

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



**Alert Digest**

**No. 10 of 2006**

**13 September 2006**



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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 A McEwen  
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**

Archives Amendment Bill 2006	5
Customs Amendment (2007 Harmonized System Changes) Bill 2006	6
Customs Tariff Amendment (2007 Harmonized System Changes) Bill 2006	7
Education Services for Overseas Students Legislation Amendment (2006 Measures No. 2) Bill 2006	8
• Fuel Quality Standards (Renewable Content of Motor Vehicle Fuel) Amendment Bill 2006	9
• Higher Education Legislation Amendment (2006 Budget and Other Measures) Bill 2006	12
• Law and Justice Legislation Amendment (Marking of Plastic Explosives) Bill 2006	14
Migration Legislation Amendment (End of Mandatory Detention) Bill 2006	17
Schools Assistance (Learning Together—Achievement Through Choice and Opportunity) Amendment Bill (No. 2) 2006	18
<b>Scrutiny of standing appropriations</b>	<b>19</b>

- **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.



## **Archives Amendment Bill 2006**

Introduced into the Senate on 6 September 2006

Portfolio: Arts and Sport

### **Background**

This bill amends the *Archives Act 1983*, the *Copyright Act 1968*, the *Freedom of Information Act 1982* and the *Privacy Act 1988* to implement some of the recommendations of the Australian Law Reform Commission report *Australia's Federal Record: A Review of the Archives Act 1983* in relation to record-keeping and the preservation, promotion and availability of Commonwealth archival resources.

*The Committee has no comment on this bill.*

## **Customs Amendment (2007 Harmonized System Changes) Bill 2006**

Introduced into the House of Representatives on 7 September 2006  
Portfolio: Justice and Customs

### **Background**

Introduced with the Customs Tariff Amendment (2007 Harmonized System Changes) Bill 2006, this bill amends the *Customs Act 1901* to enable the revocation of approximately 700 Tariff Concession Orders (TCOs) that will be affected by amendments to the *Customs Tariff Act 1995* by the Customs Tariff Amendment (2007 Harmonized System Changes) Bill 2006, and to replace them with approximately 1200 new TCOs. TCOs provide 'Free' rate of customs duty for imported goods when there are no substitutable domestically produced goods.

*The Committee has no comment on this bill.*

## **Customs Tariff Amendment (2007 Harmonized System Changes) Bill 2006**

Introduced into the House of Representatives on 7 September 2006

Portfolio: Justice and Customs

### **Background**

Introduced with the Customs Amendment (2007 Harmonized System Changes) Bill 2006, this bill amends the *Customs Tariff Act 1995* to implement changes (with effect from 1 January 2007) resulting from the third periodic review of the Harmonized Commodity Description and Coding System, (the Harmonized System or HS) by the World Customs Organization, which maintains the HS.

The HS provides a hierarchical system that uniquely identifies all traded goods and commodities and forms the basis of the Australian Customs Tariff. The HS is uniform across all countries that have adopted it. Australia and other signatory countries are required to implement the changes arising from the third review, with effect from 1 January 2007.

The bill repeals numerous headings and subheadings relating to deleted classifications for goods where there have been low levels of international trade, amends the system to reflect changes in industry practices and technological developments and provides for new subheadings to allow signatory parties to separately identify new products for community protection reasons. The bill also clarifies existing descriptions and terminology in the HS.

A number of amendments implement the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

Schedules 5 and 6 specify the alternative rates of duty which apply under Australia's Free Trade Agreements with the US and Thailand.

*The Committee has no comment on this bill.*

## **Education Services for Overseas Students Legislation Amendment (2006 Measures No. 2) Bill 2006**

Introduced into the House of Representatives on 6 September 2006  
Portfolio: Education, Science and Training

### **Background**

This bill amends the *Education Services for Overseas Students Act 2000* (the ESOS Act) and the *Migration Act 1958* to implement measures recommended by the 3-year review of the ESOS Act.

The amendments include changes to:

- the administration of the ESOS Assurance Fund in relation to the payment of refunds and management of calls on the fund;
- the requirements applying to providers in relation to registration and reporting; and
- clarify provisions relating to consumer protection for overseas students.

*The Committee has no comment on this bill.*

## **Fuel Quality Standards (Renewable Content of Motor Vehicle Fuel) Amendment Bill 2006**

Originally introduced into the House of Representatives on 21 October 2002, reintroduced on 5 September 2005 in an amended form, and subsequently reintroduced on 4 September 2006 in the same form by Mr Katter.

### **Background**

The bill proposes to amend the *Fuel Quality Standards Act 2000* to provide for a regulatory regime that enables the inclusion of ethanol and other renewable fuels in motor vehicle fuels.

The Committee notes that this bill is, to all intents and purposes, identical with the bill of the same name introduced by Mr Katter on 5 September 2005. The Committee commented on that previous bill in *Alert Digest No. 11 of 2005*, but received no response from the proposer in relation to those comments. In the circumstances, the Committee reiterates its earlier comments.

### **Explanatory memorandum**

The Committee notes that this bill, introduced as a private Member's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the parliament is assisted if they are accompanied by explanatory memoranda. The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of such documents. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and explanatory material, *Preparing Private Senator's Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may also assist Members in preparing explanatory memoranda.

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

## **Commencement on proclamation Schedule 1**

The Committee takes the view that Parliament is responsible for determining when laws are to come into force, and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. This view has long been reflected in the drafting directions issued by the Office of Parliamentary Counsel (currently *Drafting Direction No. 1.3* at paragraphs 18 to 22). The drafting direction provides that a clause which provides for commencement by proclamation should also specify a period or date after which the Act either commences or is taken to be repealed. It also provides that any proposal to defer commencement for more than 6 months after assent should be explained in the explanatory memorandum.

Item 2 in the table to subclause 2(1) in this bill provides that the amendments proposed in Schedule 1 would commence only on a ‘day or days to be fixed by Proclamation.’ As there is no explanatory memorandum to the bill, the Committee has no means of knowing the reason the provision does not comply with the general rule stated in paragraph 18 of the drafting direction. The Committee **seeks the advice of the member sponsoring the bill** as to whether the commencement clause might not be subject to appropriate restrictions, as set out in the drafting direction.

*Pending the Member’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)(iv) of the Committee’s terms of reference.*

## **Strict liability Schedule 1, item 1**

The offences created by new subsections 29M(1) and 29N(5) of the *Fuel Quality Standards Act 2000*, to be inserted by item 1 of Schedule 1 to this bill, are offences of strict liability.

In its *Sixth Report of 2002* the Committee reported on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. It

recommended a range of principles which the Committee concluded should form the framework for Commonwealth policy and practice in relation to strict and absolute liability.

In February 2004, the Minister for Justice and Customs published a *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide), which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the Guide contains a statement of the matters which should be considered in framing strict and absolute liability offences.

The Committee will generally draw to Senators' attention provisions which create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum which accompanies the bill.

As there is no explanatory memorandum to the bill, the Committee has no means of knowing whether the member sponsoring the bill had regard to the relevant principles. The Committee **seeks the advice of the member** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the Guide.

*Pending the Member'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.*

## **Higher Education Legislation Amendment (2006 Budget and Other Measures) Bill 2006**

Introduced into the House of Representatives on 6 September 2006  
Portfolio: Education, Science and Training

### **Background**

This bill amends the *Higher Education Support Act 2003* and the *Higher Education Funding Act 1988* to:

- revise the maximum funding amounts for new commencing medical places, new commencing nursing places and clinical training for nursing students as part of the COAG Health Workforce package;
- provide funding for new medical places at certain universities, new mental health nursing places and new clinical psychology places;
- provide funding for the Federation of Australian Scientific and Technological Societies and the Council for the Humanities, Arts and Social Sciences;
- increase the general FEE-HELP limit and the limit for students enrolled in a medicine, dentistry or veterinary science course and makes changes in relation to the calculation of HELP debts;
- provide for the electronic communication of notices;
- provide for the Commonwealth to develop guidelines to regulate higher education in Australia's external territories and to set fees for such applications in the guidelines; and
- repeal the Higher Education (HECS) Account.

The bill also amends the *Australian Research Council Act 2001* to reflect updated annual caps on funding and contains application, saving, technical and transitional provisions.

**Retrospective application**  
**Schedule 4, item 5**

Item 5 of Schedule 4 to the bill would apply the amendments, made by that Schedule in relation to rounding of HELP debts, retrospectively from 1 January 2005. However, on the second page of the explanatory memorandum it is noted that this retrospective application ‘is required to give effect to the current administrative arrangements which have rounded down HELP debts incurred since 1 January 2005.’ The explanatory memorandum goes on to observe that this measure ‘will reduce a person’s repayable HELP debt by any rounded down amount.’

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

## **Law and Justice Legislation Amendment (Marking of Plastic Explosives) Bill 2006**

Introduced into the House of Representatives on 7 September 2006

Portfolio: Attorney-General

### **Background**

This bill amends the *Criminal Code Act 1995*, the *Customs Act 1901* and the *Australian Federal Police Act 1979*, and makes consequential amendments to the *Australian Security Intelligence Organisation Act 1979*, the *Crimes Act 1914*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception) Act 1979*. The bill implements Australia's obligations under the United Nations' Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal 1991).

The bill makes it an offence to manufacture, import, export, traffic in, or possess plastic explosives which have not been marked with a detection agent as prescribed within the terms of the Technical Annex to the Convention.

The bill obliges State parties to take necessary action in relation to the manufacture, movement into or out of a territory, and the possession and transfer of unmarked plastic explosives. The bill is not intended to override any existing State or Territory legislation or offences dealing with plastic explosives.

### **Indeterminate commencement Schedules 1 to 3**

Item 2 in the table to subclause 2(1) of this bill provides for the amendments proposed in Schedules 1 to 3 to commence on the later of the end of the period of 6 months after the date of Assent to the bill and the day on which the Convention on the Marking of Plastic Explosives for the Purposes of Detection, (Montreal 1991) (the Convention), comes into force for Australia. The item goes on to require the Minister for Justice and Customs to announce by *Gazette* notice the day on which the Convention comes into force.

The Committee notes that, while item 2 provides that the proposed amendments do not commence at all if the Convention does not come into force, there is no time limit specified within which the Schedules will be taken to be repealed in such circumstances. The Committee takes the view that Parliament is responsible for determining when laws are to come into force, and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. This view is reflected in the drafting directions issued by the Office of Parliamentary Counsel (currently Drafting Direction 1.3 at paragraphs 18 – 22). While the Committee notes the Minister’s statement, in his Second Reading speech, that in October 2004 ‘the Government announced in its *National Security Policy* its intention to accede to the Convention’, the Committee **seeks the Attorney-General’s advice** as to whether the commencement clause might not be subject to appropriate restrictions, as set out in the drafting direction.

*Pending the Attorney-General’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.*

### **Strict criminal liability** **Schedule 1, item 8**

Item 8 of Schedule 1 to this bill inserts a new Subdivision B into Division 72 of the *Criminal Code*. The new Subdivision creates a number of offences in relation to trafficking, importing, exporting, manufacturing and possessing unmarked plastic explosives, many of which include elements to which strict liability applies. However, the explanatory memorandum states in each case that ‘[t]his is appropriate because those trafficking in such dangerous substances are in an industry where it is a reasonable expectation that they enquire about the regulation requirements, including authorisation mechanisms. It would be onerous for the prosecution to prove a person was aware of the requirements. Where the person accused is mistaken, section 9.2 of the Criminal Code provides that the person is not criminally responsible.’ The Committee considers that this explanation accords with the principles proposed by the Committee in its *Sixth Report of 2002* on Absolute and Strict Liability Offences.

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

## **Migration Legislation Amendment (End of Mandatory Detention) Bill 2006**

Introduced into the Senate on 7 September 2006

By Senator Bartlett

### **Background**

This bill amends the *Migration Act 1958* by providing for persons detained as unlawful non-citizens under section 189 of the Act to be taken before a magistrate for a hearing and by repealing the current limitation on judicial review in relation to persons detained under section 189.

*The Committee has no comment on this bill.*

## **Schools Assistance (Learning Together—Achievement Through Choice and Opportunity) Amendment Bill (No. 2) 2006**

Introduced into the House of Representatives on 6 September 2006  
Portfolio: Education, Science and Training

### **Background**

This bill amends the *Schools Assistance (Learning Together—Achievement Through Choice and Opportunity) Act 2004* to allow for the approval of maximum capital grant funding amounts for government and non-government schools for the programme years 2009 to 2011.

This amendment is foreshadowed in note 2 to Schedules 3 and 5 of the Act which states that ‘amounts for 2009, 2010 and 2011 will be inserted by later amending Acts’. Schedules 3 and 5 currently set out maximum funding amounts for the years 2005 to 2008.

*The Committee has no comment on this bill.*

## SCRUTINY OF STANDING APPROPRIATIONS

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 41<sup>st</sup> Parliament.

### Bills introduced with standing appropriation clauses - 41<sup>st</sup> Parliament

*Indicates passed by Senate	Bills and Clauses
*	<b>Appropriation (Regional Telecommunications Services) Bill 2005-2006</b> – clause 13
*	<b>Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005</b> – subclause 8(2)
*	<b>Asbestos-related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005</b> – subclause 5(3)
*	<b>Australian Technical Colleges (Flexibility in Achieving Australia's Skills Needs) Bill 2005</b> – clause 23
*	<b>Financial Framework Legislation Amendment Bill 2004</b> – Schedule 1, item 397, paragraphs 124(1)(b) and (c) and item 422, subsection 235(2)  [also Schedule 1, items 58, 63, 82, 86, 95, 99, 114, 135, 136, 145, 153, 164, 169, 182, 197, 205, 218, 261, 293, 317, 324, 370, 419, 437, 448, 484 and 493 – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> ]
*	<b>Human Services Legislation Amendment Bill 2005</b> – Schedule 2, subitem 720(4)
*	<b>Indigenous Education (Targeted Assistance) Amendment Bill 2004</b> – Schedule 1, item 3, subsection 14A(1)
	<b>Indigenous Education (Targeted Assistance) Amendment Bill 2006</b> – Schedule 1, subsection 14A

*	<b>National Water Commission Bill 2004</b> – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>
*	<b>Offshore Petroleum Bill 2005</b> – clause 56
*	<b>Schools Assistance (Learning Together—Achievement Through Choice and Opportunity) Bill 2004</b> – clause 133
*	<b>Skilling Australia’s Workforce Bill 2005</b> – clause 40
*	<b>Superannuation Bill 2005</b> – subclause 29(4)
*	<b>Superannuation (Consequential Amendments) Bill 2005</b> – Schedule 5, item 1, subsection 4AA(5) and Schedule 6, item 1, subsection 12A(5)
*	<b>Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005</b> – Schedule 1, item 1, subsections 158ZO(4), 158ZP(7) and 158ZQ(5) and Schedule 3, item 1, subsection 136C(4)
*	<b>Textile Clothing and Footwear Strategic Investment Program Amendment (Post-2005 Scheme) Bill 2004</b> – Schedule 1, item 12, section 37ZH and subsection 37ZJ(3)
*	<b>Water Efficiency Labelling and Standards Bill 2004</b> – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>

**Other relevant appropriation clauses**

*Indicates Passed by Senate	Bills and Clauses
*	<b>AusLink (National Land Transport—Consequential and Transitional Provisions) Bill 2004</b> – Schedule 2, item 3: special appropriation clause – for a finite amount and a finite period of time.
*	<b>Social Security Legislation Amendment (One-off Payments for Carers) Bill 2005</b> – Schedule 2, item 1: special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).

## STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2005/2006

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
<b>Bills dealt with in 2005</b>							
Australian Citizenship Bill 2005	14(30.11.05)	9.11.05		Citizenship and Multicultural Affairs	1.12.05	13.2.06	1(1.3.06)
Corporations (Aboriginal and Torres Strait Islander) Bill 2005	8(10.8.05) 9(17.8.05)	23.6.05		Immigration and Multicultural and Indigenous Affairs	11.8.05		
Fuel Quality Standards (Renewable Content of Motor Vehicle Fuel) Amendment Bill 2005	11(14.9.05)	5.9.05	--	Mr Katter	15.9.05	--	RNP
Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill 2005	11(14.9.05)	5.9.05	--	Mr Kerr	15.9.05	--	RNP
<i>Workplace Relations Amendment (Work Choices) Act 2005</i>	13(9.11.05)	2.11.05	10.11.05	Employment and Workplace Relations	10.11.05	28.3.06	2(29.3.06)
<b>Bills dealt with in 2006</b>							
Aboriginal Land Rights (Northern Territory) Amendment Bill 2006	5(14.6.06)	31.5.06	20.6.06	Families, Community Services and Indigenous Affairs	15.6.06	20.6.06 17.7.06	4(21.6.06) 5(9.8.06)
Aged Care (Bond Security) Bill 2005	1(8.2.06)	8.12.05	9.2.06	Ageing	9.2.06	23.3.06	2(29.3.06)
Airport Development and Aviation Noise Ombudsman Bill 2006	4(10.5.06)	27.3.06		Mr Georganus	11.5.06		

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
ASIO Legislation Amendment Bill 2006 Noise Ombudsman Bill 2006	4(10.5.06)	29.3.06	13.6.06	Attorney-General	11.5.06	8.6.06	3(14.6.06)
Australian Sports Anti-Doping Authority Bill 2005	1(8.2.06)	7.12.05	9.2.06	Arts and Sport	9.2.06	27.2.06	1(1.3.06)
Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006	7(9.8.06)		21.6.06	Justice and Customs	10.8.06	15.8.06	6(16.8.06)
<i>Defence Legislation Amendment (Aid to Civilian Authorities) Act 2005</i>	1(8.2.06)	13.2.06	7.12.05	Defence	9.2.06	27.3.06	2(29.3.06)
Education Services for Overseas Students Legislation Amendment (2006 Measures No. 1) Bill 2006	5(14.6.06)	31.5.06		Education, Science and Training	15.6.06	19.7.06	5(9.8.06)
Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006	5(14.6.06)	25.5.06	13.6.06	Families, Community Services and Indigenous Affairs	15.6.06	20.6.06	4(21.6.06)
Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006	4(10.5.06)	29.3.06	22.6.06	Attorney-General	11.5.06	20.6.06	4(21.6.06)
Law Enforcement Integrity Commissioner Bill 2006	4(10.5.06)	29.3.06	22.6.06	Attorney-General	11.5.06	20.6.06	4(21.6.06)
Migration Amendment (Designated Unauthorised Arrivals) Bill 2006	5(14.6.06)	11.5.06		Immigration and Multicultural Affairs	15.6.06		Withdrawn

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Migration Amendment (Visa Integrity) Bill 2006	7(9.8.06)		21.6.06	Immigration and Multicultural Affairs	10.8.06		
Protection of the Sea (Harmful Anti-Fouling System) Bill 2006	7(9.8.06)	22.6.06		Transport and Regional Services	10.8.06	5.9.06	7(6.9.06)
Renewable Energy (Electricity) Amendment Bill 2006	3(29.3.06)	2.3.06	21.6.06	Environment and Heritage	30.3.06	18.5.06	4(21.6.06)
Tax Laws Amendment (2006 Measures No. 4) Bill 2006	7(9.8.06)	22.6.06		Treasurer	10.8.06		
Telecommunications (Interception) Amendment Bill 2006	2(1.3.06)	16.2.06	1.3.06	Attorney-General	2.3.06	17.3.06	2(29.3.06)
Trade Practices Legislation Amendment Bill 2006	7(9.8.06)	19.6.06		Mr Katter	10.8.06		

