

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



**Alert Digest**

**No. 4 of 2008**

**4 June 2008**



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**ISSN 1329-668X**



# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator the Hon C Ellison (Chair)

Senator M Bishop (Deputy Chair)

Senator J Collins

Senator A McEwen

Senator A Murray

Senator the Hon J Troeth

## 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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## **A New Tax System (Luxury Car Tax Imposition—Customs) Amendment Bill 2008**

Introduced into the House of Representatives on 26 May 2008

Portfolio: Treasury

### **Background**

Part of a package of four bills, this bill amends the *A New Tax System (Luxury Car Tax Imposition—Customs) Act 1999* to increase the rate of luxury car tax payable from 25 per cent to 33 per cent, effective from 1 July 2008.

The bill also contains application provisions.

*The Committee has no comment on this bill.*

## **A New Tax System (Luxury Car Tax Imposition—Excise) Amendment Bill 2008**

Introduced into the House of Representatives on 26 May 2008

Portfolio: Treasury

### **Background**

Part of a package of four bills, this bill amends the *A New Tax System (Luxury Car Tax Imposition—Excise) Act 1999* to increase the rate of luxury car tax payable from 25 per cent to 33 per cent, effective from 1 July 2008.

The bill also contains application provisions.

*The Committee has no comment on this bill.*

## **A New Tax System (Luxury Car Tax Imposition—General) Amendment Bill 2008**

Introduced into the House of Representatives on 26 May 2008  
Portfolio: Treasury

### **Background**

Part of a package of four bills, this bill amends the *A New Tax System (Luxury Car Tax Imposition—General) Act 1999* to increase the rate of luxury car tax, to the extent that it is neither a duty of customs nor a duty of excise, from 25 per cent to 33 per cent, effective from 1 July 2008.

The bill also contains application provisions.

*The Committee has no comment on this bill.*

## **Appropriation Bill (No. 5) 2007-2008**

Introduced into the House of Representatives on 13 May 2008  
Portfolio: Finance and Deregulation

### **Background**

This bill appropriates additional funding of \$626.54 million, to meet payments for the ordinary annual services of the government for the financial year ending 30 June 2008.

*The Committee has no comment on this bill.*

## **Appropriation Bill (No. 6) 2007-2008**

Introduced into the House of Representatives on 13 May 2008  
Portfolio: Finance and Deregulation

### **Background**

This bill appropriates additional funding of \$501.90 million to enable agencies to meet payments to or for the states, territories and local government, and for new administered expenses and non-operating expenses for the financial year ending 30 June 2008.

*The Committee has no comment on this bill.*

## **Appropriation Bill (No. 1) 2008-2009**

Introduced into the House of Representatives on 13 May 2008  
Portfolio: Finance and Deregulation

### **Background**

This bill appropriates \$60.87 billion to meet payments for the ordinary annual services of the government for the financial year ending 30 June 2009.

*The Committee has no comment on this bill.*



## **Appropriation Bill (No. 2) 2008-2009**

Introduced into the House of Representatives on 13 May 2008  
Portfolio: Finance and Deregulation

### **Background**

This bill appropriates \$12.69 billion to meet payments to or for the States, Territories and local government and payments for new administered expenses and non-operating expenses for the financial year ending 30 June 2009.

*The Committee has no comment on this bill.*

## **Appropriation (Parliamentary Departments) Bill (No. 1) 2008-2009**

Introduced into the House of Representatives on 13 May 2008  
Portfolio: Finance and Deregulation

### **Background**

This bill appropriates \$170.96 million to meet the expenses of the parliamentary departments for the financial year ending 30 June 2009.

*The Committee has no comment on this bill.*

## **Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008**

Introduced into the Senate on 14 May 2008

By Senator Brown

### **Background**

This bill amends and repeals provisions in the *Commonwealth Electoral Act 1918* relating to group voting tickets to allow for preferential above-the-line-voting in Senate elections. The bill removes from the parties or groups contesting Senate elections the decision of how preferences are to be allocated and provides the voter with the right to choose the preference flow of their vote.

*The Committee has no comment on this bill.*

## **Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008**

Introduced into the Senate on 15 May 2008

Portfolio: Special Minister of State

### **Background**

This bill amends the funding and disclosure provisions of the *Commonwealth Electoral Act 1918* to:

- reduce the disclosure threshold for donors, registered political parties, candidates and others involved in incurring political expenditure, from ‘more than \$10,000’ (indexed to the CPI annually) to \$1,000 (non-indexed);
- reduce the time frames for the making of returns and the disclosure of gifts and expenditure relating to an election, by individual candidates and members of groups and donors who make donations within the election period, from the existing 15 weeks to a period of 8 weeks after polling day;
- ensure that, for the purposes of the \$1,000 threshold and the disclosure of gifts, related political parties are treated as the one entity;
- make it unlawful for registered political parties, candidates and members of a Senate group (and associated entities and people incurring political expenditure in certain circumstances) to accept gifts of foreign property;
- prohibit the receipt of all anonymous gifts by registered political parties, candidates and members of a Senate group (and associated entities and people incurring political expenditure in certain circumstances);
- limit public funding of election campaigning to ‘electoral expenditure’ incurred and claimed, or to a sum calculated according to a formula outlined in the bill, whichever is the lesser;

- provide for the recovery of gifts of foreign property and anonymous gifts that are not returned and undisclosed gifts; and
- introduce new offences and increase the penalties for existing offences.

The bill also contains application and saving provisions.

*The Committee has no comment on this bill.*

## Customs Tariff Amendment (Tobacco Content) Bill 2008

Introduced into the House of Representatives on 28 May 2008  
Portfolio: Home Affairs

### Background

This bill amends the *Customs Tariff Act 1995* to insert a definition of ‘tobacco content’ into the Customs Tariff. The purpose of the amendment is to clarify the existing references to ‘tobacco content’ found within the Customs Tariff.

The amendment confirms that the customs duty payable on tobacco and tobacco products is based on the total weight of the goods, which is consistent with the practice of the Australian Customs Service and industry since the introduction of the term in 1999. The amendment will apply from 1 November 1999, which is when the term ‘tobacco content’ was first introduced in the Customs Tariff.

### Retrospective application Schedule 1, item 2

Item 2 of Schedule 1 to this bill provides that item 1 (the only substantive amendment made by this bill) applies from 1 November 1999. As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this instance, the Committee notes that the explanatory memorandum and the Minister’s second reading speech, when read together, indicate that concerns have arisen as to the meaning of the term ‘tobacco content’ in the *Customs Tariff Act 1995*, a term that was introduced into that Act from 1 November 1999, and that item 1 of Schedule 1 confirms the meaning originally intended when that term was first introduced. Thus, while the amendment will clearly have retrospective effect, it ‘reflects what has been the practice of the Australian Customs Service and industry since the introduction of the term in 1999’ (Second Reading speech).

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

## **Defence Home Ownership Assistance Scheme Bill 2008**

Introduced into the House of Representatives on 28 May 2008

Portfolio: Defence

### **Background**

Introduced with the Defence Home Ownership Assistance Scheme (Consequential Amendments) Bill 2008, this bill provides a home ownership assistance scheme that will be available to eligible members of the Australian Defence Force (ADF) who are serving on or after 1 July 2008. The scheme will provide a subsidy on the home loan interest expense incurred in purchasing a home in which the eligible member or their family will live.

The scheme will provide progressively higher levels of benefits to ADF members as an incentive to remain in active service - higher levels of assistance will become available on completion of 8 and 12 years service for permanent ADF members and 12 and 16 years service for Reserve Force members.

The scheme also provides transitional eligibility for members under existing home loan subsidy schemes. Serving members who are eligible under the *Defence Service Homes Act 1918* may join the new scheme, however those who choose to do so extinguish any entitlement that they have under existing schemes.

The bill also contains application provisions.

### **Standing (special) appropriation**

#### **Clause 84**

Clause 84 would appropriate the Consolidated Revenue Fund for the payments of subsidy under this Act, and for any taxes payable in respect of those payments of subsidy. The Committee notes that the bill does not limit the time during which the Consolidated Revenue Fund may be appropriated,

but acknowledges that, because of the nature of the subsidy scheme set up by this bill, it would be impossible to set a time frame for its operation.

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



## **Defence Home Ownership Assistance Scheme (Consequential Amendments) Bill 2008**

Introduced into the House of Representatives on 28 May 2008  
Portfolio: Defence

### **Background**

Introduced with the Defence Home Ownership Assistance Scheme Bill 2008, this bill makes consequential amendments to the *Defence Force (Home Loans Assistance) Act 1990* and the *Defence Service Homes Act 1918*. The amendments, together with the rules under the Defence Home Ownership Assistance Scheme Bill 2008, will provide for people to transition into the new Defence Home Ownership Assistance Scheme.

Under this bill the scheme established under the *Defence Force (Home Loans Assistance) Act 1990* will be closed: on 30 June 2008 to serving members who have not yet exercised their rights under that scheme; and on 30 June 2010, to other eligible persons. The amendments seek to ensure that a subsidy is payable under only one scheme.

*The Committee has no comment on this bill.*

## Dental Benefits Bill 2008

Introduced into the House of Representatives on 29 May 2008  
Portfolio: Health and Ageing

### Background

Introduced with the Dental Benefits (Consequential Amendments) Bill 2008, this bill establishes a legislative framework for the payment of dental benefits under a new government program known as the Teen Dental Plan. The bill:

- establishes an entitlement to dental benefits and provides for the payment of such benefits;
- provides a framework for the issuing of vouchers;
- provides for the protection (and, where authorised, the disclosure) of protected information;
- creates general offence provisions relating to assignment of benefit agreements and the giving of false or misleading information;
- allows the Minister to make Dental Benefits Rules through a legislative instrument; and
- appropriates the Consolidated Revenue Fund to pay for amounts of dental benefits payable under the Act.

### Strict liability

#### Subclauses 48(2), 49(2), 50(2) and 51(2)

Subclauses 48(2), 49(2), 50(2) and 51(2) create offences of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The Committee notes that the explanatory memorandum to this bill (pages 19-20) seeks to justify each of these provisions by asserting that, apart from some minor changes that were made ‘to reflect current criminal law policy’, the provisions are consistent with the existing strict liability offences in the *Health Insurance Act 1973* relating to offences in relation to Medicare benefits. The Committee **seeks the Minister’s advice** whether the ‘current criminal law policy’ which is referred to is that set out in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, and, if so, whether the explanatory memorandum might have made that fact clear.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

### **Incorporation of extrinsic material Subclause 60(3)**

Subclause 60(3) would permit the Dental Benefits Rules – which the Minister is to make by legislative instrument – to apply, adopt or incorporate, with or without modification, any matter contained in any other instrument as in force from time to time, in derogation of subsection 14(2) of the *Legislative Instruments Act 2003*. The Committee routinely draws attention to provisions that seek to incorporate into delegated legislation material ‘as in force from time to time’ where that incorporation involves material that appears not to be subject to sufficient parliamentary scrutiny.

The Committee notes that the explanatory memorandum (page 27) seeks to justify the incorporation of extrinsic material as in force from time to time on the basis that it ‘may be of assistance, for example, if the Dental Benefits Rules should refer to instruments made under State or Territory Acts, or other documents, relating to registration, licensing or accreditation, when specifying a class of persons to be dental providers for the purpose of paragraph 6(1)(b)’ of the bill. The Committee notes, however, that the bill does not place any limits on the extrinsic material that may be applied, adopted or incorporated. That is, it does not limit it to the sorts of material cited in the example.

As such, the Committee considers that this clause may insufficiently subject the exercise of legislative power to parliamentary scrutiny, and **seeks the Minister's advice** as to whether there might not be some limit put upon the exercise of this power.

*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.*

### **Standing (special) appropriation Clause 65**

Clause 65 would appropriate the Consolidated Revenue Fund for the purpose of making payments of dental benefits under this bill. Although the clause does not set a limit to the time during which the Consolidated Revenue Fund may be appropriated, the explanatory memorandum notes, at page 28, that this 'standing appropriation is similar to the standing appropriation contained in section 125 of the *Health Insurance Act 1973* in relation to Medicare benefit.'

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

## **Dental Benefits (Consequential Amendments) Bill 2008**

Introduced into the House of Representatives on 29 May 2008  
Portfolio: Health and Ageing

### **Background**

Introduced with the Dental Benefits Bill 2008, this bill makes consequential amendments to the *Age Discrimination Act 2004*, the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Health Insurance Act 1973*, the *Jurisdiction of Courts (Cross-vesting) Act 1987*, the *Medicare Australia Act 1973*, the *Sea Installations Act 1987*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973* to provide for the implementation and administration of the Teen Dental Plan. Some of the amendments allow the payment of dental benefits under the proposed *Dental Benefits Act 2008* to be treated in the same manner as the payment of Medicare benefits under the *Health Insurance Act 1973*.

*The Committee has no comment on this bill.*

## Evidence Amendment Bill 2008

Introduced into the House of Representatives on 28 May 2008

Portfolio: Attorney-General

### Background

This bill amends the *Evidence Act 1995* and the *Amendments Incorporation Act 1905*, to implement the majority of recommendations made by the Australian Law Reform Commission, NSW Law Reform Commission, and Victorian Law Reform Commission in their inquiry into the operation of the uniform Evidence Acts. The bill also makes consequential amendments to the *Acts Interpretation Act 1901*, the *Carriage of Goods by Sea Act 1991*, the *Legislative Instruments Act 2003* and the *Workplace Relations Act 1996*.

The amendments are largely technical in nature, however, the bill does contain a number of reforms, including amendments to: make it easier for children and people with a cognitive impairment to give evidence; promote the use of narrative evidence; and control cross-examination of vulnerable witnesses.

The bill also contains application and transitional provisions.

### Delayed commencement

#### Schedule 3

Item 3 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedule 3 will commence on Proclamation, but must commence in any event 12 months after Assent. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

In this case, the explanatory memorandum (page 3) points out that the amendments proposed in Schedule 3 provide for certain printed and electronic versions of Acts, (including compilations of Acts) to be taken to be an accurate record of those Acts, unless the contrary is proven. It goes on to observe (page 4) that the delay in commencement of up to 12 months after Assent is 'to ensure that the Office of Legislative Drafting and Publishing has sufficient time to prepare for electronic compilations of Acts to be included in the Acts database.'

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

**Abrogation of the privilege against self-incrimination  
Schedule 1, item 63, subsections 128(4) and 128A(6)**

Subsections 128(4) and 128A(6) of this bill, both to be inserted by item 63 of Schedule 1, provide for a court to require the disclosure of self-incriminating information in certain circumstances. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law privilege trespasses on personal rights and liberties.

The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. In this case, the Committee notes that proposed new subsections 128(7) and 128A(8) respectively, limit the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. The committee therefore accepts that these provisions strike a reasonable balance between the competing interests of obtaining information and protecting individual rights.

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

## **Excise Legislation Amendment (Condensate) Bill 2008**

Introduced into the House of Representatives on 15 May 2008

Portfolio: Treasury

### **Background**

This bill amends the *Excise Act 1901*, the *Petroleum Excise (Prices) Act 1987*, and the *Petroleum Revenue Act 1985* to facilitate a policy change, outlined in the Excise Tariff Amendment (Condensate) Bill 2008, to apply the Crude Oil Excise regime to condensate produced in the North West Shelf project area and onshore Australia.

The bill also contains application and transitional provisions.

### **Retrospective application Schedule 1, items 3 and 6**

Proposed new subsection 164A(1) of the *Excise Act 1901*, to be inserted by item 3 of Schedule 1, would permit regulations made for the purposes of that Act to take effect from a date prior to their registration under the *Legislative Instruments Act 2003*, which is the date on which such regulations would normally take effect. Similarly, proposed new subsection 4(1C) of the *Petroleum Excise (Prices) Act 1997*, to be inserted by item 6 of Schedule 1, would permit regulations made for the purposes of that Act to take effect from a date prior to their registration under the *Legislative Instruments Act 2003*.

As a matter of practice, the Committee draws attention to any bill that 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 (paragraph 1.23) describes the effect of these proposed provisions and provides an assurance that the bill will not allow the making of regulations that apply retrospectively to make a person liable to an offence or civil penalty. However, the explanatory memorandum provides no rationale for why it is considered necessary for these regulations to apply from a date prior to their registration under the *Legislative Instruments Act 2003*, nor does



it provide an assurance that their retrospective application will not be detrimental to any person.

The Committee **seeks the Treasurer's advice** as to the rationale for requiring these regulations to take effect from a date prior to their registration under the *Legislative Instruments Act 2003*, and whether this retrospective application will be detrimental to any person.

*Pending the Treasurer's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

## **Retrospective application Schedule 1**

Item 13 of Schedule 1 would apply the amendments made by that Schedule from the end of 13 May 2008, and therefore to some extent retrospectively. This was the date on which the measure was announced by the Treasurer.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee will not generally comment adversely, however, where the bill implements a tax or revenue measure in respect of which the relevant Minister has published a date from which the measure is to apply, the publication took place prior to the date of application, and the legislation is introduced into the parliament within six months. This is the case in respect of the current bill.

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

## **Excise Tariff Amendment (Condensate) Bill 2008**

Introduced into the House of Representatives on 15 May 2008

Portfolio: Treasury

### **Background**

Introduced with the Excise Legislation Amendment (Condensate) Bill 2008, this bill amends the *Excise Tariff Act 1921* to apply the Crude Oil Excise regime to condensate produced in the North West Shelf project area and onshore Australia, which has the effect of removing the current exemption of condensate from the Crude Excise Oil regime.

The bill also contains application and transitional provisions.

### **Retrospective application**

#### **Schedule 1**

Item 31 of Schedule 1 would apply the amendments made by that Schedule from after midnight on 13 May 2008, and therefore to some extent retrospectively. This was the date on which the measure was announced by the Treasurer.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee will not generally comment adversely, however, where the bill implements a tax or revenue measure in respect of which the relevant Minister has published a date from which the measure is to apply, the publication took place prior to the date of application, and the legislation is introduced into the parliament within six months. This is the case in respect of the current bill.

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

## **Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2008 Budget and Other Measures) Bill 2008**

Introduced into the House of Representatives on 29 May 2008

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill amends a number of Acts in relation to social security law, the family assistance law and related Acts to implement certain 2008 Budget measures. The bill:

- establishes a \$150,000 limit on primary earner income for family tax benefit Part B and related tax offsets;
- introduces an income test for the baby bonus from 1 January 2009, changes the indexation date to 1 July each year, and provides for the baby bonus to be paid by instalment, rather than by lump sum;
- extends eligibility for the baby bonus to parents who adopt children under the age of 16 and allows an adoptive parent to access the full amount of baby bonus, even if it has been previously paid for the child;
- establishes a compliance regime for the Commonwealth seniors health card (CSHC) which allows the Secretary to collect tax file numbers both from current holders of, and claimants for, CSHC to ensure eligibility under the CSHC income test;
- provides for a person to enter voluntarily into an agreement with the Secretary, under which the person agrees to be subject to the income management regime under Part 3B of the *Social Security (Administration) Act 1999*; and
- increases the eligible age for a partner service pension to qualifying age.

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

**Retrospective commencement**  
**Schedule 6, items 16 and 17**

Item 21 in the table to subclause 2(1) of this bill provides that the amendments proposed in items 16 and 17 of Schedule 6 will commence immediately after the commencement of items 73 and 74 of Schedule 5 to the *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006*, which occurred on 6 December 2006.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this instance, however, the Committee notes that the explanatory memorandum (page 40) assures readers that ‘No person’s rights will be adversely affected by [this] retrospectivity because the changes [to be made by items 16 and 17 of Schedule 6] only relate to activities which will take place after 1 July 2008.’

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

## **Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008**

Introduced into the House of Representatives on 29 May 2008  
Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999* to give effect to a number of government commitments. The bill:

- increases, from 1 July 2008, the percentage of allowable out-of-pocket child care expenses that an individual can be paid per income year as a child care tax rebate (CCTR), from 30 per cent to 50 per cent;
- increases the annual CCTR limit for a child from \$4,354 to \$7,500, commencing 2008-09;
- allows the CCTR to be paid quarterly in certain circumstances;
- clarifies the nature of family assistance amounts that can be set off against debts and provides that child care benefit (CCB) amounts, which are currently available only for recovery of CCB debts, are also available for recovery of CCTR debts;
- establishes a civil penalties scheme which will regulate approved child care services and former approved child care services, with the aim of ensuring that they comply with a range of obligations under the family assistance law; and
- expands the purposes for which authorised officers may enter premises of approved child care services.

The bill also contains application and transitional provisions.

### **Strict liability**

#### **Schedule 4, items 13, 17, 20, 23, 27, 32, 37, 40 and 43**

Various amendments in Schedule 4 create offences of strict liability. They are proposed new subsection 219B(2A) of the *A New Tax System (Family Assistance) (Administration) Act 1999*, to be added by item 13 of Schedule 4, proposed new subsection 219BB(3), to be added by item 17, proposed new subsection 219BC(3), to be added by item 20, proposed new subsection 219BD(1B), to be added by item 23, proposed new subsection 219E(1B), to be added by item 27, proposed new subsection 219F(1B), to be added by item 32, proposed new subsection 219G(1B), to be added by item 37, proposed new subsection 219G(3B), to be added by item 40, and proposed new subsection 219G(4B), to be added by item 43.

The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill. In respect of these provisions, the Committee notes from the explanatory memorandum (pages 48 to 50) that Schedule 4 of the bill provides for a new civil penalty regime for approved child care service providers and that where 'the current criminal penalty... has been repealed and replaced in order to re-frame the provisions in modern penalty terminology', or where a criminal penalty is being supplemented by a civil penalty, the bill ensures that the criminal offences already in the Act 'remain ones of strict liability.'

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

### **Strict liability**

#### **Schedule 4, item 33**

Proposed new subsection 219F(2B) of the *A New Tax System (Family Assistance) (Administration) Act 1999*, to be added by item 33 of Schedule 4, creates an offence of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its

imposition should be set out in the explanatory memorandum which accompanies the bill.

In this case, the Committee notes that the explanatory memorandum (page 50) merely states that this new subsection ‘ensures that the offence [created by subsection 219F(2A)] is one of strict liability.’ There is no indication as to why it is considered necessary for the offence to be one of strict liability. Nor does the explanatory memorandum provide advice on whether the imposition of strict liability in this case is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

The Committee **seeks the Minister’s advice** as to whether the imposition of strict liability is justified in these circumstances and whether the *Guide* was taken into account in framing this provision.

*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.*

### **Strict liability** **Schedule 4, item 45**

Proposed new subsection 219J(4) of the *A New Tax System (Family Assistance) (Administration) Act 1999*, to be added by item 45 of Schedule 4, creates an offence of strict liability. The Committee will generally draw to Senators’ attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

The Committee notes that, in respect of this provision, the explanatory memorandum (page 50) makes no reference to the fact that the provision creates an offence of strict liability. Consequently, there is no indication of why it is considered necessary for the offence to be one of strict liability, nor whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted in the course of framing this offence.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and whether the *Guide* was taken into account in framing this provision.

*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.*

**Strict liability**  
**Schedule 4, items 50, 53 and 57**

Proposed new subsection 219L(1B) of the *A New Tax System (Family Assistance) (Administration) Act 1999*, to be added by item 50 of Schedule 4, proposed new subsection 219L(2B), to be added by item 53 and proposed new subsection 219L(3B), to be added by item 57, create offences of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this case, the Committee notes that the explanatory memorandum (page 52) advises that, in each of these cases, the legislation ensures that the criminal offences already in the Act 'remain ones of strict liability.'

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

**Strict liability**  
**Schedule 5, item 23**

Proposed new subsection 219E(3) of the *A New Tax System (Family Assistance) Act 1999*, to be added by item 23 of Schedule 5, creates an offence of strict liability. The Committee will generally draw to Senators'



attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this case, the Committee notes that the explanatory memorandum (page 68) advises that ‘the current subsection 219E makes it an offence for a service not to issue a receipt. The offence is of strict liability and carries a penalty of 60 penalty units. New subsection 219E(3) makes the offence in new subsection 219E(2) an offence of strict liability’, consistent with the existing offence provision.

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

### **Retrospective application Schedule 5, item 28**

In part 2 of Schedule 5, item 28 provides that the amendment made by item 3 of that Schedule applies to care provided by an approved child care service on or after 1 July 2006. As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

In this instance, the Committee notes that the explanatory memorandum does not indicate whether the amendment made by item 3 is beneficial or adverse to recipients of child care services and, therefore, **seeks the Minister’s advice** whether this retrospective application will adversely affect any individual.

*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.*

## **Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008**

Introduced into the House of Representatives on 29 May 2008

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill amends the *Farm Household Support Act 1992* and the *Social Security Act 1991* to introduce new eligibility criteria for the Exceptional Circumstances Relief Payment (ECRP). The bill:

- increases the income exemption for the ECRP income test from \$10,000 to \$20,000;
- extends the ECRP in certain circumstances to include the operators of small businesses that are located in towns that are substantially reliant on farm income, have a population of 10,000 or less, and are wholly or partially located in an Exceptional Circumstances declared area; and
- allows recipients of ECRP to travel overseas in certain circumstances, without losing their ECRP.

The bill also contains application and transitional provisions.

### **Explanatory Memorandum**

In considering the bills that come before it, the Committee places considerable reliance on the explanatory material that accompanies each bill, in particular the explanatory memorandum. If this material does not clearly explain the operation and impact of the legislative proposal under consideration then the work of both the Committee and the Senate is made more difficult.

The Committee was disappointed with the quality of the explanatory memorandum that accompanied this bill, which failed to explain the intent and operation of several provisions.

**Retrospectivity**  
**Schedule 1, item 4**

Proposed new subsection 8A(7) of the *Farm Household Support Act 1992*, to be inserted by item 4 of Schedule 1, applies from 25 September 2007, and is therefore retrospective to some extent. 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 instance, the Committee notes that the purpose of this bill is to extend the classes of people eligible for Exceptional Circumstances Relief Payment and is, therefore, beneficial to some parts of the rural industry.

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

**Legislative Instruments Act—determination**  
**Schedule 1, item 4 and subitem 23(5)**

Proposed new subsection 8A(9) of the *Farm Household Support Act 1992*, to be inserted by item 4 of Schedule 1, states that a determination made by the Minister under paragraph 8A(7)(c) is not a legislative instrument. Similarly, subitem 23(5) of Schedule 1, which is a transitional provision relating to the circumstances dealt with in proposed new section 8A, states that a Ministerial determination made under that item is not a legislative instrument.

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

The Committee notes that, in respect of both of the above-mentioned provisions, the explanatory memorandum does not acknowledge their existence and, as such, there is no indication of whether they are no more than

declaratory of the law or seek to create an exemption from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

The Committee **seeks the Minister's advice** whether these provisions are declaratory in nature or provide for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

### **Retrospective operation Schedule 1, item 10**

Proposed new paragraphs 24A(4)(a) and (b) of the *Farm Household Support Act 1992*, to be inserted by item 10 of Schedule 1, substitute paragraphs referring to the period from 1 July 2005 to 30 June 2006 with paragraphs referring to the period from 1 July 2007 to 30 June 2009. The new paragraphs are, therefore, to some extent retrospective in operation.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that, in this instance, the explanatory memorandum does not acknowledge the existence of item 10 of Schedule 1, and therefore provides no explanation of the change proposed by that item. The Committee **seeks the Minister's advice** whether this retrospectivity will be detrimental to any person and whether this information could be included in the explanatory memorandum.

*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.*

**Retrospective operation**  
**Schedule 1, part 3**

Part 3 of Schedule 1 provides for the validation of payments purported to have been made under the *Farm Household Support Act 1992* since 25 September 2007 and is, therefore, retrospective in operation. 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 whilst this part is clearly retrospective in operation, it is beneficial to recipients of the payments.

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

## First Home Saver Accounts Bill 2008

Introduced into the House of Representatives on 28 May 2008

Portfolio: Treasury

### Background

This bill, along with two supporting bills, the First Home Saver Accounts (Consequential Amendments) Bill 2008 and the Income Tax (First Home Saver Accounts Misuse Tax) Bill 2008, aims to implement the Government's election commitment to introduce First Home Saver Accounts (FHSA). The bill:

- provides for the general operation of the FHSA, outlines the eligibility rules for opening and issuing FHSA, and establishes the rules for making contributions into these accounts;
- provides for a Government contribution of 17 per cent on the first \$5,000 of personal contributions made into the account each year;
- outlines the prudential regulatory framework that applies to FHSA providers;
- establishes an enforcement regime, including providing for the appointment of authorised persons and defining the powers of such persons; and
- establishes a range of offences under the Act.

The bill also contains application and transitional provisions.

### Strict liability offences

#### Subclauses 58(5), 60(9), 61(5), 111(4) and 112(3)

Various clauses in this bill impose strict criminal liability. They are subclauses 58(5), 60(9), 61(5), 111(4) and 112(3). The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its

imposition should be set out in the explanatory memorandum which accompanies the bill.

The Committee notes that with regard to the first three of these provisions (subclauses 58(5), 60(9) and 61(5)), the only reference to them in the explanatory memorandum is at paragraph 8.94 which states, in full: ‘Where an offence of strict liability (requiring no fault element) is proven the FHSA provider is liable for a penalty of up to 50 penalty units.’ There is no reference to the reason for the imposition of strict liability, nor to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs in February 2004.

With regard to the fourth and fifth of the above provisions (111(4) and 112(3) respectively), the explanatory memorandum is slightly more helpful, but only marginally so. Paragraph 4.49, which relates to subclause 111(4), states: ‘Consistent with the [*Superannuation Industry (Supervision) Act 1993*], this offence is a strict liability offence punishable by 50 penalty units. These offences are ones of strict liability because they are basic, objective requirements of APRA’s prudential supervision functions, and should be complied with by all persons.’

The Committee notes that this commentary is very similar to that provided by the explanatory memorandum to the Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007, on which the Committee commented in *Alert Digest No. 8 of 2007*. The Committee reiterates the view that it expressed at that time, that is, that it could be argued that all laws, by their very nature, ‘should be complied with by all persons’ and that this is not, in and of itself, justification for applying strict liability to these particular offences.

The Committee **seeks the Treasurer’s advice** whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of these offences and, if so, whether the justifications used to support the imposition of strict liability in the context of the *Guide* could be included in the explanatory memorandum.

*Pending the Treasurer’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.*

## **Abrogation of the privilege against self-incrimination Subclause 79(1)**

Subclause 79(1) would abrogate the privilege against self-incrimination for a person required to provide information to the Commissioner of Taxation under clauses 77 or 78. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law privilege trespasses on personal rights and liberties.

The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures.

The Committee notes that, in this instance, subclause 79(2) would limit the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. The Committee therefore accepts that these provisions strike a reasonable balance between the competing interests of obtaining information and protecting individual rights.

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

## **Personal rights and liberties 91(4) and 102(4)**

Subclause 91(1) requires APRA to decide an application for a body to be authorised as a provider of a first home saver account within 30 days of receiving the application, with an extension of a further 14 days provided for by subclause 91(2). Subclause 91(4) provides that if APRA has not decided the application within the required period, 'APRA is taken to have decided... to refuse the application.' Clause 102 is in very similar terms.

The Committee is concerned that under these clauses a body could be refused authorisation as a provider of a first home account (clause 91), or refused to have a condition applied by APRA to such an authorisation varied or removed



(clause 102), not because of any failing on their part, but rather because the APRA had failed to make a decision within the allotted timeframe. The Committee notes that the explanatory memorandum, at paragraphs 4.23 and 4.38 respectively, summarises the effect of these clauses, but gives no explanation for why it is considered appropriate that the consequences of any inaction on APRA's part will be born by the applicant, rather than by APRA.

The Committee **seeks the Treasurer's advice** on this matter, including what safeguards will be put in place to ensure that the APRA makes a decision on these matters within the required timeframe and what recourse will be available to bodies who may have their application deemed to be unsuccessful as a result of inaction by the APRA.

*Pending the Treasurer'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.*

## **Setting the rate of a fee by regulation**

### **Paragraph 131(2)(a)**

Paragraph 131(2)(a) of this bill provides that the Governor-General may make regulations that 'prescribe fees in respect of any matter under this Act'. The Committee has consistently drawn attention to legislation that provides for the rate of a fee or levy to be set by regulation. This creates a risk that the fee may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

Where a fee is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. The vice to be avoided is delegating an unfettered power to impose fees. In this instance, the Committee notes that the primary legislation does not provide for any limits on this power to impose fees.

The Committee further notes that the explanatory memorandum, at paragraph 8.108, merely states that 'the main Bill includes a standard power permitting the Governor-General to make regulations', but provides no explanation of why it is necessary to be able to prescribe fees by regulation. Similarly, the

explanatory memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of this power. The Committee **seeks the Treasurer's advice** in respect of these matters.

*Pending the Treasurer'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.*

## **First Home Saver Accounts (Consequential Amendments) Bill 2008**

Introduced into the House of Representatives on 28 May 2008

Portfolio: Treasury

### **Background**

Introduced with the First Home Saver Accounts Bill 2008 and the Income Tax (First Home Saver Accounts Misuse Tax) Bill 2008, this bill makes consequential amendments to a range of legislation, including the *Income Tax Act 1986*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax Rates Act 1986*, and the *Taxation Administration Act 1953*, necessary to implement the First Home Saver Accounts (FHSA).

The taxation amendments outlined in the bill establish the tax treatment of First Home Saver Accounts including that:

- individual contributions to FHSA are not taxed as they will be made from post-tax income;
- Government contributions are not taxed;
- withdrawals to purchase a first home are not taxed; and
- other withdrawals are generally not taxed.

The bill also amends the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* to ensure that the financial services licensing, conduct, advice and disclosure rules apply appropriately to FHSA..

*The Committee has no comment on this bill.*

## Health Care (Appropriation) Amendment Bill 2008

Introduced into the House of Representatives on 15 May 2008  
Portfolio: Health and Ageing

### Background

This bill amends the *Health Care (Appropriation) Act 1998* to:

- extend the current 5 year appropriation period for the 2003-08 Australian Health Care Agreements to 6 years; and
- increase the total amount that may be paid by way of financial assistance to the States and Territories for public hospital services under section 4 of the Act from \$42.01 billion to \$52.26 billion.

The amendments will enable the transitional health funding arrangements, agreed by the Council of Australian Governments on 26 May 2008, to be implemented.

*The Committee has no comment on this bill.*

## **Higher Education Support Amendment (2008 Budget Measures) Bill 2008**

Introduced into the House of Representatives on 29 May 2008  
Portfolio: Education

### **Background**

This bill amends the *Higher Education Support Act 2003* to revise the maximum funding amounts (for the years 2009 to 2012) in relation to the Commonwealth Grant Scheme, Other Grants, and Commonwealth Scholarships, to facilitate the implementation of a range of measures announced in the 2008-09 Budget.

The bill also makes amendments to the Act to provide:

- for a reduction in compulsory Higher Education Loan Program repayments;
- that commencing undergraduate domestic students at public universities may not be enrolled on a full fee paying basis from 2009, with certain exceptions; and
- for a reduction in the maximum annual student contribution for certain courses, and for a transitional loading, under the Commonwealth Grant Scheme, to provide higher education providers with funding for the reduction in revenue due to the lower maximum student contribution.

The bill also contains application provisions.

*The Committee has no comment on this bill.*

## **Income Tax (First Home Saver Accounts Misuse Tax) Bill 2008**

Introduced into the House of Representatives on 28 May 2008  
Portfolio: Treasury

### **Background**

Introduced with the First Home Saver Accounts Bill 2008 and the First Home Saver Accounts (Consequential Amendments) Bill 2008, this bill provides for a First Home Saver Accounts Misuse Tax to be applied in specified circumstances, to claw back benefits account holders have obtained in the improper use of their accounts.

*The Committee has no comment on this bill.*

## **Indigenous Affairs Legislation Amendment Bill 2008**

Introduced into the House of Representatives on 29 May 2008

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill makes amendments to the emergency measures to protect Aboriginal children in the Northern Territory, through amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Northern Territory National Emergency Response Act 2007*. The amendments include provisions:

- allowing township leases to be made for a period of between 40 and 99 years;
- granting the Executive Director of Township Leasing additional functions;
- allowing the Commonwealth and certain persons to agree on amounts to be paid in respect of the five-year leases and certain other payments; and
- allowing for the grant of 13 further areas of Aboriginal land, which will be operated as national parks.

The bill also contains application and technical provisions.

*The Committee has no comment on this bill.*

## **Indigenous Education (Targeted Assistance) Amendment (2008 Budget Measures) Bill 2008**

Introduced into the House of Representatives on 29 May 2008

Portfolio: Education

### **Background**

This bill amends the *Indigenous Education (Targeted Assistance) Act 2000* to appropriate additional funding of \$8.353 million in the 2008 calendar year to:

- provide initial funding to expand intensive literacy and numeracy programs to assist Indigenous students;
- support teachers to develop individual learning plans with Indigenous students; and
- build and contribute to the operations of three new boarding accommodation facilities for Indigenous secondary students in the Northern Territory.

*The Committee has no comment on this bill.*



## Judiciary Amendment Bill 2008

Introduced into the House of Representatives on 28 May 2008  
Portfolio: Attorney-General

### Background

This bill amends the *Judiciary Act 1903* to implement recommendations of the Standing Committee of Attorneys-General in response to the High Court decision in *British American Tobacco v Western Australia* [2003 HCA 47] (BAT case) in relation to the recovery of invalid taxes paid under Western Australian law.

The bill assists in restoring the States and Territories to the position it was thought they were in prior to the BAT case, by amending section 79 of the Judiciary Act to provide that nothing in the Judiciary Act prevents State and Territory laws, related to the recovery of invalid State and Territory taxes, from applying in federal jurisdiction in proceedings for the recovery of a tax (or an amount paid in connection with a tax) invalidly imposed by a law of a State or Territory.

The bill also contains an application provision.

*The Committee has no comment on this bill.*

## Law Officers Legislation Amendment Bill 2008

Introduced into the House of Representatives on 28 May 2008

Portfolio: Attorney-General

### Background

This bill amends the *Law Officers Act 1964* and the *Long Service Leave (Commonwealth Employees) Act 1976* to provide holders of the office of the Solicitor-General with an entitlement to long service leave. This corrects an oversight which occurred when legislation was amended in 1997, which unintentionally left the Solicitor-General with no coverage for long service leave.

The bill also contains an application provision.

### Retrospective application

#### Schedule 1

Item 5 of Schedule 1 provides that the amendments made by this bill to the *Long Service Leave (Commonwealth Employees) Act 1976* apply from 31 December 1997, and are therefore retrospective. As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth.

The Committee notes that, in this instance, the explanatory memorandum makes it clear that the purpose of the bill is to ensure that the Solicitor-General has the same long service leave entitlements as senior members of the Australian Public Service. The retrospectivity is, therefore, of benefit to the Solicitor-General.

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

## **National Fuelwatch (Empowering Consumers) Bill 2008**

Introduced into the House of Representatives on 29 May 2008

Portfolio: Treasury

### **Background**

Introduced with the National Fuelwatch (Empowering Consumers) (Consequential Amendments) Bill 2008, this bill establishes a National Fuelwatch Scheme. The bill:

- requires that specified petrol retailers must notify the Australian Competition and Consumer Commission (ACCC) of their next day's fuel prices by 2pm each day and that the ACCC must publish this information by 4pm each day;
- requires that specified petrol retailers must sell at their notified prices from 6.00am the next day and maintain these notified prices for a 24-hour period; and
- establishes a civil penalty regime for breaches of the Act.

The bill also contains application provisions.

*The Committee has no comment on this bill.*

## **National Fuelwatch (Empowering Consumers) (Consequential Amendments) Bill 2008**

Introduced into the House of Representatives on 29 May 2008

Portfolio: Treasury

### **Background**

Introduced with the National Fuelwatch (Empowering Consumers) Bill 2008, this bill makes amendments to the *Trade Practices Act 1974* (TPA) consequential to the implementation of a National Fuelwatch scheme. The bill:

- allows the Australian Consumer and Competition Commission (ACCC) to delegate to a member of the ACCC any of its powers under the National Fuelwatch (Empowering Consumers) Bill 2008;
- enables the Minister to give a direction to the ACCC connected with the performance of its functions or the exercise of its powers under the National Fuelwatch (Empowering Consumers) Bill 2008;
- provides for the ACCC to seek and execute a search warrant in relation to suspected contraventions of the National Fuelwatch (Empowering Consumers) Bill 2008;
- enables the ACCC to require a person to provide information or documents, or answer any question put to the person it has reason to believe they are capable of providing in relation to a contravention of the National Fuelwatch (Empowering Consumers) Bill 2008; and
- provides for the protection of information obtained by the ACCC in the course of administering and enforcing the National Fuelwatch (Empowering Consumers) Bill 2008 against unauthorised disclosure.

## **Abrogation of the privilege against self-incrimination Schedule 1, item 6**

Section 155 of the *Trade Practices Act 1974* enables the ACCC to require a person to provide information, produce documents, or appear before the ACCC in relation to a suspected contravention of the Trade Practices Act, or other Acts, as listed in subsection 155(1). Item 6 of Schedule 1 of this bill provides that a reference to ‘the *National Fuelwatch (Empowering Consumers) Act 2008* be inserted into subsection 155(1) of the *Trade Practices Act 1974*. Subsection 155(7) of the Trade Practices Act, provides that ‘a person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document may tend to incriminate the person...’

The effect of this amendment is, therefore, to abrogate the privilege against self-incrimination for a person required to provide information under subsection 155(1) of the Trade Practices Act, in relation to a suspected contravention of the National Fuelwatch (Empowering Consumers) Bill 2008. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law privilege trespasses on personal rights and liberties.

The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. In this case, the Committee notes that subsection 155(7) of the *Trade Practices Act 1974* limits the circumstances in which information so provided is admissible in evidence in proceedings against an affected person or body corporate. However, that limitation applies only to information directly supplied by the person, and not to information gained indirectly from the statement or document provided by the person. The immunity is, in other words, only a ‘use immunity’ and not a ‘derivative use immunity’.

The Committee notes that the explanatory memorandum does not provide any information on why the bill provides only a ‘use immunity’ and not a ‘derivative use immunity’ in respect of information or documents required to be furnished under these provisions. The Committee **seeks the Treasurer’s advice** as to the reasons why use immunity, rather than both use and derivative use immunity, applies in these circumstances.

*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.*

## **National Health Amendment (Pharmaceutical and Other Benefits—Cost Recovery) Bill 2008**

Introduced into the House of Representatives on 29 May 2008  
Portfolio: Health and Ageing

### **Background**

Introduced with the National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2008, this bill amends the *National Health Act 1953* to enable regulations to be made with respect to services provided by the Commonwealth associated with the exercise of powers by the Minister for the Pharmaceutical Benefits Scheme and the National Immunisation Program.

The bill provides that the regulations may include prescription of fees payable in relation to those services provided by the Commonwealth, such as the making of declarations, determinations, agreements and arrangements and that the Minister may refuse to exercise powers under section 9B and Part VII of the *National Health Act 1953* until a fee is paid.

### **Setting the rate of a fee by regulation**

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

Proposed new paragraph 99YBA(2)(b) of the *National Health Act 1953*, to be inserted by item 1 of Schedule 1, provides that ‘regulations may make provision in relation to the...prescribing of fees for those services...’. The Committee has consistently drawn attention to legislation that provides for the rate of a fee or levy to be set by regulation. Where the rate of a fee is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. In this case, the Committee notes that proposed new subsection 99YBA(3) provides that ‘a prescribed fee must not be such as to amount to taxation’, thus implying a limit on the amount of the fees.

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

## **National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2008**

Introduced into the House of Representatives on 29 May 2008  
Portfolio: Health and Ageing

### **Background**

Introduced with the National Health Amendment (Pharmaceutical and Other Benefits—Cost Recovery) Bill 2008, this bill amends the *National Health Act 1953* in relation to certain aspects of the Pharmaceutical Benefits Scheme (PBS).

Schedule 1 expands the criteria for determining that brands of pharmaceutical items are co-marketed and provides that the Minister may determine that co-marketed brands cease to be co-marketed.

Schedule 2 provides for people who are otherwise eligible for pharmaceutical benefits to access those benefits while working outside Australia as officers of the Commonwealth, or of a State or Territory (and for their accompanying spouses and dependent children).

Schedule 3 allows the same PBS safety net arrangements to apply for legally married and de facto couples living apart due to illness or infirmity as apply for legally married and de facto couples living together.

Schedule 4 makes minor changes to two PBS-related definitions and removes provisions for the gazettal of determinations made in relation to pharmaceutical benefits that may be prescribed by participating dental practitioners and authorised optometrists.

The bill also contains application provisions.

*The Committee has no comment on this bill.*



## **Passenger Movement Charge Amendment Bill 2008**

Introduced into the House of Representatives on 28 May 2008

Portfolio: Home Affairs

### **Background**

This bill amends the *Passenger Movement Charge Act 1978* to increase the rate of the Passenger Movement Charge by \$9, to \$47, with effect from 1 July 2008. Departures made by a person using a ticket or equivalent authority, where the ticket or authority was sold or issued before 1 July 2008, will be exempt from the increase in the rate of the Charge.

*The Committee has no comment on this bill.*

## Private Health Insurance Legislation Amendment Bill 2008

Introduced into the House of Representatives on 15 May 2008  
Portfolio: Health and Ageing

### Background

This bill amends the *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001*, the *Insurance Act 1973*, the *Insurance Contracts Act 1984*, and the *Private Health Insurance Act 2007* with the aim of regulating private health insurance more consistently and equitably.

Schedule 1 removes the requirement, due to commence on 1 July 2008, for dual regulation of ‘health-related business’ conducted through ‘health benefits funds’ by the Private Health Insurance Administration Council (PHIAC) and the Australian Prudential Regulation Authority. The amendments provide that such ‘health-related business’ will remain regulated solely by the PHIAC.

Schedule 2 inserts the words ‘or rules’ into several references to the constitutions of restricted access private health insurers, to ensure that the relevant provisions of the Act can be satisfied by inclusion of statements in relation to membership in the rules or the constitution of such insurers.

Schedule 3 amends the *Private Health Insurance Act 2007* to require a body to be a company within the meaning of the Corporations Act in order to apply to the PHIAC for registration as a private health insurer. It also gives registered bodies until 1 January 2010 to make the transition to a company and provides an exemption from stamp duty and other taxes if the reason for transition was solely for the purpose of registering as private health insurers.

The bill also provides that the following do not constitute a breach of the principle of community rating:

- offering a discounted premium for a corporate product (Schedule 4); and
- conducting a pilot project in accordance with the Private Health Insurance (Complying Product) Rules (Schedule 5).

The bill also contains consequential and transitional provisions.

*The Committee has no comment on this bill.*

## **Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008**

Introduced into the Senate on 15 May 2008

By Senator Milne

This bill amends the *Renewable Energy (Electricity) Act 2000* to establish a national feed-in-tariff scheme, with a view to providing greater financial support for the commercialisation of a broad range of prospective renewable energy technologies. The bill:

- provides for owners of qualifying electricity generators to register their generator, feed electricity into the grid, and be paid a tariff, as long as certain conditions are met;
- requires the Minister to set a feed-in-tariff scheme rate for qualifying generators each financial year and sets out the circumstances in which the rate may be varied;
- provides that the feed-in-tariff scheme rate set by the Minister, and payable to the owner of a qualifying generator at the date of registration of that generator, is fixed and guaranteed for a period of 20 years from the date of registration;
- requires the Minister to set a feed-in-tariff scheme levy rate annually. The levy is to be payable by all electricity retailers and direct customers of electric energy from the grid and is to be sufficient to cover the estimated cost of payments under the feed-in-tariff scheme; and
- sets out record keeping and reporting requirements.

### **Legislative Instruments Act—declarations**

#### **Schedule 1, item 2, proposed new subsections 34D(15) and 34E(5)**

Proposed new subsection 34D(15) of the *Renewable Energy (Electricity) Act 2000*, to be inserted by item 2 of Schedule 1, would provide that the feed-in-tariff rates (to be set under proposed new subsections 34D(1) and (2)) and the statement made by the Minister under subsection 34D(14), are not legislative

instruments and section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to them.

Similarly, proposed new subsection 34E(5) of the same Act, also to be inserted by item 2 of Schedule 1, would provide that the feed-in-tariff levy rates (to be set under proposed new subsection 34E(1)) and the statement made by the Minister under subsection 34E(4) are not legislative instruments and section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to them.

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

The Committee notes that, in this instance, the explanatory memorandum makes no reference to these provisions. The Committee **seeks the Senator's advice** whether these provisions are declaratory in nature or provide for a substantive exemption from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003* and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

*Pending the Senator's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

### **Setting the rate of a levy by delegated legislation Schedule 1, item 2, proposed new subsection 34E(1)**

Proposed new subsection 34E(1) of the *Renewable Energy (Electricity) Act 2000* requires the Minister to set a feed-in-tariff levy rate per MWh of

electricity acquisition from the electricity grid, to fund the feed-in-tariff rate scheme. The Committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by delegated legislation. This creates a risk that the levy may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. For example, the Committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

The Committee notes that in this case, the levy only needs to be set once per financial year, so it is unclear why the levy cannot be set via an amendment to the primary legislation, thus providing the parliament with an opportunity to consider the proposed levy. The Committee also notes that while the bill specifies that the amount of the levy must be 'sufficient to cover the estimated cost of payments under the feed-in-tariff rate scheme' it does not provide for any maximum amount above which the Minister may not set the levy.

Finally, the Committee notes that the bill provides for no parliamentary scrutiny whatsoever of the Minister's power to set the rate of the levy, because proposed new subsection 34E(5) of the bill declares that the feed-in-tariff levy rate set under subsection (1) and the statement made under subsection (4) by the Minister, explaining how the feed-in-tariff levy rate is calculated, are not legislative instruments and section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to them.

The Committee **seeks the Senator's advice** as to the reasons why the feed-in-tariff levy rate is to be determined by the Minister, rather than through an amendment to the primary legislation, and why no provision has been made for parliamentary review of the Minister's determination.

*Pending the Senator'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.*

## **Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008**

Introduced into the House of Representatives on 28 May 2008

Portfolio: Attorney-General

### **Background**

This bill aims to eliminate discrimination against same-sex couples and the children of same sex relationships by amending the following Acts to enable death benefits to be conferred on de facto same-sex partners and children of a same-sex relationship, where they currently would have no entitlement: the *Parliamentary Contributory Superannuation Act 1948*, the *Superannuation Act 1922*, the *Superannuation Act 1976*, the *Federal Magistrates Act 1999*, the *Judges' Pensions Act 1968*, the *Law Officers Act 1964*, the *Defence Force Retirement and Death Benefits Act 1973*, the *Defence Forces Retirement Benefits Act 1948*, the *Retirement Savings Accounts Act 1997*, the *Small Superannuation Accounts Act 1995*, the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*, the *Superannuation Industry (Supervision) Act 1993*, the *Income Tax (Transitional Provisions) Act 1997* and the *Governor-General Act 1974*.

The bill also contains application provisions.

*The Committee has no comment on this bill.*

## **Social Security and Other Legislation Amendment (Employment Entry Payment) Bill 2008**

Introduced into the House of Representatives on 29 May 2008  
Portfolio: Employment and Workplace Relations

### **Background**

This bill amends the *Income Tax Assessment Act 1997*, the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to repeal the ‘employment entry payment’ from 1 July 2008.

The bill also contains transitional provisions.

*The Committee has no comment on this bill.*



## **Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008**

Introduced into the House of Representatives on 14 May 2008

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill amends a range of legislation, including the *Social Security Act 1991*, the *Social Security (Administration) Act 1999* and the *Veterans' Entitlements Act 1986*, to give effect to measures announced in the 2008 Budget to provide extra assistance to certain older Australians, carers and members of the veteran community.

The bill provides for a one-off payment of \$500 to eligible older Australians, eligible veterans, and to people who are receiving widow allowance, mature age allowance, partner allowance, wife pension or widow B pension for a period that includes 13 May 2008. The bill also provides for a one-off payment of \$1,000 to eligible carers.

In addition, the bill:

- contains provisions to enable administrative schemes to be established in relation to the one-off payments; and
- provides for a person's concession card to remain current for a maximum period of 13 weeks when the cardholder leaves Australia temporarily.

The bill also contains application provisions.

### **Determination of important matters by regulation Schedule 2, items 1 and 2 and Schedule 4, item 1**

Item 1 of Schedule 2 would grant to any of the Ministers administering provisions of the *Social Security Act 1991* a discretion to establish, by legislative instrument, a scheme under which one-off payments may be made

to older Australians. Item 2 of the Schedule grants a similar discretion to the Minister administering the *Veterans' Entitlements Act 1986*. Similarly, item 1 of Schedule 4 grants the Minister administering part 2.5 of the *Social Security Act 1991* a discretion to establish, by legislative instrument, a scheme under which one off payments may be made to carers.

The bill further provides for payments under these schemes 'to be made out of the Consolidated Revenue Fund, which is appropriated accordingly.' The only limit on the width of this discretion is that the respective Minister must, among other things, consider that the scheme established by the primary legislation proposed in this bill 'does not produce appropriate results' (see paragraphs 1(2)(a) and 2(2)(a) of Schedule 2 and paragraph 1(2)(a) of Schedule 4). The bill does not provide a definition of 'appropriate results'.

The Committee draws attention to provisions which may be considered to inappropriately delegate legislative powers of a kind that ought to be exercised by Parliament alone. In this instance, the detail of these schemes including, for example, the circumstances in which payments are to be made and the amount of the payment, is to be included in delegated legislation and the bill includes no limit on the amount of funds that can be appropriated to implement the schemes.

In addition, while any legislative instrument made under these provisions would be subject to review by the Senate Standing Committee on Regulations and Ordinances, the Terms of Reference of that Committee do not encompass the question of whether a Minister has properly exercised a discretion in deciding to make the legislative instrument. It therefore appears that these provisions may make the rights of possible beneficiaries of such schemes unduly dependent upon non-reviewable decisions.

The Committee notes that the Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Bill 2007 contained almost identical provisions, on which the Committee commented in *Alert Digest No. 6 of 2007*. The Minister for Families, Community Services and Indigenous Affairs responded to that comment, saying, among other things, that

It is unlikely that the provisions in the [various] Acts, enabling a scheme to be made, will ever be used. This is consistent with the fact that the primary one-off payment provisions were intended to cover all the known situations in which payments should be made. A scheme would be made only to cover

unusual and unforeseen situations that come within the spirit of the one-off payment measures but are not strictly covered by the primary legislation. Clearly, it would be impractical to include such situations in primary legislation.

Similarly, and given the very slight use made of the scheme-enabling provisions in the past, and the fact that any future use is unlikely and would be small in scale, it is not considered necessary to provide for any funding limits and formal review of any decision to make a scheme. The special (standing) appropriation mechanism is appropriate to fund any such payments, consistent with the appropriation mechanism for one-off payments under the primary legislation and for payments generally under the family assistance law, social security law and *Veterans' Entitlements Act 1986*.

The tabling and disallowance process for any schemes made would give sufficient opportunity to address any issues arising.

The Committee thanked the Minister for that response, which addressed the Committee's concerns, and noted that 'it would have been helpful if [that] information had been included in the explanatory memorandum.' The explanatory memorandum to the 2008 bill (pages 10-11) gives an explanation of the current provisions which is identical to that provided by the former Minister to the Committee in 2007.

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

## **Tax Laws Amendment (2008 Measures No. 3) Bill 2008**

Introduced into the House of Representatives on 29 May 2008

Portfolio: Treasury

### **Background**

This bill amends the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to implement a range of changes to Australia's tax law.

Schedule 1 amends the *Income Tax Assessment Act 1997* to restore the original tax treatment of rights issued by companies to shareholders to acquire additional shares. The amendments aim to overcome the impact of the High Court of Australia's decision in *Commissioner of Taxation v McNeil*.

Schedule 2 amends the *Taxation Administration Act 1953* to correct deficiencies in the goods and services tax refund restriction provisions and in the four-year time limit on indirect tax and fuel tax credit related liabilities and entitlements to refunds related to indirect tax and fuel tax credits.

Schedule 3 amends the *Income Tax Assessment Act 1997* to exempt rent assistance paid to Austudy recipients (in the 2007-08 income year and later years) from income tax.

Schedule 4 amends the *Income Tax Assessment Act 1997* to exempt the Carer Adjustment Payment (paid in the 2007-08 income year and later income years) from income tax.

The bill also contains application and transitional provisions.

### **Retrospective application**

#### **Schedule 1, item 9**

Item 9 of Schedule 1 provides that the amendments made by that Schedule apply to rights issued to shareholders and unitholders on or after 1 July 2001.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this instance, however, the Committee notes from the explanatory memorandum that the ‘retrospective application of these amendments will not disadvantage taxpayers.’

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

## Tax Laws Amendment (Budget Measures) Bill 2008

Introduced into the House of Representatives on 27 May 2008

Portfolio: Treasury

### Background

This bill amends the *Fringe Benefits Tax Assessment Act 1986*, the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to implement measures announced in the 2008-09 Budget. The amendments:

- ensure that food or drink provided as part of a salary sacrifice arrangement is excluded from the Fringe Benefits Tax (FBT) exemption that applies to property consumed on an employer's premises;
- restrict the FBT exemption for eligible work-related items to items that are used primarily for work-related purposes and limits the exemption to one item per employee per FBT year, unless the item is a replacement item;
- provide that an employee who wishes to be assessed on discounts on shares or rights received in the year of acquisition must make the election in the income tax return for the income year in which the shares or rights are acquired;
- ensure that a trustee or beneficiary of an employee share trust is not subject to capital gains tax where an employee who exercises employee share scheme rights becomes absolutely entitled to the shares in the trust; and
- increase the period over which taxpayers write off for tax purposes depreciable in-house software, from 2½ years to four years.

The bill also contains application and transitional provisions.

## **Retrospective application Schedules 1 and 2**

Most of the substantive amendments made by this bill will apply from 7.30pm on 13 May 2008, and therefore, to some extent, retrospectively. As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

The Committee will not generally comment adversely, however, where the bill implements a tax or revenue measure in respect of which the relevant Minister has published a date from which the measure is to apply, the publication took place prior to the date of application, and the legislation is introduced into the parliament within six months. This is the case in respect of the current bill, which implements measures announced in the 2008-09 Budget.

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

## Tax Laws Amendment (Luxury Car Tax) Bill 2008

Introduced into the House of Representatives on 26 May 2008

Portfolio: Treasury

### Background

Part of a package of four bills, this bill amends the *A New Tax System (Luxury Car Tax) Act 1999* to insert, into several sections of the Act, a definition of ‘rate’ – being the rate applicable under the *A New Tax System (Luxury Car Imposition—General) Act 1999*; or the *A New Tax System (Luxury Car Imposition—Customs) Act 1999* or the *A New Tax System (Luxury Car Imposition—Excise) Act 1999*.

*The Committee has no comment on this bill.*



## **Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2008**

Introduced into the House of Representatives on 27 May 2008

Portfolio: Treasury

### **Background**

Introduced with the Tax Laws Amendment (Medicare Levy Surcharge Thresholds) Bill 2008, this bill amends the *A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999* and the *Medicare Levy Act 1986* to:

- increase the Medicare levy low-income thresholds for individuals and families and the dependent child/student component of the family threshold, in line with movements in the consumer price index; and
- increase the Medicare levy low-income threshold for pensioners below age pension age so that they do not have a Medicare levy liability where they do not have an income tax liability.

The increased thresholds are to apply from the 2007-08 year of income and later years of income.

The bill also contains application provisions.

*The Committee has no comment on this bill.*

## **Tax Laws Amendment (Medicare Levy Surcharge Thresholds) Bill 2008**

Introduced into the House of Representatives on 27 May 2008

Portfolio: Treasury

### **Background**

Introduced with the Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2008, this bill amends the *A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999* and the *Medicare Levy Act 1986* to:

- increase the Medicare levy surcharge threshold for individuals from \$50,000 to \$100,000; and
- increase the Medicare levy surcharge threshold for families from \$100,000 to \$150,000.

The thresholds are to apply from the 2008-09 year of income and later years of income.

The bill also contains application provisions.

*The Committee has no comment on this bill.*

## **Unit Pricing (Easy comparison of grocery prices) Bill 2008**

Introduced into the Senate on 15 May 2008

By Senator Fielding

### **Background**

This bill amends the *National Measurement Act 1960* to introduce a compulsory comparative pricing system (also known as unit pricing) for all products sold in retail grocery stores. The bill also:

- requires retailers to prominently display posters and pamphlets containing information about unit pricing and how it can be used by consumers;
- requires retailers to display both the price and unit price for specified grocery items;
- establishes an enforcement regime, including providing for the appointment of unit pricing inspectors and detailing their powers; and
- provides for civil and criminal penalties and infringement notice penalties for breaches of the Act.

### **Explanatory memorandum**

The Committee notes that this bill, introduced as a private Senator'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 an explanation of the intent and operation of the proposed amendments, preferably in the form of an explanatory memorandum. 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 case, the Committee notes that the second reading speech provides some explanation of the intent and operation of the proposed amendments.

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 assist Senators and Members in preparing explanatory memoranda.

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

## **Commencement on Proclamation Schedule 1**

Item 2 in the table to subclause 2(1) provides that Schedule 1 shall commence on Proclamation, but that it must commence 12 months after Assent in any event.

The Committee will generally not comment where a bill specifies a period of delayed commencement of six months or less. Where the delay is longer, the Committee expects that the explanatory memorandum to the bill will provide an explanation. This is consistent with Paragraph 19 of Drafting Direction No. 1.3, which states that 'if the Specified period option is chosen, the period should generally not be longer than 6 months. A longer period should be explained in the Explanatory Memorandum'.

Unfortunately, in the absence of an explanatory memorandum, there is no explanation for this extended delay in commencement. The Committee therefore **seeks the Senator's advice** regarding the reasons for this commencement provision.

*Pending the Senator'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.*

**Legislative Instruments Act—declarations**  
**Schedule 1, item 2**

Proposed new subsection 18ZZU(5) of the *National Measurement Act 1960*, to be inserted by item 2 of Schedule 1, provides that a remedial direction, which may be given by the Secretary of the Department administering this provision, is not a legislative instrument. In the absence of an explanatory memorandum, it is not clear to the Committee whether this provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt the remedial direction from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

The Committee **seeks the advice of the Senator** whether this provision is declaratory in nature or provides for a substantive exemption. If it provides for a substantive exemption, the Committee **seeks the Senator's advice** about why an exemption is considered appropriate.

*Pending the Senator'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.*

## Wheat Export Marketing Bill 2008

Introduced into the House of Representatives on 29 May 2008

Portfolio: Agriculture, Fisheries and Forestry

### Background

Introduced with the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008, this bill establishes a system for regulating the export of bulk wheat. The bill:

- establishes a new industry regulator, Wheat Exports Australia (WEA), which will control bulk wheat exports by managing an export accreditation scheme, and sets out the functions, powers and membership of WEA;
- authorises WEA to formulate a 'wheat export accreditation scheme', by legislative instrument, which provides for the accreditation of companies as accredited wheat exporters;
- establishes criteria for the accreditation of companies under the scheme, conditions of accreditation, cancellation and surrender of accreditation, and reporting requirements;
- provides for an internal review of decisions made by the WEA in respect of the accreditation scheme, and for review by the Administrative Appeals Tribunal;
- provides for WEA to maintain a register of accredited wheat exporters, which is available for inspection on the internet;
- provides WEA with information gathering powers and the power to order an external audit of an accredited wheat exporter;
- establishes a WEA Special Account for the purposes of the *Financial Management and Accountability Act 1997*;
- establishes a civil penalty regime for breaches of the Act; and
- provides for the Productivity Commission to begin to conduct a review of the Act and the accreditation scheme before 1 January 2011.

### **Setting the rate of a fee by regulation** **Subclause 10(1) and paragraph 69(2)(c)**

Subclause 10(1) provides that ‘The wheat export accreditation scheme may provide that an application under the scheme must be accompanied by the fee (if any) specified in the scheme.’ Subclause 8(1) provides that the WEA may formulate the wheat export accreditation scheme by legislative instrument. As such, the combined effect of these subclauses is that a fee may be set by delegated legislation. Similarly, paragraph 69(2)(c) provides that an application for reconsideration of decisions ‘must be accompanied by the fee (if any) specified in the legislative instrument made by WEA.’

The Committee has consistently drawn attention to legislation that provides for the rate of a fee or levy to be set by regulation. Where the rate of a fee is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. In this case, the Committee notes that subclause 10(2) provides that ‘a fee under subsection (1) must not be such as to amount to taxation’ and subclause 69(5) also provides that a fee specified under [paragraph 69(2)(c)] must not be such as to amount to taxation’, thus implying a limit on the amount of the fees. The Committee further notes that the explanatory memorandum to the bill makes it clear that such fees ‘must be charged on a cost recovery basis...’.

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

### **Standing (special) appropriation** **Clause 58**

Subclause 58 establishes the Wheat Exports Australia Special Account. If an Act establishes a Special Account and identifies the purposes of the account then, by virtue of section 21 of the *Financial Management and Accountability Act 1997*, the consolidated revenue fund is appropriated for those purposes. This proposed new section is, therefore, establishing a standing appropriation.

In its *Fourteenth Report of 2005*, the Committee stated that:

*The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.*

The Committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the Committee notes that the explanatory memorandum (page 38) states that 'a special account is desired so that revenue raised from the Wheat Export Charge and from application fees will be clearly identifiable to the wheat industry.

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



## **Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008**

Introduced into the House of Representatives on 29 May 2008  
Portfolio: Agriculture, Fisheries and Forestry

### **Background**

Introduced with the Wheat Export Marketing Bill 2008, this bill repeals the *Wheat Marketing Act 1989* and makes consequential amendments to the *Criminal Code Act 1995*, the Customs (Prohibited Exports) Regulations 1958, the Financial Management and Accountability Regulations 1997, the *Freedom of Information Act 1982*, the *Primary Industries and Energy Research and Development Act 1989* and the *Primary Industries Levies and Charges Collection Act 1991*, to facilitate the effective operation of the Wheat Export Marketing Bill 2008.

The bill also contains transitional provisions.

*The Committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Tax Laws Amendment (2008 Measures No. 2) Bill 2008**

On 14 May 2008, the House of Representatives agreed to six amendments to this bill. Amendments 2 to 6 added schedules 7 to 11 to the bill, which were previously Schedules 2 to 6 to the Tax Laws Amendment (2008 Measures No. 1) Bill 2008. Amendment 1 amended the commencement information table at clause 2 of the bill, incorporating commencement information for new schedules 7 to 11, which is identical to that provided for the equivalent schedules in the Tax Laws Amendment (2008 Measures No. 1) Bill 2008.

The Committee commented on the Tax Laws Amendment (2008 Measures No. 1) Bill 2008 in its *Alert Digest No. 1 of 2008*.

### **Telecommunications (Interception and Access) Amendment Bill 2008**

On 14 May 2008, the Senate agreed to twenty-one amendments to the bill, none of which fall within the Committee's terms of reference.

### **Telecommunications Legislation Amendment (National Broadband Network) Bill 2008**

On 14 May 2008, the Senate agreed to thirteen Government amendments and sixteen Opposition amendments to the bill. On 15 May 2008, the House of Representatives agreed to eighteen amendments, sixteen of which reversed the Opposition amendments that had been passed by the Senate. On 15 May 2008, the Senate agreed to the eighteen amendments made by the House of Representatives.

### **Non-reviewable decisions**

#### **Proposed new subsection 531G(3A)**

The Committee's comments in *Alert Digest No. 3 of 2008* (pages 51-52), in respect of non-reviewable decisions relating to the disclosure of information under proposed new subsection 531G(2) and limits on the ability of the

Federal Court or the Federal Magistrates Court to order a stay of a decision, apply equally to the use of information under proposed new subsection 531G(3A), which was inserted by one of the government amendments.

**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**

<b>Bill/Act</b>	<b>Section/Subsection</b>	<b>Offence</b>	<b>Penalty</b>
First Home Saver Accounts Bill 2008	Subclauses 77(2) and 78(2)	Failure to provide information	30 penalty units
Unit Pricing (Easy comparison of grocery prices) Bill 2008	Schedule 1, item 2, subsection 18ZZZE(3)	Failure to provide information	200 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 42<sup>nd</sup> Parliament.

### Bills introduced with standing appropriation clauses – 42nd Parliament

*Indicates passed by Senate	Bills and Clauses
	<b>Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008</b> — Schedule 1, item 79, section 94B (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
	<b>Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008</b> — Schedule 1, item 1
	<b>Defence Home Ownership Assistance Scheme Bill 2008</b> — Clause 84
	<b>Dental Benefits Bill 2008</b> – Clause 65
	<b>Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008</b> —Item 29.
	<b>Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008</b> — Schedule 2, item 1, subclauses 1(4) and 2(4) and Schedule 4, subclause 1(4)
	<b>Wheat Export Marketing Bill 2008</b> — clause 58 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )

## STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2007/2008

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
<b>Bills dealt with in 2007</b>							
Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures Bill 2007	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007	8(8.8.07)	21.6.07	13.9.07	Treasurer	9.8.07	20.9.07	1(12.3.08)
Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007	8(8.8.07)	21.6.07	13.9.07	Treasurer	9.8.07	19.9.07	1(12.3.08)
National Greenhouse and Energy Reporting Bill 2007	11(12.9.07)	15.8.07	18.9.07	Environment and Water Resources	13.9.07	2.10.07	1(12.3.08)
<i>Northern Territory National Emergency Response Act 2007</i>	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
<i>Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007</i>	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
<i>Water Act 2007</i>	10(15.8.07)	8.8.07	15.8.07	Environment and Water Resources	16.8.07	23.11.07	1(12.3.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
<b>Bills introduced 2008</b>							
<i>Aged Cared Amendment (2008 Measures No. 1) Act 2008</i>	1(12.3.08)	13.2.08	14.2.08	Health and Ageing	13.3.08		
<i>Australian Crime Commission Amendment Act 2007</i>	3(14.5.08)	19.9.07	18.9.07	Home Affairs	15.5.08		
Australian Energy Market Amendment (Minor Amendments) Bill 2008	3(14.5.08)	20.3.08		Resources, Energy and Tourism	15.5.08	28.5.08	4(4.6.08)
Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008	3(14.5.08)	20.3.08		Infrastructure, Transport, Regional Development and Local Government	15.5.08		
Communications Legislation Amendment (Miscellaneous Measures) Bill 2008	2(19.3.08)	17.3.08	12.3.08	Broadband, Communications and the Digital Economy	20.3.08	13.5.08	3(14.5.08)
Customs Amendment (Strengthening Border Controls) Bill 2008	3(14.5.08)	20.3.08		Home Affairs	15.5.08		
Customs Legislation Amendment (Modernising) Bill 2008	3(14.5.08)	20.3.08		Home Affairs	15.5.08		
Drink Container Recycling Bill 2008	2(19.3.08)		13.3.08	Senator Fielding			
Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008	1(12.3.08)	11.3.08	13.2.08	Treasury	13.3.08	18.3.08	2(19.3.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority And Other Matters) Bill 2008	3(14.5.08)	20.3.08		Agriculture, Fisheries and Forestry	15.5.08	28.5.08	4(4.6.08)
Horse Disease Response Levy Bill 2008	1(12.3.08)	21.2.08		Agriculture, Fisheries and Forestry	13.3.08		
Horse Disease Response Levy Collection Bill 2008	1(12.3.08)	21.2.08		Agriculture, Fisheries and Forestry	13.3.08		
Independent Reviewer of Terrorism Laws Bill 2008	3(14.5.08)	17.3.08		Mr Georgiou MP	15.5.08	26.5.08	4(4.6.08)
Infrastructure Australia Bill 2008	1(12.3.08)	21.2.08	18.3.08	Infrastructure, Transport, Regional Development and Local Government	13.3.08	18.3.08	2(19.3.08)
National Commissioner for Children Bill 2008	3(14.5.08)		18.3.08	Senator Bartlett	15.5.08		
Protection of the Sea (Civil Liability For Bunker Oil Pollution Damage) Bill 2008	3(14.5.08)	20.3.08		Infrastructure, Transport, Regional Development and Local Government	15.5.08		
Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008	3(14.5.08)	19.3.08		Veterans' Affairs	15.5.08		
<i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008</i>	1(12.3.08)	13.2.08	17.3.08	Employment and Workplace Relations	13.3.08 20.3.08	18.3.08 22.4.08	2(19.3.08) 3(14.5.08)



