

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



**Alert Digest**

**No. 2 of 2005**

**9 March 2005**



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# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator R Ray (Chair)  
Senator B Mason (Deputy Chair)  
Senator G Barnett  
Senator D Johnston  
Senator G Marshall  
Senator A Murray

## Terms of Reference

Extract from **Standing Order 24**

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



## TABLE OF CONTENTS

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### Commentary on bills

- Aged Care Amendment (Transition Care and Assets Testing) Bill 2005 5
- Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005 7
- Appropriation Bill (No. 3) 2004-2005 11
- Appropriation Bill (No. 4) 2004-2005 12
- Appropriation (Parliamentary Departments) Bill (No. 2) 2004-2005 13
- Australian Institute of Marine Science Amendment Bill 2005 14
- Avoiding Dangerous Climate Change (Kyoto Protocol Ratification) Bill 2005 15
- Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 16
- Defence Amendment Bill 2005 22
- Family and Community Services and Veterans' Affairs Legislation Amendment (Further 2004 Election Commitments and Other Measures) Bill 2005 26
- Farm Household Support Amendment Bill 2005 27
- Great Barrier Reef Marine Park (Protecting the Great Barrier Reef from Oil Drilling and Exploration) Amendment Bill 2005 28
- Higher Education Legislation Amendment (2005 Measures No. 1) Bill 2005 29

- **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.

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|   |    |
|---|----|
| • Medical Indemnity Legislation Amendment Bill 2005   | 30 |
| • National Security Information (Criminal Proceedings) Amendment (Application) Bill 2005                      | 33 |
| • Tax Laws Amendment (2005 Measures No. 1) Bill 2005  | 35 |
| • Telecommunications (Consumer Protection and Service Standards) Amendment (National Relay Service) Bill 2005 | 36 |
| • Trade Practices Legislation Amendment (No. 1) Bill 2005   | 37 |
| • Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005                     | 40 |

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

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## **Aged Care Amendment (Transition Care and Assets Testing) Bill 2005**

[Introduced in the House of Representatives 10 February 2005. Portfolio: Ageing]

The bill amends the *Aged Care Act 1997* to ensure that leave arrangements are in place to allow recipients of residential care to receive transition care following a hospital stay.

The bill also provides for the Secretary of the Department of Health and Ageing to undertake and make determinations about assets assessments for new residents entering aged care homes after 1 July 2005. This task is currently undertaken by approved providers of residential aged care. The bill enables the Secretary to delegate relevant powers to Centrelink and the Department of Veterans' Affairs.

The bill also contains application provisions.

### **Retrospective application Schedule 1, items 3 and 4**

Item 4 of Schedule 1 to this bill would apply the amendments made by item 3 of the Schedule to circumstances which may have arisen before the amendment had commenced and is, to that extent, retrospective. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth.

In this case, the explanatory memorandum does not indicate whether this retrospective application could be to the disadvantage of some recipients of aged care, and the Committee **seeks the Minister's advice** as to whether this might be the case.

*Pending the Minister's advice, 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.*

## **Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005**

[Introduced in the House of Representatives on 17 February 2005. Portfolio: Agriculture, Fisheries and Forestry]

The Australian Pesticides and Veterinary Medicines Authority (APVMA) evaluates and regulates agricultural and veterinary chemicals. The costs of the authority are recoverable through a system of fees and levies. According to the minister's second reading speech the amendments in this bill 'bring the cost recovery arrangements for the APVMA into closer consistency with the Government's Cost Recovery Guidelines.'

Key amendments to levy arrangements include:

- a shift from a calendar year to a financial year basis;
- provision for a tiered rate of levy based on the volume of leviable disposals of a particular chemical product;
- removal of existing caps and thresholds; and
- creation of a new penalty for understating the amount of leviable disposals.

The bill also repeals a suite of 'interim' levy legislation enacted in 1994.

### **Retrospective commencement Schedule 1, items 48, 49, 50 and 52**

By virtue of items 7, 8 and 10 of the table in subclause 2(1) of this bill, items 48, 49, 50 and 52 of Schedule 1 will commence retrospectively (at the same time as the commencement of legislation passed in 2004). As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, paragraphs 78, 79, 80 and 82 of the explanatory memorandum make it clear that the amendments proposed by these items are technical, and do no more than correct earlier cross-references to other legislation.

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

## **Legislative Instruments Act – Declarations**

### **Schedule 1, item 6**

Proposed subsection 6(3) of the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994*, to be added by item 6 of Schedule 1 to this bill, would declare that a notice made under paragraph 6(1)(a) of that Act is not a ‘legislative instrument’. This has the effect of excluding such a notice from parliamentary scrutiny.

Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the Legislative Instruments Act. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision. (See the Committee’s *Second Report of 2005* under the heading ‘Legislative Instruments Act – Declarations’.)

In this case, it appears that a notice made under paragraph 6(1)(a) is not of a legislative character, as it does no more than determine the notional wholesale value of a particular product at a particular time, and does not state any general principle that is applicable in a variety of circumstances. Unfortunately the explanatory memorandum does little more than repeat the words of the amendment.

The Committee **seeks the Minister’s advice** as to whether proposed new subsection 6(3) is no more than declaratory (and included for the avoidance of doubt) and, if so, whether it would have been appropriate to include that information in the explanatory memorandum.

*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.*

### **Abrogation of the privilege against self-incrimination Schedule 1, item 38**

Proposed new section 34(1) of the same Act, to be inserted by item 38 of Schedule 1, would abrogate the privilege against self-incrimination for a person required to provide information or produce a document under the Act. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law entitlement trespasses on personal rights and liberties.

The Committee does not see this privilege as absolute, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. In this case, proposed new subsection 34(2) limits the circumstances in which information so provided is admissible in evidence in proceedings against the affected person, and the Committee is prepared to accept that it strikes a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

### **Retrospective validation Schedule 1, item 46**

Subsection 164(3) of the *Agricultural and Veterinary Chemicals Code Act 1994* places a limit on the fee which may be prescribed to be paid under section 164 of the Act. Item 45 of Schedule 1 to this bill removes that limit and item 46 would retrospectively validate any fee that was purported to have been paid under regulations made under section 164, despite the fact that the fee may have been in excess of the statutory limit.

As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case the explanatory memorandum, in respect of item 46, states merely that ‘Since 2 October 1996, the regulations have included one item of application fees that exceeds the limit in subsection 164(3)’, but does not indicate how much was wrongfully exacted from members of the public. The Committee **seeks the Minister’s advice** as to the amount by which the fees exceeded the statutory limit, and the number of people who paid those fees, in order that the Committee and the Senate may better determine whether this retrospective validation of fees trespasses *unduly* on the personal rights of those who have paid the fees.

*Pending the Minister’s advice, 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.*

## **Appropriation Bill (No. 3) 2004-2005**

[Introduced in the House of Representatives on 10 February 2005. Portfolio: Finance and Administration]

The bill appropriates money (\$1,540.2 million) out of the Consolidated Revenue Fund, additional to the appropriations made by the Appropriation Act (No. 1) 2004-2005, to meet payments for the ordinary annual services of the government for the year ending on 30 June 2005.

*The Committee has no comment on this bill.*

## **Appropriation Bill (No. 4) 2004-2005**

[Introduced in the House of Representatives on 10 February 2005. Portfolio: Finance and Administration]

The bill appropriates money (\$552.6 million) out of the Consolidated Revenue Fund, additional to the appropriations made by the Appropriation Act (No. 2) 2004-2005, to provide additional funding to agencies for:

- expenses in relation to grants to the States and for payments to the Northern Territory and the Australian Capital Territory; and
- non-operating purposes such as equity injections and loans.

*The Committee has no comment on this bill.*



## **Appropriation (Parliamentary Departments) Bill (No. 2) 2004-2005**

[Introduced in the House of Representatives on 10 February 2005. Portfolio: Finance and Administration]

The bill appropriates money (\$349,000) out of the Consolidated Revenue Fund, additional to the appropriations made by the Appropriation (Parliamentary Departments) Bill (No. 1) 2004-2005, to provide additional funding to parliamentary departments, the largest component of which relates to increased expenditure on the Citizenship Visit Programme.

*The Committee has no comment on this bill.*

## **Australian Institute of Marine Science Amendment Bill 2005**

[Introduced in the House of Representatives on 10 February 2005. Portfolio: Education, Science and Training]

The bill amends the *Australian Institute of Marine Science Act 1972* to expand the Council of the institute by the addition of a part-time member to be nominated by James Cook University and to change the title of the principal executive officer of the institute from 'Director' to 'Chief Executive Officer'.

*The Committee has no comment on this bill.*

## **Avoiding Dangerous Climate Change (Kyoto Protocol Ratification) Bill 2005**

[Introduced in the House of Representatives on 14 February 2005 as a private Member's bill]

The bill requires the Australian Government to take the necessary steps to ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

*The Committee has no comment on this bill.*

## **Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005**

[Introduced in the House of Representatives on 17 February 2005. Portfolio: Fisheries, Forestry and Conservation]

The bill amends the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984*, and the *Migration Act 1958* to implement a consistent regime for the investigation and detention of suspected illegal foreign fishers. According to the explanatory memorandum, this will ‘ensure that breaches of illegal foreign fishing offences can be managed with significantly improved efficiency.’

The bill will provide consistency between the Torres Strait Fisheries Act and the Fisheries Management Act in relation to illegal foreign fishing arrangements. The bill will also insert into those Acts provisions, similar to those in the Migration Act:

- declaring that an officer controlling a boat is not unlawfully restraining the liberty of any of the people that are on the boat;
- dealing with the detention of people suspected of committing illegal foreign fishing offences and provisions for searching and screening detainees and carrying out identification tests.

The bill will also amend provisions in the Torres Strait Fisheries Act and the Fisheries Management Act for the protection of officers performing duties under those Acts. The offences of assaulting, resisting or obstructing an officer, or using abusive or threatening language against an officer, will be amended to provide consistency between the two Acts and to extend coverage to all people performing duties under either Act rather than just officers.

The bill will also amend the Migration Act to ensure that the enforcement visa regime applies consistently to illegal foreign fishing offences under both the Fisheries Management Act and the Torres Strait Fisheries Act.

## **Prohibition on instituting proceedings Schedule 1, items 1 and 2**

Items 1 and 2 of Schedule 1 to this bill, respectively, would insert a new subsection 84(1BA) in the *Fisheries Management Act 1991* and a new subsection 42(2AAA) in the *Torres Strait Fisheries Act 1984*. The effect of each of these new provisions is to grant immunity from both civil and criminal proceedings for officers who, in the exercise of powers under the respective Acts, restrain the liberty of a person on a boat. Expressed another way, these provisions prohibit the institution of proceedings for restraints on the liberty of persons on board a detained ship.

The Committee usually views such provisions with concern. According to the explanatory memorandum, these provisions are similar to subsection 245F(8A) of the *Migration Act 1958* and subsection 185(3AAA) of the *Customs Act 1901*. These subsections were inserted into those Acts by the *Border Protection (Validation and Enforcement Powers) Act 2001*, introduced into the Parliament in the wake of the Tampa affair.

The Committee commented on the bill for that Act in its *Alert Digest No. 11 of 2001* and sought information from the Minister in respect of these provisions, among others. The Committee's deliberations and the Minister's response are contained in the Committee's *Second Report of 2002*, in which the Committee continued to draw these provisions to the attention of the Senate, notwithstanding that the Act had already commenced.

While these provisions clearly trespass on the personal rights of those who may be detained, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

*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.*

## Legislative Instruments Act – Declarations Schedule 1, items 13 and 20

Proposed new subclauses 7(5), 11(3) and 17(5) of Schedule 1A of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1, and proposed new subclauses 7(5), 11(3) and 17(5) of Schedule 2 to the *Torres Strait Fisheries Act 1984*, to be inserted by item 20 of Schedule 1, each declare various instruments not to be legislative instruments. The effect of the various subclauses is to remove the respective instruments from parliamentary scrutiny.

Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the Legislative Instruments Act. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision. (See the Committee's *Second Report of 2005* under the heading 'Legislative Instruments Act – Declarations'.)

It appears that in each case the respective subclause is merely declaratory. However, the explanatory memorandum does not indicate the reason for the inclusion of the various provisions. The Committee therefore **seeks the Minister's advice** as to whether those subclauses are indeed no more than declaratory (and included for the avoidance of doubt) and, if so, whether it would have been appropriate to include that information in the explanatory memorandum.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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.*

## **Detention on suspicion**

### **Schedule 1, items 13 and 20**

Proposed new clause 8 of Schedule 1A of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1, and proposed new clause 8 of Schedule 2 to the *Torres Strait Fisheries Act 1984*, to be inserted by item 20 of Schedule 1, would permit an authorised officer to detain a person ‘in Australia or a Territory for the purpose of determining during the period of detention whether or not to charge the person with an offence.’ According to the explanatory memorandum:

This power is restricted by the requirement that it can only be used to detain people where the officer has reasonable grounds to believe that the person is not an Australian citizen or resident and that the person was on a foreign boat when it was used in the commission of an offence against one of the sections outlined in new subsection 8(1).

The general rule at common law is that a police officer may detain a person only for the purpose of arresting him or her for an offence and that, in the absence of statutory provisions, the police have no power to detain suspects while they seek evidence of the commission of an offence.

The Committee usually views such provisions with concern. The proposed clause 8 and related provisions substantially replicate provisions currently contained in sections 84 and 84A of the *Fisheries Management Act 1991* (particularly in paragraph 84(1)(ia)). Those provisions were inserted by the *Border Protection Legislation Amendment Act 1999*. The Committee commented on the relevant provisions of the bill for that Act and sought advice from the Minister. The Committee’s deliberations and the Minister’s advice are contained in the Committee’s *Eighteenth Report of 1999* at pages 441 to 443.

While these provisions clearly trespass on the personal rights of those who may be detained, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

*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.*

### **Detention on suspicion – search without warrant Schedule 1, items 13, 20, 21 and 28**

Proposed new clause 15 of Schedule 1A of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1, proposed new clause 15 of Schedule 2 to the *Torres Strait Fisheries Act 1984*, to be inserted by item 20 of Schedule 1, proposed new paragraph 84(1)(aaa) of the *Fisheries Management Act 1991*, to be inserted by item 21 of Schedule 1, proposed new subsection 87H(2A) of the *Fisheries Management Act 1991*, to be inserted by item 26 of Schedule 1 and proposed new paragraph 42(1)(aa) of the *Torres Strait Fisheries Act 1984*, to be inserted by item 28 of Schedule 1, would permit an authorised officer to conduct a search of a detainee and his or her clothing without a warrant, but on the basis of the officer's reasonable suspicion of various matters.

The proposed clause substantially replicates paragraph 84(1)(ic) of the *Fisheries Management Act 1991* and, according to the explanatory memorandum, 'corresponds closely to section 252 of the *Migration Act 1958* and, as such, will facilitate the seamless transfer of detainees from fisheries detention to immigration detention with one set of rules applying to the detainee's entire period of detention.' The original provision in the fisheries legislation is also discussed in the Committee's *Eighteenth Report of 1999* at pages 441 to 443.

While these provisions clearly trespass on the personal rights of those who may be subject to such a search, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

*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.*



**Detention on suspicion – search without warrant  
Schedule 1, items 13 and 20**

Proposed new clause 17 of Schedule 1A of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1 and proposed new clause 17 of Schedule 2 to the *Torres Strait Fisheries Act 1984*, to be inserted by item 20 of Schedule 1, would empower an authorised officer to conduct a strip search, without a warrant, of a detainee, in order to determine whether there are weapons or other implements on the person.

According to the explanatory memorandum, these clauses ‘closely correspond to section 252A of the *Migration Act 1958*’.

While these provisions clearly trespass on the personal rights of those who may be subject to such a search, the Committee **leaves for the Senate as a whole** the question of whether the bill *unduly* trespasses on those rights.

*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.*

## Defence Amendment Bill 2005

[Introduced in the House of Representatives on 10 February 2005. Portfolio: Defence]

The bill amends the *Defence Act 1903* to provide a more comprehensive drug-testing regime for members of the Australian Defence Force. The amendments:

- expand the range of drugs for which testing may be undertaken and the circumstances in which testing may be required;
- make provision for the use of new tests; and
- clarify the action that may follow a confirmed positive test result.

The bill enables details of the drug-testing regime to be set out in Defence Instructions issued under section 9A of the Act and amends that section to provide for the incorporation in Defence Instructions of any instrument ‘in force from time to time’. The bill also inserts new powers of delegation into section 120A of the Act.

### **Incorporation of extrinsic material Schedule 1, item 1**

Item 1 of Schedule 1 to this bill would permit the making of Defence Instructions by the Secretary to the Department of Defence and the Chief of the Defence Force which may apply, adopt or incorporate ‘any matter contained in an instrument or other writing, whether as in force at a particular time, or as amended and in force from time to time.’ The explanatory memorandum acknowledges that this provision expressly overrides the limitation in section 46AA of the *Acts Interpretation Act 1901*, which generally limits the incorporation of material into delegated legislation to that which is in force at the time of the incorporation.

While the majority of the bill focuses on the implementation of a flexible drug-testing regime, this provision has general application and would allow the incorporation of any material (as in force from time to time) into any Defence Instructions validly made under section 9A of the *Defence Act 1903*.

Neither the Minister's second reading speech nor the explanatory memorandum seeks to justify the inclusion of this wide ranging provision.

This provision would allow material to be incorporated into delegated legislation of the Parliament, despite the fact that such material has not been considered by the Regulations and Ordinances Committee and is also not subject to disallowance.

The Committee recognises that the point is probably academic, given that Defence Instructions are specifically excluded from the usual tabling and disallowance regime in the Legislative Instruments Act (see section 7 of that Act) and are therefore not susceptible to parliamentary scrutiny. Nevertheless, given the latitude provided by the measure, the Committee draws the provision to the attention of the Senate as it may be considered to constitute an inappropriate delegation of legislative power.

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

### **Parliamentary scrutiny of the exercise of legislative power Schedule 1, items 2 to 39**

One of the key principles underlying the work of the Scrutiny of Bills Committee is that Parliament properly carry out its legislative function. Parliament should not inappropriately delegate its legislative power to the Executive and, where it does delegate legislative powers, Parliament must address the question of how much oversight it should maintain over the exercise of the delegated power.

The criterion in standing order 24(1)(a)(v) requires that the Committee draw to the attention of the Senate provisions which seek to delegate legislative power but fail to provide for the proper auditing of its use. One area in which a bill may insufficiently subject the exercise of delegated power to parliamentary scrutiny is in giving a power to make subordinate legislation which is not to be tabled in the Parliament or, where tabled, is free from the risk of disallowance.

This bill raises the question of the adequacy of parliamentary oversight of delegated legislation because it seeks to expand the scope of a scheme (which appears to be legislative in character) at the same time as reducing the opportunity for parliamentary scrutiny.

Part VIIIA of the *Defence Act 1903* currently provides for a drug-testing regime to be implemented through regulations. Regulations (or, under the *Legislative Instruments Act 2003*, which commenced on 1 January 2005, legislative instruments) implementing that regime must be tabled in each House and are subject to scrutiny by the Parliament, including the Senate Regulations and Ordinances Committee, and to the risk of disallowance.

Despite the provisions in Part VIIIA, it appears that no regulations were ever made. The Minister's second reading speech stated that 'limitations under the legislative drug testing regime were a major reason why a command initiated program of drug testing was implemented.' The Minister indicates that the program was suspended last year when a Defence Force magistrate found 'there is no scope for such testing outside Part VIIIA of the Defence Act'. The changes proposed in the bill are to 'ensure that the legislation better reflects Defence Force policy regarding drug use.'

The bill extends the scope of the drug-testing regime, but at the same time removes aspects of it from the legislative instruments scheme, instead providing for their inclusion in Defence Instructions made under section 9A of the Act. Those Instructions are not required to be tabled and are not subject to the scrutiny of the Parliament.

One difficulty the Committee has found in considering this legislation is that there is nothing in the explanatory memorandum to explain the reasons for moving aspects of the scheme from regulations/legislative instruments, which are susceptible to the usual tabling and disallowance regime, to Defence Instructions, which are not. As a general rule, the Committee would expect the explanatory memorandum accompanying a bill to provide sufficient explanation to enable the Committee and, indeed, the Parliament to assess the need for such a change.

This raises, as a threshold question, whether it is appropriate to remove those aspects of the regime from parliamentary scrutiny. The Committee **seeks the Minister's advice** as to the reasons justifying this change.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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.*

## **Privacy**

### **Schedule 1, items 2 to 39**

The current provisions, which enable drug urinalysis of Defence Force members undertaking combat and combat-related duties, are contained in Part VIIIA of the *Defence Act 1903*. They were introduced as part of the *Defence Legislation Amendment Act (No. 1) 1999* after concerns were raised by the Privacy Commissioner and the Attorney-General's Department about a 1993 command-initiated proposal to instigate random drug testing among Defence personnel (see Privacy Commissioner, *Seventh and Eighth Annual Report on the Operation of the Privacy Act*). Those concerns focused on balancing the privacy rights of personnel and associated civil liberties concerns against the public interest in promoting and maintaining a drug-free Defence Force.

The Committee **seeks the Minister's advice** as to what consideration has been given to these concerns in formulating the measures in the bill.

*Pending the Minister's advice, 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.*

## **Family and Community Services and Veterans' Affairs Legislation Amendment (Further 2004 Election Commitments and Other Measures) Bill 2005**

[Introduced in the House of Representatives on 17 February 2005. Portfolio: Family and Community Services]

The bill amends family assistance legislation to:

- increase the rate of family tax benefit Part B from 1 January 2005 by introducing a new FTB Part B supplement payable as a lump sum upon income reconciliation after the end of the income year; and
- repeal the existing formula for the family tax benefit income cut-out amount for FTB, replacing it with a specific figure (\$11 233) to apply from 1 July 2005 and to be subsequently indexed each 1 July according to movements in the consumer price index.

The bill also amends the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to exempt aged care accommodation bonds from the social security and veterans' affairs assets test.

### **Retrospectivity**

#### **Schedule 1, subclause 2(1)**

By virtue of item 2 in the table to subclause 2(1) of this bill, the amendments proposed in Schedule 1 would commence on 1 January 2005, and thus, to some extent, prior to their passage through the Parliament. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, according to the explanatory memorandum, the amendments are 'purely beneficial to customers'; that is, presumably, beneficial to some recipients of the family tax benefit.

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

## **Farm Household Support Amendment Bill 2005**

[Introduced in the House of Representatives on 16 February 2005. Portfolio: Agriculture, Fisheries and Forestry]

The bill amends the *Farm Household Support Act 1992* to reinforce the structural adjustment focus of the Farm Help – Supporting Families Through Change programme. It does this by amending qualification provisions for entry to the programme and enabling on-going communication with grant recipients regarding their undertakings not to re-enter farming and to notify changes of address.

*The Committee has no comment on this bill.*

## **Great Barrier Reef Marine Park (Protecting the Great Barrier Reef from Oil Drilling and Exploration) Amendment Bill 2005**

[Introduced in the House of Representatives on 14 February 2005 as a private Member's bill]

This bill aims to protect the Great Barrier Reef by amending the *Great Barrier Reef Marine Park Act 1975* to provide for an extension of the boundaries of the Great Barrier Reef Region.

*The Committee has no comment on this bill.*



## **Higher Education Legislation Amendment (2005 Measures No. 1) Bill 2005**

[Introduced in the House of Representatives on 17 February 2005. Portfolio: Education, Science and Training]

The bill amends the *Higher Education Support Act 2003* to:

- set new aggregate funding levels for certain grants to reflect additional funding for radiation therapy places and aged care nursing places; funding for capital development at Charles Darwin University and James Cook University; and additional national institute funding for the Australian National University;
- extend eligibility for capital development pool funding under Other Grants to Table B providers; and
- allow conditional exemptions from the tuition assurance requirements for Higher Education Providers and clarify provisions relating to the re-crediting of Student Learning Entitlement and FEE-HELP balances

The bill also amends the *Higher Education Funding Act 1988* to clarify that no refunds of voluntary HECS repayments will be made from 1 January 2005 and to make a technical correction to the definition of HECS debt; and amends the *Maritime College Act 1978* to ensure that the college complies with National Governance Protocols.

### **Retrospective commencement Schedule 5, subclause 2(1)**

By virtue of item 7 in the table to subclause 2(1) of this bill, the amendment proposed in Schedule 5 would commence on 1 January 2004, immediately after the commencement of legislation passed in 2003. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the explanatory memorandum indicates that the amendment is technical only, and makes no change to the substantive law.

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

## Medical Indemnity Legislation Amendment Bill 2005

[Introduced in the House of Representatives on 17 February 2005. Portfolio: Health and Ageing]

According to the explanatory memorandum, the bill amends existing medical indemnity legislation to ‘give effect to improvements identified through consultations with the medical indemnity insurance industry, the medical profession and the Health Insurance Commission’.

The amendments deal with the administration of the Run-off Cover Scheme (amending some definitions, eligibility criteria and notification provisions), the Exceptional Claims Scheme and the High Cost Claim Scheme. They also create a High Cost Claims Protocol allowing for payments associated with incidents notified by practitioners.

The bill also:

- aligns arrangements for the Incurred But Not Reported Indemnity Scheme with similar provisions in other payments schemes; and
- amends Division 4 of the *Medical Indemnity Act 2002* to enable the Minister to formulate schemes to provide assistance to medical practitioners through other bodies which are not subject to the *Insurance Act 1973*.

### Retrospectivity

#### Schedule 1, items 1 to 5, 9, 13 and 14

By virtue of items 2, 6 and 8 in the table to subclause 2(1) of this bill, the amendments proposed in items 1 to 5, item 9 and items 13 and 14 of Schedule 1 would commence on 1 July 2004, immediately after the commencement of Schedule 1 to the *Medical Indemnity Legislation Amendment (Run-off Cover Indemnity and Other Measures) Act 2004*. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that

retrospectivity is sought and whether it adversely affects any person other than the Commonwealth.

In this case, regrettably, the explanatory memorandum gives no indication of whether this retrospectivity is beneficial or prejudicial to those to whom the legislation applies although, in respect of item 2, the explanatory memorandum indicates that ‘it is *not intended* that the amendments have a retrospective impact on criminal sanctions within the *Medical Indemnity Act 2002*’ (emphasis added).

The Committee **seeks the Minister’s advice** regarding this retrospectivity and the reason for the explanatory memorandum failing to provide that information.

*Pending the Minister’s advice, 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.*

### **Retrospective commencement**

#### **Schedule 1, item 7; Schedule 3, items 1, 4, 10, 11, 13 and 14**

By virtue of items 4, 14, 16, 19 and 21 in the table to subclause 2(1) of this bill, the amendments proposed in item 7 of Schedule 1 and items 1, 4, 10, 11, 13 and 14 of Schedule 3 would commence on 1 January 2005, immediately after the commencement of sections 3 to 62 of the *Legislative Instruments Act 2003*. Although, again, the explanatory memorandum does not vouchsafe this information, all of the amendments are technical only, and do no more than ensure that the principal legislation now conforms to the requirements of the *Legislative Instruments Act*. The Committee **seeks the Minister’s advice** as to the reason for the explanatory memorandum failing to provide that information.

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

**Retrospective commencement**  
**Schedule 3, items 5 to 7, 15 and 16**

By virtue of items 17 and 22 in the table to subclause 2(1) of this bill, the amendments proposed in items 5 to 7 and 15 and 16 of Schedule 3 would commence respectively on 1 January 2003, immediately after the commencement of the *Medical Indemnity Act 2002* and on 5 December 2003, immediately after the commencement of the *Medical Indemnity Amendment Act 2003*. Regrettably, again, the explanatory memorandum gives no indication of whether this retrospectivity is beneficial or prejudicial to those to whom the legislation applies.

The Committee **seeks the Minister's advice** regarding this retrospectivity and the reason for the explanatory memorandum failing to provide that information.

*Pending the Minister's advice, 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.*

**Typographical error**  
**Schedule 3, item 12**

By virtue of item 20 in the table to subclause 2(1) of this bill, the amendment proposed in item 12 of Schedule 3 would commence on 'The day on which this Act receives the Royal Assent 1 January 2003'. Presumably the inclusion of the date is an oversight. The Committee draws this apparent error to the Minister's attention.

*The Committee makes no further comment on this provision.*

## **National Security Information (Criminal Proceedings) Amendment (Application) Bill 2005**

[Introduced in the House of Representatives on 9 February 2005. Portfolio: Attorney-General]

The bill amends the *National Security Information (Criminal Proceedings) Act 2004* to clarify the intended operation of the Act and, in particular:

- to provide for the application of the Act to federal criminal proceedings that occur after 11 January 2005 (the date on which the main provisions of the Act commenced), notwithstanding that the proceedings may have commenced before that date; and
- to restate the intent of the Act to require a prosecutor to give the requisite notice only once, after which the Act will apply to all subsequent parts of the proceedings.

### **Retrospective application Schedule 1**

The purpose of this bill, as is made clear in the Attorney-General's second reading speech, is to ensure that the *National Security Information (Criminal Proceedings) Act 2004* applies to criminal proceedings even though they were begun before the Act came into force, on 11 January 2005. Although the explanatory memorandum states that the bill 'would only apply to the future stages of a proceeding and not affect anything that occurred before the notice was given', it also contemplates the application of the amended provisions to an unspecified number of cases already on foot. The memorandum concedes that 'without this amendment there is a risk that any attempt to apply the Act to future stages of these proceedings would be found incompetent.'

The bill is therefore to that extent retrospective in operation, and may be regarded as trespassing on personal rights and liberties in that it has the potential to interfere with a defendant's right to a fair trial. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

*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.*

## **Tax Laws Amendment (2005 Measures No. 1) Bill 2005**

[Introduced in the House of Representatives on 10 February 2005. Portfolio: Treasury]

This bill is an omnibus tax laws amendment bill, comprising 4 Schedules and making amendments to 3 Acts. Topics include:

- expansion of fringe benefits tax exemptions to cover engagement of relocation consultants, work-related items such as personal digital assistants, and broader access to the employer-provided housing exemption;
- statutory caps for the decline in value of transport assets;
- application of the goods and services tax to the offshore supply of options or rights to ‘goods, services and other things’ connected with Australia; and
- provision of a tax offset for mature age workers.

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

By virtue of item 3 of Schedule 2, the amendments proposed by that Schedule will apply from 1 January 2005, and therefore to some extent retrospectively. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the explanatory memorandum points out that those amendments are beneficial to taxpayers.

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

## **Telecommunications (Consumer Protection and Service Standards) Amendment (National Relay Service) Bill 2005**

[Introduced in the House of Representatives on 10 February 2005. Portfolio: Communications, Information Technology and the Arts]

The National Relay Service provides people who have a hearing or speech impairment access to a standard telephone service using operators who relay text messages to other telephone users. It is funded by a levy on eligible telecommunications carriers and is provided by a person under a contract with the Commonwealth.

The bill amends the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to enable the Commonwealth to contract with more than one person to provide the service.

*The Committee has no comment on this bill.*



## Trade Practices Legislation Amendment (No. 1) Bill 2005

[Introduced in the House of Representatives on 24 June 2004 and reintroduced on 10 February 2005. Portfolio: Treasury]

The bill amends the *Trade Practices Act 1974* to implement the Government's response to the *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review). The amendments:

- create a voluntary formal merger clearance system;
- make merger and non-merger authorisations clearer and more timely;
- introduce a notification process for collective bargaining by small business dealing with large business;
- provide a 'joint venture defence' to the prohibitions on exclusionary and price-fixing provisions;
- provide that dual listed companies are treated as corporate groups for certain purposes, and prohibit the formation of dual listed companies where it would substantially lessen competition;
- bring the treatment of third line forcing provisions into line with other forms of exclusive dealing;
- replace the provisions which provide the ACCC the power to enter premises and inspect documents without a warrant with new arrangements requiring the ACCC to obtain a warrant to search premises and seize evidence;
- increase penalties and prohibit corporations indemnifying employees and agents against pecuniary penalty;
- clarify the application of the Act to local government bodies; and
- address issues of constitutional validity by expressly providing that states and territories may confer duties on the ACCC under the provisions of the Competition Code.

The bill also amends the *Corporations Act 2001* and *Trade Practices Act 1974* in relation to disqualification from managing corporations.

The bill was first introduced in June 2004 as the Trade Practices Legislation Amendment Bill 2004, but lapsed prior to the commencement of the current Parliament. The Committee considered the bill in its *Alert Digest No. 9 of 2004* and repeats here the comments it made in respect of the original bill.

### **Retrospective commencement Schedule 12**

By virtue of item 12 in the table in subclause 2(1), the amendment proposed in Schedule 12 to this bill would commence retrospectively on 1 March 2004, immediately after the commencement of Schedule 1 to the *Trade Practices Amendments Act 2003*. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the explanatory memorandum notes that the amendment merely corrects an earlier incorrect cross-reference and makes no change to the substantive law.

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

### **Abrogation of the privilege against self-incrimination Schedule 8, item 4**

Proposed new subsection 154R(3) of the *Trade Practices Act 1974*, to be inserted by item 4 of Schedule 8 to this bill, would abrogate the privilege against self-incrimination for a person required to provide information under proposed new subsection 154R(1). At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law entitlement trespasses on personal rights and liberties.

The Committee does not see this privilege as absolute, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. In this case, subsection 154R(4) limits

the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. The Committee accepts that it strikes a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

## **Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005**

[Introduced into the House of Representatives on 11 August 2004 and reintroduced on 9 February 2005. Portfolio: Employment and Workplace Relations]

The bill amends freedom of association provisions of the *Workplace Relations Act 1996* to extend the prohibition on bargaining services fee clauses to state employment agreements to which a constitutional corporation is a party.

The bill also contains an application provision.

*The Committee has no comment on this bill.*

## STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2005

| NAME OF BILL  | ALERT DIGEST             | INTRODUCED |          | MINISTER  | RESPONSE |          | REPORT NUMBER |
|---|--------------------------|------------|----------|---|----------|----------|---------------|
|   |                          | HOUSE      | SENATE   |   | SOUGHT   | RECEIVED |               |
| <b>Bills dealt with in 2004</b>                         |                          |            |          |   |          |          |               |
| Australian Communications and Media Authority Bill 2004 | 12(8.12.04)              | 2.12.04    | 7.3.05   | Communications, Information Technology and the Arts             | 9.12.04  |          |               |
| <i>Copyright Legislation Amendment Act 2004</i>         | 12(8.12.04)              | 9.12.04    | 30.11.04 | Attorney-General  | 9.12.04  | 2.2.05   | 1(9.2.05)     |
| James Hardie (Investigations and Proceedings) Bill 2004 | 12(8.12.04)              | 2.12.04    | 8.12.04  | Treasury  | 9.12.04  |          |               |
| Water Efficiency Labelling and Standards Bill 2004      | 9(4.8.04)<br>12(8.12.04) | 24.6.04    | 12.8.04  | Environment and Heritage<br>Reintroduced – no response required | 5.8.04   | 24.12.04 | 1(9.2.05)     |
| <b>Bill dealt with in 2005</b>                          |                          |            |          |   |          |          |               |
| AusLink (National Land Transport) Bill 2004             | 1(9.2.05)                | 9.12.04    | 10.2.05  | Transport and Regional Services                                 | 10.2.05  |          |               |

