



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

FIFTEENTH REPORT
OF
2012

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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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 2012

The Committee presents its *Fifteenth Report of 2012* to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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Banking Amendment (Banking Code of Conduct) Bill 2012

Introduced into the House of Representatives on 10 September 2012

By: Mr Wilkie

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2012*. Mr Wilkie responded to the Committee's comments in a letter dated 16 November 2012. A copy of the letter is attached to this report.

Alert Digest No. 11 of 2012 - extract

Background

This bill amends the *Banking Act 1959* to provide for:

- the minister to make, by legislative instrument, a mandatory Banking Code of Conduct stipulating standards to be complied with by authorised deposit-taking institutions when dealing with their customers;
- the Australian Prudential Regulation Authority to accept and investigate complaints by bank customers and to name banks found to be non-compliant; and
- amendments to the code to be made after consultation; and a three-yearly review of the code.

Delegation of legislative power

Items 3 and 4

Under proposed section 36A, inserted by item 3, the Minister is empowered to make the Banking Code of Conduct (the Code) by legislative instrument. Customers may then, under other amendments inserted by item 3, make complaints to the Australian Prudential Regulation Authority (APRA) in relation to possible breaches of the Code. If APRA is satisfied that there has been a breach of the Code it must name the Authorised Deposit-taking Institution (ADI) in question on a website and in a newspaper, indicating the reasons for the publication. Item 2 proposes amendments which would enable civil penalty provisions to be included in the Code.

Item 4 provides that the Code must be made within three months of commencement and must include and limit itself to standards equivalent to those already present in the Code of

Banking Practice published by the Australian Bankers' Association as in force on 1 May 2012. (However, a standard is not required to be included if the Minister is satisfied that compliance with the standard would be impossible or impracticable to assess.)

Given that the Code is to be based on existing professional standards it is unclear to the Committee why the standards which are to be adopted cannot be included in the primary legislation. As it is envisaged that breach of some of the standards will amount to civil penalty provisions, the Committee is concerned that important matters are being inappropriately dealt with in delegated legislation. As currently drafted, the explanatory memorandum does not give a detailed explanation as to why it is not possible or not desirable for the standards to be included in the primary legislation.

The Committee therefore seeks the Member's advice as to why the standards cannot be included in the primary legislation.

Pending the Member'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.

Member's response - extract

I have been asked to respond to concerns that the *Banking Amendment (Banking Code of Conduct) Bill 2012* delegates legislative powers to regulations in breach of the principle in Standing Order 24 (1)(a)(iv).

The decision to have the Code of Conduct contained in regulations rather than in the primary legislation was based on both a desire to give the industry greater ownership of the safeguards and ensure some flexibility as the need for certain safeguards comes and goes.

That said, there is no reason why the Code of Conduct could not be contained in the primary legislation. I would have no objection to its incorporation into the Bill and would consider amendments to that effect friendly.

Committee Response

The Committee thanks the Member for this response and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.

Fair Entitlements Guarantee Bill 2012

Introduced into the House of Representatives on 11 October 2012

Portfolio: Education, Employment and Workplace Relations

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2012*. The Minister responded to the Committee's comments in a letter dated 26 November 2012. A copy of the letter is attached to this report.

Alert Digest No. 13 of 2012 - extract

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.

Minister’s response - extract

The Committee has sought advice on the rationale for, and the appropriateness of, the delegation of legislative power in clause 50 of the Bill. As the Committee has noted, the Explanatory Memorandum to the Bill explains the purpose of this provision is to ensure the scheme established by the Bill is able to be adapted to encompass individuals who are affected by insolvency but do not fit within the traditional employer/employee paradigm.

When considering the appropriateness of this delegation of legislative power, it is the case that, as delegated legislation, any regulation made under clause 50 will be constrained by the objects contained in clause 3 of the Bill. The regulation making power will therefore only support schemes that are consistent with the empowering legislation and could not fundamentally undermine or alter the contours of the primary scheme.

In recognition of the need for sufficient parliamentary oversight of any schemes established by regulation, clause 50 of the Bill also provides any regulation made under it will not take effect before the end of the period in which it could be disallowed in either House of the Parliament. This additional safeguard ensures Parliamentary scrutiny of any such scheme and for Parliament to disallow the regulation if concerned about its effect.

Committee Response

The Committee thanks the Minister for this response, and notes the amended disallowance provisions which mean that any regulations won't commence until the period for disallowance has passed. The Committee notes that this bill has already been passed by the Parliament.

Alert Digest No. 13 of 2012 - extract

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.

Minister's response - extract

Clause 51 of the Bill provides that the Consolidated Revenue Fund is appropriated for the purposes of payments made under the Bill or a regulation made for the purposes of clause 50. The Committee has sought 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.

As a demand driven scheme, there are a number of factors unable to be precisely predicted that will determine the cost of the scheme established by this Bill. These include the number of insolvencies that occur in a particular year, the number of claims resulting from these insolvencies and each claimant's individual entitlements under industrial instruments. The relative weight these factors will have in determining the cost of the scheme in any given year will vary considerably and could be affected by both domestic and international factors.

It is also important to note that the General Employee Entitlements and Redundancy Scheme upon which this Bill is based has been in operation for over a decade. This is not a new scheme and information on the past cost of the scheme is publicly available. In moving from an administrative to a legislative scheme, a strict framework has been established for the assessment of an individual's eligibility for an advance and determining the amounts of entitlements. This has removed some of the discretionary elements of the former administrative scheme adding greater clarity to the scheme's potential costs.

The Committee has particularly noted the capacity for entitlements payable under the Bill to grow in light of the regulation making power contained in clause 50. As noted above, any schemes created by regulation would be consistent with the primary scheme established by the Bill. This provides an important limit on the potential for schemes created to add additional costs.

In many situations the scheme established by this Bill will provide the only avenue for former employees to recover their legal entitlements. The funding arrangements established by clause 51 will provide certainty to individuals who have lost their jobs as a result of the insolvency of their employers. The people who will utilise this scheme will be facing difficult circumstances and will require the certainty that their employment entitlements will be advanced to them in a timely manner.

I thank the Committee for its consideration of the Bill and I trust the information provided is helpful.

Committee Response

The Committee thanks the Minister for this response. The Committee notes that this bill has already been passed by the Parliament.

Senator the Hon Ian Macdonald
Chair