

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



Alert Digest

No. 1 of 2007

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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.

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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
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Airspace Bill 2006

Introduced into the House of Representatives on 29 November 2006
Portfolio: Transport and Regional Services

Insufficiently defined administrative power – delegation to a 'person'

Sub-clause 11(8)

The Committee considered this bill in *Alert Digest No. 15 of 2006* and sought a response from the Minister in relation to subclauses 8(1) and (5) and section 42, clause 10.

The Committee's attention has subsequently been drawn to subclause 11(8) which provides for regulations made for the purpose of conferring functions and powers on CASA in connection with the administration and regulation of Australian-administered airspace to provide for CASA to delegate functions or powers to another person.

The Committee notes that the provision appears to afford a wide discretion in the delegation of CASA's functions and powers. The Committee notes that the explanatory memorandum states, at page eight, that '[T]his delegation is most likely when decisions are required in the management of Australian-administered airspace. For example, this could occur with respect to the designation and conditions of use of an air route or airway, and the giving of direction in connection with the use or operation of designated routes and airways.' Notwithstanding this statement, the Committee remains concerned that the bill appears to permit significant and wide-ranging powers to be delegated to anyone who fits the all embracing description of 'a person'. The Committee has a longstanding expectation that delegation powers will reflect the principle that the discretion to delegate ought to be limited to a particular class of persons or to a particular range of powers and functions. The Committee **seeks the Minister's advice** as to the need for this wide discretion and whether it would be possible to provide some specification in the legislation as to the scope of the powers that can be delegated and the attributes or qualifications of the persons who may be appointed as delegates.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(ii) of the Committee's terms of reference.

AusCheck Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Attorney-General

Background

This bill is intended to provide a regulatory framework for the conduct of a centralised background checking service by the Attorney-General's Department. The bill authorises coordination of background criminal and security assessment for applications for the Aviation Security Card and the Maritime Security Identity Card. The bill also provides for the maintenance of a database of applicants and cardholders, the collection, use and disclosure of information, and the recovery of costs for the conduct of background checks.

The Committee has no comment on this bill.

Australian Technical Colleges (Flexibility in Achieving Australia's Skills Needs) Amendment Bill (No. 2) 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Vocational and Technical Education

Background

This bill amends the *Australian Technical Colleges (Flexibility in Achieving Australia's Skills Needs) Act 2005* to increase the appropriation for the establishment and operation of Australian Technical Colleges for each calendar year from 2006 to 2009.

The Committee has no comment on this bill.

Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006

Introduced into the Senate on 6 December 2006

Portfolio: Attorney-General

Background

This bill amends the *Bankruptcy Act 1966*, the *Payment Systems and Netting Act 1998* and the *Proceeds of Crime Act 2002* in response to the High Court's decision in *Cook v Benson* in relation to the recovery of superannuation contributions made by a person in the lead up to bankruptcy. The bill:

- provides for the recovery of superannuation contributions made prior to bankruptcy with the intention to defeat creditors; and
- provides for certain rural support grants to be exempt from the property available to pay the bankrupt's creditors.

The bill also contains transitional provisions and makes minor technical amendments.

Legislation by press release Schedule 1, part 1

Item 2 in the table to subclause 2(1) of this bill provides that the amendments contained in part 1 of Schedule 1, which provide for certain superannuation contributions to be void against a trustee in bankruptcy, would commence retrospectively on 28 July 2006.

The explanatory memorandum notes, in paragraph 19, that this commencement provision 'is in line with the announcement by the Attorney-General on 27 July 2006 that the amendments would apply to superannuation contributions made after the date of that announcement.' The Second Reading speech elaborates on this by observing that the purpose of the amendments is to nullify the effect of a decision of the High Court in the case of *Cook v Benson*, handed down on 19 June 2003.

The amendments in Part 1 of Schedule 1 may be regarded as ‘legislation by press release’, a practice on which the Committee has regularly commented. As a general principle the Committee disapproves of legislation by press release both because, if enacted, it will have retrospective effect and because it is treated by its proposer as being the law from the time the intention to have it passed through Parliament is made public, usually by press release. The Committee’s concern is that this practice leaves the law in a state of uncertainty and places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or overturning arrangements which many people may have relied upon following the announcement.

The Committee has, in the past, been prepared to accept legislation by press release which amends taxation law, so long as the legislation is introduced into the Parliament within six months of the press release. The Committee notes that, in this case, the amendments have been introduced within six months of the announcement.

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

Retrospective commencement Schedule 2, items 8, 9 and 10

Items 7, 8 and 9 in the table to subclause 2(1) of this bill provide that the amendments contained in items 8, 9 and 10 of Schedule 2 would commence retrospectively on various dates since 1 July 1994.

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 notes, however, that the explanatory memorandum makes it clear, in paragraph 16, that the amendments correct drafting errors, and do not make any change to the substantive law.

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

**Regulations - retrospective effect
Schedule 2, item 7**

Proposed new subsection 116(2E) of the *Bankruptcy Act 1966*, to be inserted by item 7 of Schedule 2, would permit the making of regulations which may have retrospective effect, in derogation of section 12(2) of the *Legislative Instruments 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. The explanatory memorandum seeks to justify this provision on the ground that its purpose is to protect from seizure under the Bankruptcy Act payments made pursuant to certain rural support schemes, and that the new subsection is necessary because existing rural support schemes may in the future be amended without the passage of new primary legislation, and new rural support schemes may be introduced without new primary legislation. The explanatory memorandum regards the solution to this perceived problem to be proposed new subsections 116(2)(k) to (ma) which would permit payments under rural support schemes which are to be protected from the recipient's bankruptcy to be prescribed by regulation, and the new subsection 116(2E), which would allow such regulations to have retrospective effect. The Committee **seeks the Attorney-General's advice** as to whether protection of rural support schemes from seizure under the Bankruptcy Act may be afforded by means other than retrospective regulations.

Pending the Attorney-General'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.

**Regulations – incorporating material as in force from time to time
Schedule 2, item 7**

Proposed new subsection 116(2F) of the *Bankruptcy Act 1966*, also to be inserted by item 7 of Schedule 2, would permit the making of regulations which may ‘make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.’ The explanatory memorandum seeks to justify this provision on the same basis as that for new subsection 116(2E), discussed above. New subsection 116(2F) would give the Executive a completely unfettered discretion in determining the nature of the matter which regulations may apply, adopt or incorporate. The Committee **seeks the Attorney-General’s advice** as to whether some limit might be included in new subsection 116(2F), as to the scope of the matter which may be so applied, adopted or incorporated.

Pending the Attorney-General’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.

Classification (Publications, Films and Computer Games) Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Attorney-General

Background

This bill amends the *Broadcasting Services Act 1992*, the *Classification (Publications, Films and Computer Games) Act 1995*, and the *Freedom of Information Act 1982* to:

- facilitate the integration of the Office of Film and Literature Classification into the Attorney-General's Department;
- reinforce the independence of the Classification Board and the Classification Review Board; and
- amend the operation of the National Classification Scheme to respond to technological developments, provide for certain additions to already classified films not to be treated as modifications necessitating reclassification and to provide for an additional content assessor scheme to make recommendations to the Board in relation to additional content releases with an already classified or exempt film.

The bill also makes minor amendments to repeal expired or redundant provisions and contains application, saving and transitional provisions.

Commencement on Proclamation

Schedule 2, part 1, items 3 to 7, 9, 14, 17 and 18

Schedule 3, items 7 and 8 and Schedule 4, part 2

Items 5, 7, 10 and 13 in the table to subclause 2(1) of this bill provide that the amendments contained in items 3 to 7, 9, 14, 17 and 18 of Part 1 of Schedule 2 would commence on Proclamation, but within 12 months of Assent in any event. Similarly, item 18 in the table to subclause 2(1) of this bill provides that the amendments contained in items 7 and 8 of Schedule 3

would commence on Proclamation, but within 12 months of Assent in any event, and item 22 in the table to subclause 2(1) of this bill provides that the amendments contained in Part 2 of Schedule 4 would commence on Proclamation, but within 12 months of Assent in any event. In relation to all of these proposed amendments, the explanatory memorandum justifies the deferral of commencement on the ground that the provisions referred to ‘require amendments to complementary State and Territory legislation to be effective.’

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

Insufficiently defined administrative power – wide discretion Schedule 2, item 11 and Schedule 2, item 15

Proposed new subsection 59(2) of the *Classification (Publications, Films and Computer Games) Act 1995*, to be inserted by item 11 of Schedule 2, and proposed new section 79A of the same Act, to be inserted by item 15 of Schedule 2, would permit the Director of the Office of Film and Literature Classification and the new Convenor of the Classification Review Board respectively to delegate many of their several powers, and the powers of the Classification Board and the Classification Review Board, to ‘a member of staff mentioned in section 88A’. That section, which is to be inserted in the same Act by item 13 of Schedule 1, provides that the staff assisting both the Classification Board and the Review Board ‘are to be persons engaged under the *Public Service Act 1999*’. As a consequence, the delegations in new subsection 59(2) and section 79A may be to any APS employee, regardless of the position which such an employee holds or of his or her qualifications. The Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to anyone who fits the all-embracing description of ‘a person’. While the Committee notes that the delegation in this case is limited to members of staff engaged under the Public Services Act, the Committee’s preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. The Committee **seeks the Attorney-General’s advice** as to whether the very wide discretion given to the Director and Convenor under these proposed new provisions should not be limited in some way.

Pending the Attorney-General's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Cluster Munitions (Prohibition) Bill 2006

Introduced into the Senate on 5 December 2006

By Senators Allison, Bartlett, Bishop and Bob Brown

Background

This bill provides for the prohibition of the use, possession and manufacture of cluster munitions.

The Committee has no comment on this bill.

Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Justice and Customs

Background

This bill amends the *Customs Act 1901* and the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* to:

- enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons or evidence of specified offences;
- recognise contractual arrangements in relation to the employment of locum or freelance customs brokers;
- consolidate provisions relating to duty recovery and impose a time limit of four years on the recovery of all Customs duty; and
- make it an offence to make false or misleading declarations in using the new SmartGate automated passenger processing system being introduced in early 2007.

The bill also contains application, consequential and transitional provisions.

The Committee has no comment on this bill.

Employment and Workplace Relations Legislation Amendment (Welfare to Work and Vocational Rehabilitation Services) Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Employment and Workplace Relations

Background

This bill amends the *Disability Services Act 1986* to provide for the staged introduction of contestability in the provision of vocational rehabilitation services. The bill broadens the range of non-departmental organisations to which the Secretary may delegate powers under Part III of the Disability Services Act in relation to the provision of rehabilitation services by the Commonwealth.

The bill makes changes to the income test arrangements where a CDEP Scheme payment is payable and allows for financial case management debts to be deducted from social security payments.

The bill also contains application provisions and makes minor and technical amendments to the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* in relation to the application of Welfare to Work measures which commenced on 1 July 2006.

Insufficiently defined administrative power – wide discretion Schedule 1, items 2 and 16

Proposed new paragraph 34(1)(a) of the *Disability Services Act 1986*, to be inserted by item 16 of Schedule 1, would permit the Secretary to the Department to ‘delegate to an officer all or any of the powers of the Secretary under Part III’ of that Act. Item 2 of Schedule 1 would amend section 4 of the *Disability Services Act 1986* to define **officer** as including a person or company who or which ‘performs services on behalf of the Department under a contract made between [the person or company] and the Commonwealth’ or an employee of such a person or company. The Secretary will therefore be given the power to delegate all or any of his or her powers to any employee of

a company to which the Department has outsourced the provision of services, without reference to the capabilities or qualifications of such an employee. The Committee **seeks the Minister's advice** as to whether the very wide discretion given to the Secretary to the Department under this proposed new paragraph should not be limited in some way.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Maritime Legislation Amendment (Prevention of Air Pollution from Ships) Bill 2006

Introduced into the House of Representatives on 6 December 2006
Portfolio: Transport and Regional Services

Background

This bill amends the *Navigation Act 1912* and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement Australia's obligations under Annex VI (Prevention of Air Pollution from Ships) of the Convention for the Prevention of Pollution from Ships, commonly known as MARPOL, which came into force on 19 May 2005. The bill also updates certain references and removes the current limit on the amount of penalty for a breach of a regulation or an order.

Legislative Instruments Act - Declarations Schedule 1

Item 2 in the table to subclause 2(1) to this bill, in detailing when the amendments proposed in Schedule 1 are to commence, concludes by stating that the *Gazette* notice which the Minister must give if certain conditions are met, 'is not a legislative instrument'. It appears from the context that the reason for that statement is that the notice is not legislative in character, and that the statement is included for the benefit of readers. Where a provision states 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. Unfortunately, in this case, the explanatory memorandum makes no reference to the final sentence of item 2 in the table to subclause 2(1). The Committee **seeks the Minister's advice** whether that sentence has been included merely for the information of readers.

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.

Migration Amendment (Review Provisions) Bill 2006

Introduced into the Senate on 7 December 2006
Portfolio: Immigration and Multicultural Affairs

Background

This bill amends the *Migration Act 1958* to allow the Migration Review Tribunal and Refugee Review Tribunal flexibility in providing procedural fairness to review applicants during a hearing.

The bill also contains application provisions.

The Committee has no comment on this bill.

Murray-Darling Basin Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Murray-Darling Basin Act 1993* to approve and give effect to the Murray-Darling Basin Agreement Amending Agreement 2006 between the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory.

The Amending Agreement:

- provides for appropriate contracting governments to make annual annuity contributions towards the future capital replacements and major cyclic maintenance costs and for contributions to be accumulated and invested;
- allows the Murray-Darling Basin Commission to borrow funds where contributions are insufficient to meet costs in any year;
- enables the Murray-Darling Basin Ministerial Council to recover water business costs from State governments in shares comparable to those which would apply if fee-for-service pricing were introduced;
- allows for the allocation of responsibility for River Murray Water structures from one constructing authority to another;
- allows for the altering of financial thresholds above which specific Council approval must be sought by the Commission; and
- clarifies that Queensland cannot be held liable for works and measures in which it is not directly involved.

Commencement on Proclamation

Item 2

Item 2 in the table to subclause 2(1) provides that the amendments to be made by this bill would commence on Proclamation, with no provision for their commencement at a fixed time in any event. It is the Committee's practice to note delayed commencement provisions, in particular those with open-ended commencement dates. Paragraph 6.17 of the Legislation Handbook states that 'proclamation provisions in bills are generally drafted with a deadline placed on the time within which an Act should be proclaimed, eg. that the Act should commence on a specific date or within six months of Royal Assent, or with an automatic repeal provision if the Act remains unproclaimed.'

In this case, the explanatory memorandum seeks to justify the grant of this unfettered discretion on the Executive on the basis that 'complementary legislation in each jurisdiction [which is a party to the Murray-Darling Basin Agreement Amending Agreement 2006] is required to carry the Amending Agreement into effect'. However, the Committee notes that in the case of the Classification (Publications, Films and Computer Games) Amendment Bill 2006, the Attorney-General has provided for commencement within 12 months in any event, despite the need for complementary legislation from the States and Territories to render the Commonwealth amendments affective. The Committee **seeks the Minister's advice** as to whether it would be possible to limit the discretion of the Executive in relation to the commencement of this bill by requiring that it commence within 12 months of Assent in any event or that it be taken to be repealed, if a Proclamation has not been made by that time.

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

Native Title Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Attorney-General

Background

This bill amends the *Native Title Act 1993* to implement four elements of a reform package announced by the Government in September 2005. The bill:

- introduces a new regime for representative Aboriginal and Torres Strait Islander bodies;
- implements recommendations made by an independent review into the native title claims resolution process, particularly in relation to increased powers and functions of the National Native Title Tribunal (NNTT) and coordination and communication between the Federal Court and the NNTT; and
- implements changes to the prescribed bodies corporate governance regime and the native title non-claimants financial assistance program.

The bill also contains application and transitional provisions.

The Committee has no comment on this bill.

Non-Proliferation Legislation Amendment Bill 2006

Introduced into the Senate on 6 December 2006

Portfolio: Foreign Affairs

Background

This bill amends the *Chemical Weapons (Prohibition) Act 1994*, the *Comprehensive Nuclear Test-Ban Treaty Act 1998*, the *Nuclear Non-Proliferation (Safeguards) Act 1987* and the *Australian Federal Police Act 1979* by implementing amendments to the Convention on the Physical Protection of Nuclear Material (agreed in July 2005) to strengthen international measures for the physical protection of nuclear material and facilities.

The bill:

- implements new requirements of the amendments to the Convention on the Physical Protection of Nuclear material (Physical Protection Convention) agreed in July 2005;
- regulates the decommissioning of a nuclear facility to ensure that Australia is able to meet its international obligations to the International Atomic Energy Agency under the Additional Protocol;
- introduces penalties for the most serious offences; and
- extends the geographical jurisdiction for offences related to proliferation of nuclear and chemical weapons.

The bill also contains application provisions.

Commencement

Schedule 1, item 28

Item 3 in the table to subclause 2(1) provides that the amendment to be made by item 28 of Schedule 1 to this bill would commence on 'the day on which the amendments done at Vienna on 8 July 2005 to the Convention on the

Physical Protection of Nuclear Material take effect’, but that provision does not commence at all if that event does not occur. The Committee notes that most provisions which tie commencement to the coming into force of international agreements make further provision for the Minister to announce when that event occurs by *Gazette* notice or the like. However, in this bill there is no provision for the Minister to announce if, and therefore when, item 28 of Schedule 1 has come into force, or whether the amendment to the Convention, on which the commencement of item 28 depends, is never going to occur. The Committee **seeks the Minister’s advice** whether such a notification could be provided for in this instance.

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.

Pregnancy Counselling (Truth in Advertising) Bill 2006

Introduced into the Senate on 7 December 2006

By Senators Stott Despoja, Troeth, Nettle and Carol Brown

Background

This bill prohibits misleading and deceptive advertising and notification of pregnancy counselling services which do not charge for the information they provide.

The Committee has no comment on this bill.

Private Health Insurance Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Health and Ageing

Background

Introduced as part of a package of seven bills, this bill provides a new regulatory framework for the private health insurance sector replacing the current regime which is mainly set out in the *National Health Act 1953*, the *Health Insurance Act 1973* and the *Private Health Insurance Incentives Act 1998*. The bill will come into effect on 1 April 2007.

The bill:

- provides incentives for people to purchase insurance;
- provides for standard health insurance product information;
- imposes obligations on private health insurers;
- empowers the Minister and the Private Health Insurance Administration Council to take a range of actions to encourage or compel insurers to comply with the bill; and
- establishes the Private Health Insurance Ombudsman and the Private Health Insurance Administration Council.

Delegation of legislative power – Henry VIII Clause Subclause 78-1(6) and subclause 217-5(4)

Subclause 78-1(6) would permit the Private Health Insurance (Complying Product) Rules (which will be a legislative instrument made by the Minister under clause 333-20) to modify the portability requirements set out in the other provisions of clause 78-1 in relation to all or particular kinds of private health insurers, benefits or insured persons. The explanatory memorandum seeks to justify this delegation of legislative authority, on page 46, on the ground that it will ‘give the Government flexibility in adapting the portability

regime to emerging patterns of care to ensure a fair balance between the interests of insurers and insured persons and persons transferring between insurers.’

The Committee notes that subclause 78-1(6) appears to be a Henry VIII Clause; an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. The Committee **leaves for the Senate as a whole** the question of whether this particular delegation of legislative power is inappropriate. However, the Committee **seeks the Minister’s advice** whether the flexibility to modify the portability requirements could be achieved in some other way.

Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Delegation of legislative power – Henry VIII Clause Subparagraph 217-5(1)(b)(ii)

Subparagraph 217-5(1)(b)(ii) would permit the Private Health Insurance (Health Benefits Fund Enforcement) Rules (which will be a legislative instrument made by the Minister under clause 333-20) to modify various provisions of the *Corporations Act 2001* in regulating the external management of a health benefits fund. Subclause 217-5(4) provides that the Private Health Insurance (Health Benefits Fund Enforcement) Rules may provide for different modifications according to the nature of the health benefits fund that is to be, or that is being, administered. The Committee considers that this is clearly a delegation of legislative power, but has no means of ascertaining whether or not it is appropriate as the explanatory memorandum does not indicate to what extent it is intended to modify the provisions of the *Corporations Act 2001*, nor the purpose intended to be

achieved by such modifications. The Committee **seeks the Minister's** advice as to the reason for the delegation of legislative power in this instance.

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

Subclause 250-1(6)

Abrogation of the privilege against self-incrimination

Subclause 250-1(6) would abrogate the privilege against self-incrimination for a person required to give the Private Health Insurance Ombudsman the records of a body against whom a complaint has been made under Division 241 of the bill. However, the Committee notes that the provision seeks to strike a balance between the competing interests of obtaining information and protecting individuals' rights by limiting the circumstances in which information so provided is admissible in evidence in proceedings against the affected person.

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

Private Health Insurance (Collapsed Organization Levy) Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Health and Ageing

Background

Introduced as part of a package of seven bills, this bill amends the *Private Health Insurance (Collapsed Organization Levy) Act 2003* to update definitions resulting from the replacement of the *National Health Act 1953* by the proposed Private Health Insurance Act.

The Committee has no comment on this bill.

Private Health Insurance Complaints Levy Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Health and Ageing

Background

Introduced as part of a package of seven bills, this bill amends the *Private Health Insurance Complaints Levy Act 1995* by repealing the existing levy and imposing a new levy and by updating definitions resulting from the replacement of the *National Health Act 1953* by the proposed Private Health Insurance Act.

The Committee has no comment on this bill.

Private Health Insurance (Council Administration Levy) Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Health and Ageing

Background

Introduced as part of a package of seven bills, this bill amends the *Private Health Insurance (Council Administration Levy) Act 2003* to update definitions and other references resulting from the replacement of the *National Health Act 1953* by the proposed Private Health Insurance Act.

The Committee has no comment on this bill.

Private Health Insurance (Prostheses Application and Listing Fees) Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Health and Ageing

Background

Introduced as part of a package of seven bills in relation to the reform of the private health insurance sector, this bill imposes application and listing fees on the sponsors of prostheses to recover the cost of evaluation and listing prostheses for private health insurance purposes.

The Committee has no comment on this bill.

Private Health Insurance (Reinsurance Trust Fund Levy) Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Health and Ageing

Background

Introduced as part of a package of seven bills, this bill amends the *Private Health Insurance (Reinsurance Trust Fund Levy) Act 2003* to update definitions resulting from the replacement of the *National Health Act 1953* by the proposed Private Health Insurance Act.

The Committee has no comment on this bill.

Private Health Insurance (Transitional Provisions and Consequential Amendments) Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Health and Ageing

Background

Introduced as part of a package of seven bills, this bill provides for the transition from the current regulatory regime to the new Private Health Insurance Bill and repeals redundant parts of the *National Health Act 1953* and *Health Insurance Act 1973* and makes amendments to a number of other Acts to reflect changes in the definitions of insurers and the products they offer.

The Committee has no comment on this bill.

Removal of Recognition of US Military Commissions (David Hicks) Bill 2006

Introduced into the Senate on 7 December 2006
By Senators Nettle and Bob Brown

Background

This bill amends the *Proceeds of Crime Act 2002* to remove the recognition of US Military Commissions.

The Committee has no comment on this bill.

Statute Law Revision Bill (No. 2) 2006

Introduced into the Senate on 6 December
Portfolio: Attorney-General

Background

This bill amends a number of Acts by removing references to outdated expressions and gender-specific language and also repeals a number of Acts, and provisions of Acts, that are obsolete.

Retrospective commencement

Subclause 2(1)

The table to subclause 2(1) to this bill provides for a range of retrospective commencement dates going back, in one instance, as far as 1 July 1995.

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 notes, however, that the explanatory memorandum makes it clear that all of the amendments are for the purpose of correcting drafting errors and omissions which have come to light, and that in no case does the amendment change the substantive provisions of the law.

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

Superannuation (Departing Australia Superannuation Payments Tax) Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Treasury

Background

Introduced with the Tax Laws Amendment (Simplified Superannuation) Bill 2006, this bill replaces the *Income Tax (Superannuation Payments Withholding Tax) Act 2006* to reflect the new components of superannuation benefits while retaining the same rates of taxation. The bill realigns the tax treatment of departing Australia superannuation payments with the new superannuation taxation regime that applies from 1 July 2007.

The Committee has no comment on this bill.

Superannuation (Excess Concessional Contributions Tax) Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Treasury

Background

Introduced with the Tax Laws Amendment (Simplified Superannuation) Bill 2006, this bill imposes excess concessional contributions tax to give effect to the limit on concessional contributions to superannuation.

The Committee has no comment on this bill.

Superannuation (Excess Non-concessional Contributions Tax) Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Treasury

Background

Introduced with the Tax Laws Amendment (Simplified Superannuation) Bill 2006, this bill imposes excess non-concessional contributions tax to give effect to the limit on non-concessional contributions to superannuation.

The Committee has no comment on this bill.

Superannuation (Excess Untaxed Roll-over Amounts Tax) Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Treasury

Background

Introduced with the Tax Laws Amendment (Simplified Superannuation) Bill 2006, this bill provides for a top marginal tax rate (plus Medicare levy) to be imposed on excess lump sum payments in excess of \$1 million made from untaxed schemes to ensure comparable treatment of taxed and untaxed schemes, given annual contribution limits apply to taxed schemes.

The Committee has no comment on this bill.

Superannuation (Self Managed Superannuation Funds) Supervisory Levy Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Treasury

Background

Introduced with the Tax Laws Amendment (Simplified Superannuation) Bill 2006, this bill repeals the current penalty for the late lodgement of a self-managed superannuation fund's regulatory return enabling a single annual return to be lodged covering both the supervisory levy and income tax liability.

The Committee has no comment on this bill.

Tax Laws Amendment (2006 Measures No. 7) Bill 2006

Introduced into the House of Representatives on 7 December 2006

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Tax Administration Act 1953*, the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* and the *Income Tax (Transitional Provisions) Act 1997*.

Schedule 1 reduces compliance costs for small business and increases the availability of capital gains tax concessions.

Schedule 2 exempts eligible non-debenture debt interests from interest withholding tax.

Schedule 3 streamlines the deductible gift recipients (DGR) integrity arrangements and reduces compliance requirements.

Schedule 4 extends the time period for which certain entities can receive tax deductible donations.

Schedule 5 preserves the current depreciation arrangements that apply to tractors and harvesters used in the primary production sector.

Schedule 6 increases the non-primary production income threshold and the total deposit limit for farm management deposits.

Schedule 7 ensures equivalent taxation treatment is given to capital protection on a capital protected borrowing whether the capital protection is provided explicitly or implicitly.

The bill also contains application, consequential and transitional provisions.

Retrospective application
Schedule 1, item 67

Subitem 68(2) of Schedule 1 provides that the amendment proposed in item 67 of that Schedule applies retrospectively to capital gains tax events that occurred at any time from the 1998-99 income year up to the 2005-06 income year.

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. However, the Committee notes, that the explanatory memorandum points out that the relevant amendment is beneficial to some taxpayers, as it increases the availability of the small business capital gains tax concession.

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

Retrospective application
Schedule 2, item 8

Item 8 of Schedule 2 provides that the amendments proposed in that Schedule apply to ‘interest paid in respect of debt interests issued on or after the day [that] the bill for this Act was introduced into the House of Representatives.’ Those amendments will therefore have some retrospective application.

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 notes, however, that the explanatory memorandum points out that the amendments will have no financial impact.

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

Retrospective application - legislation by press release Schedule 7, item 5

Item 5 of Schedule 7 provides that the amendments proposed in that Schedule apply retrospectively 'to arrangements, or extensions of arrangements, entered into at or after 9.30 am by legal time in the Australian Capital Territory on 16 April 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. The Committee notes, that the explanatory memorandum states, in paragraphs 7.5 to 7.11, that the purpose of these amendments is to overcome the effect of a decision of the Federal Court in *Commissioner of Taxation v Firth*, decided in 2002, which allows some borrowers to obtain an income tax deduction for what may in fact be, in substance, a capital cost. The amendments are to apply from the date (and time) of the Treasurer's original press release on 16 April 2003, even though the actual methodology used to overcome the effect of *Firth's* case was not promulgated until a later press release, issued by the Minister for Revenue on 30 May 2003. This retrospective application is therefore an instance of 'legislation by press release', upon which the Committee has always commented unfavourably.

The Committee has, in the past, been prepared to accept legislation by press release, so long as the legislation is introduced within six months of the press release. In this case the legislation has not been introduced until some three and a half years after the press release. In this context, the Committee notes that in 1988 the Senate passed a declaratory resolution to the effect that if more than six months elapses between a government announcement of a taxation proposal and the introduction or publication of a bill, the Senate will amend the bill to reduce the period of retrospectivity to the time since the introduction or publication of the bill. The Committee **seeks the Treasurer's advice** as to the reason for the delay in introducing this Schedule.

Pending the Treasurer'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.

Tax Laws Amendment (Simplified Superannuation) Bill 2006

Introduced into the House of Representatives on 7 December 2006
Portfolio: Treasury

Background

Introduced with a package of five superannuation bills, this bill amends the *Income Tax Assessment Act 1997*, the *Income Tax Assessment Act 1936*, the *Income Tax Rates Act 1986*, the *Tax Administration Act 1953*, the *Income Tax (Transitional provisions) Act 1997*, the *Superannuation Industry (Supervision) Act 1993*, the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*, the *Superannuation Guarantee (Administration) Act 1992*, the *Superannuation (Resolution of Complaints) Act 1993*, the *Tax Administration Act 1953*, the *Fringe Benefits Tax Assessment Act 1986*, the *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987*, the *Retirement Savings Accounts Act 1997* and the *Superannuation (Unclaimed Money and Lost Members) Act 1999* to simplify the tax arrangements that apply to superannuation and to rewrite superannuation tax law into the *Income Tax Assessment Act 1997*.

The bill also contains application, consequential and transitional provisions.

The Committee has no comment on this bill.

Veterans' Affairs Legislation Amendment (Statements of Principles and Other Measures) Bill 2006

Introduced into the House of Representatives on 6 December 2006
Portfolio: Veterans' Affairs

Background

This bill amends the *Veterans' Entitlements Act 1986* and contains application and consequential provisions to the *Military Rehabilitation and Compensation Act 2004* and the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* to correct anomalies and improve administrative procedures in the Veterans' Affairs portfolio.

Schedule 1 provides for the review of single or multiple factors within a State of Principles by the Repatriation Medical Authority.

Schedule 2 allows for benefits and allowances to be funded from the Consolidated Revenue Fund.

Schedule 3 enhances the operation of existing income stream rules and clarifies existing policy in relation to these products.

Retrospective application Schedule 4, items 3 and 4, 7 to 12

Items 4 and 6 in the table to subclause 2(1) of this bill provide that the amendments contained in items 3 and 4 and items 7 to 12 of Schedule 4 would commence retrospectively on 1 July 2004, immediately after the commencement of section 189 of the *Military Rehabilitation and Compensation 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. However, the Committee notes that the explanatory memorandum points out, at pages 12 to 13, that the amendments

will rectify a drafting error in that Act, and are beneficial to some members and former members of the Defence Force.

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

Wheat Marketing Amendment Bill 2006

Introduced into the Senate on 6 December 2006

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Wheat Marketing Act 1989* to provide for the temporary transfer (until 30 June 2007) of the veto power for bulk wheat exports from AWB (International) Ltd to the Minister for Agriculture, Fisheries and Forestry.

Non-reviewable decision

Schedule 1, item 2

Proposed new sections 60 and 62 of the *Wheat Marketing Act 1989*, to be inserted by item 2 of Schedule 1, would give the Minister a completely unfettered discretion to decide whether to agree with a decision of the Wheat Marketing Authority, and whether to give a direction to that Authority either to give, or to refuse to give, a bulk-export consent to an application. The only limit on this discretion is that it will operate only from the commencement of this measure until 30 June 2007. Although these provisions clearly make rights, liberties or obligations dependent upon non-reviewable decisions, the Committee **leaves for the Senate as a whole** the question of whether they do so *unduly*.

The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

PROVISIONS OF BILLS WHICH IMPOSE CRIMINAL SANCTIONS FOR A FAILURE TO PROVIDE INFORMATION

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	Section/Subsection	Offence	Penalty
Private Health Insurance Bill 2006	Subclause 250-1(7)	Fail to provide information to a public authority	30 penalty units

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 41st Parliament.

Bills introduced with standing appropriation clauses - 41st Parliament

*Indicates passed by Senate	Bills and Clauses
*	Aged Care (Bond Security) Bill 2005 – clause 17
*	Appropriation (Regional Telecommunications Services) Bill 2005-2006 – clause 13
*	Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005 – subclause 8(2)
*	Asbestos-related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005 – subclause 5(3)
*	Australian Participants in British Nuclear Tests (Treatment) Bill 2006 – clause 49
*	Australian Technical Colleges (Flexibility in Achieving Australia's Skills Needs) Bill 2005 – clause 23
*	Australian Trade Commission Legislation Amendment Bill 2006 – Schedule 4, item 16
*	Child Support Legislation Amendment (Reform of the Child Support Scheme—Initial Measures) Bill 2006 – Schedule 5, subitem 20(3)
	Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 – Schedule 1, item 13, section 9G

*	Financial Framework Legislation Amendment Bill 2004 – 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>]
*	Future Fund Bill 2006 – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>
*	Housing Loans Insurance Corporation (Transfer of Assets and Abolition) Repeal Bill 2006 – Schedule 2, subitem 1(3)
*	Housing Loans Insurance Corporation (Transfer of Pre-transfer Contracts) Bill 2006 – clause 9
*	Human Services Legislation Amendment Bill 2005 – Schedule 2, subitem 720(4)
*	Indigenous Education (Targeted Assistance) Amendment Bill 2004 – Schedule 1, item 3, subsection 14A(1)
*	Indigenous Education (Targeted Assistance) Amendment Bill 2006 – Schedule 1, subsection 14A
*	Medibank Private Sale Bill 2006 – Schedule 2, subitem 8(1)
	Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 – Schedule 1, subitem 43(3)
*	National Water Commission Bill 2004 – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>
*	Offshore Petroleum Bill 2005 – clause 56
*	Plant Health Australia (Plant Industries) Funding Amendment Bill 2006 – Schedule 1, item 17, section 10B
	Private Health Insurance Bill 2006 – clause 282-40 and subclause 318-5
	Private Health Insurance (Transitional Provisions and Consequential Amendments) Bill 2006 – subclause 39(2)
*	Schools Assistance (Learning Together—Achievement Through Choice and Opportunity) Bill 2004 – clause 133
*	Skilling Australia’s Workforce Bill 2005 – clause 40
*	Social Security and Veterans’ Entitlements Legislation Amendment (One-off Payments to Increase Assistance for Older Australians and Carers and Other Measures) Bill 2006 – Schedule 4, subitem 1(4)
*	Superannuation Bill 2005 – subclause 29(4)
*	Superannuation (Consequential Amendments) Bill 2005 – Schedule 5, item 1, subsection 4AA(5) and Schedule 6, item 1, subsection 12A(5)
*	Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005 – Schedule 1, item 1, subsections 158ZO(4), 158ZP(7) and 158ZQ(5) and Schedule 3, item 1, subsection 136C(4)
*	Textile Clothing and Footwear Strategic Investment Program Amendment (Post-2005 Scheme) Bill 2004 – Schedule 1, item 12, section 37ZH and subsection 37ZJ(3)

*	Water Efficiency Labelling and Standards Bill 2004 – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>
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Other relevant appropriation clauses

*Indicates Passed by Senate	Bills and Clauses
*	AusLink (National Land Transport—Consequential and Transitional Provisions) Bill 2004 – Schedule 2, item 3: special appropriation clause – for a finite amount and a finite period of time.
*	Social Security Legislation Amendment (One-off Payments for Carers) Bill 2005 – 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 - 2006/2007

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills dealt with in 2006							
Airspace Bill 2006	15(6.12.06)	29.11.06		Transport and Regional Services	7.12.06		
Australian Energy Market Amendment (Gas Legislation) Bill 2006	15(6.12.06)	29.11.06		Industry, Tourism and Resources	7.12.06	6.2.07	1(7.2.07)
Australian Participants in British Nuclear Tests (Treatment) Bill 2006	11(11.10.06)	14.9.06	12.10.06	Veterans' Affairs	12.10.06	7.2.07	
<i>Copyright Amendment Act 2006</i>	13(8.11.06)	19.10.06	1.12.06	Attorney-General		29.1.07	1(7.2.07)
Fuel Quality Standards (Renewable Content of Motor Vehicle Fuel) Amendment Bill 2006	10(13.9.06)	4.9.06		Mr Katter	14.9.06		
Trade Practices Legislation Amendment Bill 2006	7(9.8.06)	19.6.06		Mr Katter	10.8.06		