

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



**Alert Digest**

**No. 3 of 2005**

**16 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.



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

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## **Appropriation (Tsunami Financial Assistance and Australia-Indonesia Partnership) Bill 2004-2005**

[Introduced in the House of Representatives 9 March 2005. Portfolio: Finance and Administration]

The bill appropriates money (\$1.02 billion) out of the Consolidated Revenue Fund to provide certain expenditure for financial assistance to Indonesia following the 2004 Boxing Day tsunami. According to the minister's second reading speech, the centrepiece is a \$1 billion appropriation for the Australia-Indonesia Partnership for Reconstruction and Development, a 5-year program comprising \$500 million in grant funding and up to \$500 in loans.

The bill and its companion are being treated as supplementary appropriation bills. Supplementary portfolio estimates statements were tabled in the Senate on 9 March 2005.

*The Committee has no comment on this bill.*

## **Appropriation (Tsunami Financial Assistance) Bill 2004-2005**

[Introduced in the House of Representatives 9 March 2005. Portfolio: Finance and Administration]

The bill appropriates money out of the Consolidated Revenue Fund, additional to the appropriations made by the Appropriation Acts (Nos 1 and 3) 2004-2005, to meet payments for the ordinary annual services of the government for the year ending on 30 June 2005. The bill appropriates \$131.4 million to replace funding diverted from existing programs to enable agencies to provide immediate assistance to Indonesia following the 2004 Boxing Day tsunami.

The bill and its companion are being treated as supplementary appropriation bills. Supplementary portfolio estimates statements were tabled in the Senate on 9 March 2005.

*The Committee has no comment on this bill.*

## **Building and Construction Industry Improvement Bill 2005**

[Introduced in the House of Representatives 9 March 2005. Portfolio: Employment and Workplace Relations]

The bill replicates, with some modification, provisions in the Building and Construction Industry Improvement Bill 2003 dealing with the regulation of industrial action. That bill lapsed prior to the commencement of this Parliament.

The bill defines and prohibits ‘unlawful industrial action’ and applies a civil penalty for taking such action. It also narrows the scope of ‘protected action’ that may be taken under the *Workplace Relations Act 1996* (WR Act) in respect of ‘building industrial action’ and increases the maximum penalty for a body corporate that breaches the strike pay provisions in the WR Act.

The bill establishes an enforcement regime for contravention of civil penalty provisions and confers upon various courts the jurisdiction to hear matters relating to the matters dealt with in the bill. It also contains a regulation-making power.

The explanatory memorandum contemplates, on page 1, that government amendments based on the 2003 bill will be made ‘at a later date ... to provide a comprehensive workplace relations reform package for the construction industry’. The foreshadowed amendments may explain the curious structure of the bill, which comprises Chapters 1, 6, 12 and 13 of a proposed principal Act. The Committee will consider those amendments when they are produced.

### **Retrospective commencement Clauses 4 to 10 and Chapter 6**

Items 2 and 3 of the table in subclause 2(1) of this bill provide that clauses 4 to 10, together with Chapter 6, will commence retrospectively on 9 March 2005. 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 confirms that the provisions may operate to the detriment of people. The memorandum notes, at page 3, that ‘The retrospective character of this Bill will ensure that unions that take unlawful industrial action prior to the nominal expiry date of ... existing agreements in the coming months, will be subject to the sanctions and greater penalties’ provided by the bill. The memorandum goes on to note that Chapter 6 renders certain kinds of industrial action unlawful and modifies what may be protected action for the purposes of the WR Act.

This being the case, industrial action which is currently lawful, or which currently falls within the definition of ‘protected action’, may be rendered unlawful by the bill and those taking part in such action retrospectively subjected to the ‘sanctions and greater penalties’ in the bill.

The Committee also notes that the date proposed for the retrospective commencement of the above provisions is the date of the introduction of the bill into the House.

The Committee considers that, in principle, legislation which changes the nature of people’s rights should commence after it is finally passed by the Parliament, rather than on the date of its introduction. The approach taken here raises the same concerns as provisions which make legislation operative from the date of a press release, a practice the committee has consistently noted is unsatisfactory and, when it adversely affects personal rights, unfair.

The Committee has previously noted that this approach ‘carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with laws passed by the Parliament.’ The uncertainty this creates is compounded by the possibility that the Parliament may – quite properly – pass the legislation in an amended form.

The bill is therefore retrospective in operation and the Committee considers that it may be regarded as trespassing on personal rights and liberties. 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.*

## **Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005**

[Introduced in the House of Representatives 9 March 2005. Portfolio:  
Employment and Workplace Relations]

The bill makes amendments consequential upon commencement of the Building and Construction Industry Improvement Bill 2005 as an Act. It also contains application, saving and transitional provisions.

*The Committee has no comment on this bill.*

## **Criminal Code Amendment (Suicide Related Material Offences) Bill 2005**

[Introduced in the House of Representatives 10 March 2005. Portfolio: Justice and Customs]

The bill amends the *Criminal Code Act 1995* to insert new offences relating to the use of a carriage service, including the Internet, to access or make available material that counsels or incites suicide. According to the Minister's second reading speech, 'Clarifying provisions have been included ... which provide that a person is not guilty of these offences merely because the person uses a carriage service to engage in public discussion or debate about, or advocates reform of the law relating to, euthanasia or suicide.'

The bill is similar to the Criminal Code Amendment (Suicide Related Material Offences) Bill 2004, which lapsed prior to the commencement of this Parliament, and contains provisions originally contained in the Criminal Code Amendment (Telecommunications and Other Measures) Bill 2004.

*The Committee has no comment on this bill.*

## Customs Tariff Amendment Bill (No. 1) 2005

[Introduced in the House of Representatives 10 March 2005. Portfolio: Justice and Customs]

The bill amends the *Customs Tariff Act 1995* in relation to:

- goods used in oil and gas exploration;
- the chemical paraquat dichloride;
- the operation of the South Pacific Regional Trade and Economic Co-operation Agreement (Textile, Clothing and Footwear Provisions) Scheme;
- the standardised country codes for Poland and Wake Island; and
- certain US-originating alcohol and tobacco products.

### **Retrospective commencement** **Subclause 2(1), items 2 to 7**

Items 2 to 7 of the table in subclause 2(1) of this bill provide that most of its operative provisions will commence retrospectively, on various dates from 24 March 2003 to 1 February 2005. 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, all of the amendments other than those referred to in items 6 and 7 are either beneficial to those obliged to pay Customs duties, or have no effect on liability to such duties. The amendments referred to in items 6 and 7 have been the subject of Customs Tariff Proposals tabled in the House of Representatives prior to the date proposed for those amendments to come into force. The Committee has in the past been prepared to accept the retrospective commencement of amendments to the Customs Tariff Act in such circumstances.

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



## **Higher Education Legislation Amendment (2005 Measures No. 2) Bill 2005**

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

The bill makes amendments to the *Higher Education Support Act 2003* in relation to:

- review procedures under the Higher Education Provider Guidelines, review of decisions in respect of students undertaking industry work experience, and requirements for reviews;
- publication of student contribution amounts and tuition fees, census dates and Equivalent Full Time Student Load values;
- provision of tax file numbers by students accessing HECS-HELP or FEE-HELP and cancellation of enrolments of people without tax file numbers;
- delegation of the power to repay student contributions and remit HECS-HELP debts in relation to industry work experience;
- OS-HELP eligibility and accumulated HELP debt;
- status of guidelines issued by the Commissioner of Taxation as legislative instruments and indexation of amounts specified in guidelines; and
- access to FEE-HELP for people enrolled through Open Learning Australia.

The bill makes related amendments to two other Acts.

### **Retrospectivity Schedule 1, part 3 and Schedule 2**

Items 4 and 5 of the table in subclause 2(1) of the bill provide that the amendments in Part 3 of Schedule 1 and in Schedule 2 will commence retrospectively, on 1 January 2004, immediately after the commencement of other legislation. 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, it appears from the explanatory memorandum that the amendment proposed in Part 3 of Schedule 1 is beneficial to persons enrolled in a course provided by Open Learning Australia, and the amendment proposed by Schedule 2 corrects an earlier incorrect cross-reference, and makes no change to the substantive law.

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

## Migration Litigation Reform Bill 2005

[Introduced in the House of Representatives 10 March 2005. Portfolio: Attorney-General]

According to the explanatory memorandum, the bill amends the *Migration Act 1958* and other legislation ‘to improve the overall efficiency of migration litigation.’

It seeks to do this by:

- directing migration cases to the Federal Magistrates Court (FMC) for more efficient handling and limiting the jurisdiction of the Federal Court in relation to migration cases;
- ensuring identical grounds of review in the FMC as apply in the High Court under section 75(v) of the Constitution;
- imposing uniform time limits for applications for review of migration decisions;
- improving court processes for quicker handling of cases;
- deterring ‘unmeritorious’ applications by broadening the grounds on which a court can summarily dispose of proceedings and by providing for personal costs orders against people who contravene the obligation not to encourage unmeritorious cases; and
- changing management arrangements for the FMC, including by making the Chief Federal Magistrate responsible for managing the administrative affairs of the court.

The bill also contains application provisions.

### Exclusion of judicial review

#### Schedule 1, item 1

The explanatory memorandum notes that privative clause decisions, as defined in subsection 474(2) of the *Migration Act 1958*, are excluded from the purview of the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act). Item 1 of Schedule 1 to the bill proposes to amend the AD(JR) Act to also exclude from the purview of that Act a *purported* privative clause

decision. Item 14 of Schedule 1 to the bill inserts a definition of *purported privative clause decision* into the Migration Act.

This proposed amendment merely adds to the list of decisions excluded from review under the AD(JR) Act decisions which *would* have been privative clause decisions (and therefore excluded) if there had not been, in the making of that decision, a failure to exercise jurisdiction or an excess of jurisdiction.

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

## **National Security Information Legislation Amendment Bill 2005**

[Introduced in the House of Representatives 10 March 2005. Portfolio: Attorney-General]

The *National Security Information (Criminal Proceedings) Act 2004*, which commenced on 11 January 2005, provides a framework for the protection of information from disclosure during proceedings for Commonwealth offences where the disclosure is likely to prejudice Australia's national security. The Committee commented on the bill for that Act in its *Alert Digest No. 11 of 2004*.

The bill amends that Act to extend its operation, currently restricted to federal criminal proceedings, to include certain civil proceedings, with a number of departures to account for the nature of civil proceedings.

The bill makes consequential amendments to:

- the *Administrative Decisions (Judicial Review) Act 1977* to limit the jurisdiction of courts to hear applications in relation to certificate decisions of the Attorney-General (or appointed Minister) under the Act; and
- the *Judiciary Act 1903* to enable the court conducting a substantive hearing to deal with any judicial review of certificate or notice decisions.

### **Legislative Instruments Act – Declarations Schedule 1, items 6, 7 and 22**

Proposed new subsections 6(3), 6A(6) and 38F(8) of the Principal Act, to be inserted by items 6, 7 and 22, respectively, of Schedule 1 to this bill, declare certain notices and certificates given under other provisions of the Principal Act not to be legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

In its *Second Report of 2005, Legislative Instruments Act – Declarations*, the Committee noted that proper explanation of such provisions would be of great assistance to the Committee and to the Parliament generally. In this case the

explanatory memorandum notes that the provisions have no substantive effect but merely clarify the position for users of the legislation. This explanation meets the Committee's concerns.

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

## **Personal rights**

### **Schedule 1, item 22 and proposed new subsection 38L(8)**

Proposed new subsection 38L(7) of the Principal Act, to be inserted by item 22 of Schedule 1 to this bill, requires a court, in deciding whether to allow a witness to be called or a document to be tendered in a civil proceeding, to consider both whether its order might prejudice national security and whether such an order 'would have a substantial adverse effect on the substantive hearing in the proceeding'.

Proposed new subsection 38L(8), however, provides that, in making its decision, 'the Court must give greatest weight to' the possible prejudice to national security. These provisions are very similar to subsections 31(7) and (8) of the Principal Act, which relate to evidence in criminal proceedings and on which the Committee commented in *Alert Digest No. 11 of 2004*.

The Committee considers that these provisions, in subjecting a defendant's right to a fair hearing in a civil matter to the demands of national security, may trespass on the defendant's personal rights. The question of whether they do so *unduly* is a **matter for the Senate as a whole**.

*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.*

**Exclusion of requirement to give reasons  
Schedule 1, part 2, item 31**

Item 31 in Part 2 of Schedule 1 to this bill proposes to amend the *Administrative Decisions (Judicial Review) Act 1977* to exclude from the purview of that Act a decision of the Attorney-General to issue a certificate under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* relating to possible evidence or documents, the disclosure of which in civil proceedings may prejudice national security. This removes the requirement for the Attorney-General to furnish reasons for the decision to issue such a certificate.

As the explanatory memorandum observes, the nature of such a decision ‘is such that exposure of the reasons for the decision could itself prejudice Australia’s national security.’

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

## **Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005**

[Introduced in the House of Representatives 9 March 2005. Portfolio: Employment and Workplace Relations]

The bill amends the *Occupational Health and Safety (Commonwealth Employment) Act 1991* to exclude Commonwealth employers and employees from the application of the industrial manslaughter provisions of the Australian Capital Territory *Crimes Act 1900* inserted by the *Crimes (Industrial Manslaughter) Amendment Act 2002 (ACT)* and any similar laws enacted by a state or territory.

### **Retrospective application Proposed new subsection 11A(3)**

Although this bill would not commence until Royal Assent, proposed subsection 11A(3) provides that the substantive amendments would apply from 1 March 2004 – the date of operation of the ACT legislation which created the offence of industrial manslaughter.

The explanatory memorandum states that the Commonwealth opposes the ACT legislation and has introduced this bill for the purpose of excluding Commonwealth employers and employees from its application.

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



## **Parliamentary Service Amendment Bill 2005**

[Introduced in the Senate on 21 June 2004 as the Parliamentary Service Amendment Bill 2004 and reintroduced on 9 March 2005 by the President (Senator Calvert) as a Private Senator's bill]

The bill amends the *Parliamentary Service Act 1999* to create a statutory position of Parliamentary Librarian.

*The Committee has no comment on this bill.*

## Payment Systems (Regulation) Amendment Bill 2005

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

The Reserve Bank of Australia (RBA) has established an interchange fees standard for participants in credit card schemes. The bill amends the *Payment Systems (Regulation) Act 1998* to ensure that conduct of participants which complies with the standard is authorised for the purposes of the *Trade Practices Act 1974*. This avoids the risk that participants complying with the standard would be engaging in restrictive trade practices, in contravention of Part IV of that Act.

### **Incorporation of extrinsic material Proposed new subsection 11A(2)**

Item 1 of Schedule 1 to this bill proposes a new subsection 11A(1), which would authorise certain conduct to which ‘an interchange fees standard applies’. Proposed subsection 11A(2) defines *interchange fees standard* by adopting the existing RBA standard ‘as amended and in force from time to time’ [paragraph (a)], and providing for the adoption – on the same basis – of other standards specified by regulations [paragraph (b)].

The Committee routinely draws attention to provisions which seek to incorporate into delegated legislation material ‘as in force from time to time’ where that incorporation involves material which appears not to be subject to sufficient parliamentary scrutiny.

A similar concern may arise in respect of the adoption of the existing RBA standard ‘as amended and in force from time to time’. The question turns on whether the standard, and any amendment to the standard, is subject to sufficient parliamentary scrutiny. This will be the case if the standard (and any amendment to that standard) is a legislative instrument under the *Legislative Instruments Act 2003* (LIA) and, under that Act, subject to the usual tabling and disallowance regime, including the oversight of the Senate Regulations and Ordinances Committee.

It appears that the standard meets the definition of a *legislative instrument* in section 5 of the LIA, but the Committee **seeks the Minister's advice** as to whether the standard is in fact a legislative instrument and whether any amendment to the standard would be subject to the usual tabling and disallowance regime set out in that Act.

*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.*

## **Primary Industries (Excise) Levies Amendment (Rice) Bill 2005**

[Introduced in the House of Representatives 10 March 2005. Portfolio: Agriculture, Fisheries and Forestry]

The bill amends the *Primary Industries (Excise) Levies Act 1999* to increase the maximum allowable rice research and development levy rate (from \$2 to \$3 per tonne), and to provide that aspects of the administration of the levy can be determined in regulations.

*The Committee has no comment on this bill.*

## **Telecommunications Legislation Amendment (Regular Review and Other Measures) Bill 2005**

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

The bill is a legislative response to recommendations of the Regional Telecommunications Inquiry Report (the Estens Report). The bill amends:

- the *Telecommunications Act 1997* in relation to the character of licence conditions which may be made by the Minister requiring Telstra to maintain a local presence in regional, rural or remote parts of Australia;
- the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to insert a new Part 9B relating to independent reviews of regional telecommunications and providing for the appointment of an independent expert committee; and
- the *Telstra Corporation Act 1991* to ensure that at least two directors of Telstra will be required to have knowledge of the communications needs of regional, rural and remote areas.

*The Committee has no comment on this bill.*

## **Workplace Relations Amendment (Better Bargaining) Bill 2005**

[Introduced in the House of Representatives 9 March 2005. Portfolio: Employment and Workplace Relations]

The bill amends the *Workplace Relations Act 1996* to:

- ensure that industrial action cannot be taken from the time an agreement, or award made under subsection 170MX(3), comes into operation until the nominal expiry date of the agreement or award has passed;
- allow the suspension of a bargaining period for cooling-off and third party suspensions; and
- clarify certain matters relating to related corporations and the involvement of non-protected persons that may or may not be classed as protected industrial action.

The bill also contains application provisions.

A similar bill was introduced in the House on 6 November 2003 but lapsed before the commencement of this Parliament.

*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	14.3.05	3(16.3.05)
<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) 12(8.12.04)	24.6.04	12.8.04	Environment and Heritage 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	10.3.05		
Aged Care Amendment (Transition Care and Assets Testing) Bill 2005	2(9.3.05)	10.2.05	7.3.05	Ageing	10.3.05	15.3.05	3(16.3.05)
Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005	2(9.3.05)	17.2.05	9.3.05	Agriculture, Fisheries and Forestry	10.3.05	11.3.05	3(16.3.05)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005	2(9.3.05)	17.2.05		Fisheries, Forestry and Conservation		10.3.05	
Defence Amendment Bill 2005	2(9.3.05)	10.2.05	7.3.05	Defence		10.3.05	
Medical Indemnity Legislation Amendment Bill 2005	2(9.3.05)	17.2.05	9.3.05	Health and Ageing		10.3.05	