDCs to encourage the private sector to invest in rural research and development (R&D);
- remove the requirement for statutory RDCs to submit their annual operating plans to the minister for approval;
- make statutory RDC board selection processes more efficient;
- introduce funding agreements for statutory RDCs to drive performance improvements and increase transparency in the delivery of R&D services; and
- allow individual fisheries industry levies to be collected and matched subject to a cap based on the gross value of production of that industry.

### **Delegation of legislative power**

#### **Schedule 3, item 2**

This item makes amendments to the *Primary Industries and Energy Research and Development Act 1989* to allow the Commonwealth to enter into an agreement with a statutory rural research and development corporation. Proposed subsection 33(4) provides that such an agreement ‘must specify the terms and conditions on which money is paid to the R&D Corporation by the Commonwealth will be spent’. The explanatory memorandum (at 4) indicates that this provides a mechanism for the RDCs and the Commonwealth to agree to a range of governance and performance related matters and that these

matters can be modified over time, without legislative change, so as to reflect changing government and industry requirements and provide greater consistency in the Commonwealth's relationship with all RDCs (at 4). Subsection 33(5) provides that funding agreements must be published on the R&C Corporation's website.

**Given that the important matters of governance and accountability are being left to delegated legislation, the committee seeks the Minister's advice as to the general conditions which are intended to be included in these agreements and whether, noting the argument that flexibility is required, at least general guidance as to what matters should be included can be provided in the 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.*

## **Sugar Research and Development Services (Consequential Amendments–Excise) Bill 2013**

Introduced into the House of Representatives on 18 June 2013

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill amends the *Primary Industries (Excise) Levies Act 1999* and the Primary Industries (Excise) Levies Regulation 1999 to increase the levy rate from 14 cents per tonne to 70 cents per tonne from 1 July 2013.

*The committee has no comment on this bill.*

## **Superannuation (Excess Concessional Contributions Charge) Bill 2013**

Introduced into the House of Representatives on 19 June 2013

Portfolio: Treasury

### **Background**

This bill imposes a charge on taxpayers who have concessional contributions in excess of their annual cap to ensure that they do not receive an advantage over those taxpayers who do not exceed their annual cap.

*The committee has no comment on this bill.*

## **Tax Laws Amendment (2013 Measures No. 3) Bill 2013**

Introduced into the House of Representatives on 20 June 2013

Portfolio: Treasury

### **Background**

This bill amends various taxation laws.

Schedule 1 amends the *Tax Agent Services Act 2009* to ensure that entities that provide tax agent services in the course of giving advice of a kind that is usually given by a financial services licensee or a representative of licensees are subject to the regulatory regime of the Tax Practitioners Board.

Schedule 2 amends the *Tax Agent Services Act 2009* to correct a range of technical issues.

*The committee has no comment on this bill.*

## **Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013**

Introduced into the House of Representatives on 19 June 2013

Portfolio: Treasury

### **Background**

This bill amends the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to:

- establish a system for the taxation of individuals with concessional contributions in excess of their annual cap; and
- allow individuals to elect to release an amount of excess concessional contributions from their superannuation interests.

*The committee has no comment on this bill.*

## **Telecommunications Amendment (Get a Warrant) Bill 2013**

Introduced into the Senate on 18 June 2013

By: Senator Ludlam

### **Background**

This bill amends the *Telecommunications (Interception and Access) Act 1979* to require normal warrant authorisation procedures for law enforcement and intelligence agencies that wish to access telecommunications data.

*The committee has no comment on this bill.*

## **Voice for Animals (Independent Office of Animal Welfare) Bill 2013**

Introduced into the Senate 20 June 2013

By: Senator Rhiannon

This bill is in identical terms to the bill introduced into the House of Representatives on 27 May 2013 by Mr Bandt (see *Alert Digest No. 6 of 2013*).

### **Background**

This bill establishes the Office of Animal Welfare as an independent statutory authority with responsibility for:

- the reporting of animal welfare issues; and
- reviewing laws and policies that impact on the Commonwealth.

*The committee has no comment on this bill.*

## Commentary on amendments to bills

### **Charities Bill 2013**

#### **Charities (Consequential Amendments and Transitional Provisions) Bill 2013**

*[Digest 6/13 – no comment]*

On 18 June 2013 the Assistant Treasurer (Mr Bradbury) tabled an addendum to the explanatory memorandum to the bills in the House of Representatives, and the bills were read a third time. The committee has no comment on the additional material.

### **Export Finance and Insurance Corporation Amendment (New Mandate and Other Measures) Bill 2013**

*[Digest 5/13 – no comment]*

On 20 June 2013 the Minister for Sport (Senator Lundy) tabled an addendum to the explanatory memorandum in the Senate. The committee has no comment on the additional material.

### **Public Governance, Performance and Accountability Bill 2013**

*[Digest 6/13 – awaiting response]*

On 17 June 2013 the House of Representatives agreed to 14 Government amendments and the Assistant Treasurer (Mr Bradbury) tabled a supplementary explanatory memorandum and a replacement explanatory memorandum, and the bill was read a third time. The committee has no comment on the additional material.

### **Public Interest Disclosure Bill 2013**

*[Digest 5/13 – response in 6/13 Report]*

On 19 June 2013 the House of Representatives agreed to 73 Government and one Independent (Mr Bandt) amendments and the Minister for Public Service and Integrity (Mr Dreyfus) tabled a supplementary explanatory memorandum, and the bill was read a third time. The committee has no comment on the additional material.

**Regulatory Powers (Standard Provisions) Bill 2012**

*[Digest 13/12 – response in 1/13 Report]*

On 18 June 2013 the House of Representatives agreed to 61 Government amendments and the Attorney-General (Mr Dreyfus) tabled a supplementary explanatory memorandum, and the bill was read a third time. The committee has no comment on the additional material.

**Sugar Research and Development Services Bill 2013**

*[Digest 6/13 – awaiting response]*

On 20 June 2013 the Parliamentary Secretary for Defence (Senator Feeney) tabled a replacement explanatory memorandum in the Senate. The committee has no comment on the additional material.

**Sugar Research and Development Services (Consequential Amendments and Transitional Provisions) Bill 2013**

*[Digest 6/13 – no comment]*

On 19 June 2013 the House of Representatives agreed to four Government amendments and the Parliamentary Secretary for Agriculture, Fisheries and Forestry (Mr Sidebottom) tabled a supplementary explanatory memorandum, and the bill was read a third time. The committee has no comment on the additional material.

**Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013**

*[Digest 6/13 – no comment]*

On 20 June 2013 the House of Representatives agreed to two Government amendments and the Minister for Financial Services and Superannuation (Mr Shorten) tabled a supplementary explanatory memorandum, and the bill was read a third time.

## 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 Education Bill 2013** — clause 126

**Rural Research and Development Legislation Amendment Bill 2013** — Schedule 2, item 12, subsection 30B(9)

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

Nil