

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



Alert Digest

No. 1 of 2009

4 February 2009

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Members of the Committee

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator D Cameron

Senator J Collins

Senator R Siewert

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

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Appropriation Bill (No. 3) 2008-2009

Introduced into the House of Representatives on 4 December 2008
Portfolio: Finance and Deregulation

Background

This bill seeks appropriation authority from the Parliament for the additional expenditure of \$2.053 billion from the Consolidated Revenue Fund to meet payments (that have arisen since the last Budget) for the ordinary annual services of the Federal Government for the year ending 30 June 2009.

The Committee has no comment on this bill.

Appropriation Bill (No. 4) 2008-2009

Introduced into the House of Representatives on 4 December 2008
Portfolio: Finance and Deregulation

Background

This bill seeks appropriation authority from the Parliament for the additional expenditure of \$1.041 billion from the Consolidated Revenue Fund, to provide additional funding to agencies for:

- expenses in relation to grants to the states under section 96 of the Constitution and for payments to the Northern Territory, the Australian Capital Territory and local government authorities; and
- non-operating purposes, such as equity injections and loans.

The Committee has no comment on this bill.

Auditor-General Amendment Bill 2008

Introduced into the Senate on 3 December 2008

Portfolio: Cabinet Secretary

Background

This bill amends the *Auditor-General Act 1997* to implement certain recommendations of the Inquiry into the Auditor-General Act by the Parliamentary Joint Committee of Public Accounts and Audit (Report 386) in 2001.

The bill makes minor amendments to enhance the operation of the Auditor-General Act. In particular, the bill:

- clarifies and extends the distribution of performance audit reports and makes provision for the inclusion of any comments on proposed reports in final reports;
- clarifies the circumstances in which audit information made available to entities and other parties during the course of a performance audit may be disclosed;
- clarifies the powers of the Auditor-General when sensitive information, the disclosure of which would be contrary to the public interest, is not to be included in a public report;
- requires the Auditor-General to table a copy of a performance audit report in each House of the Parliament and to give a copy to the responsible Minister;
- requires the Auditor-General to give a copy of a performance audit report to the chief executive of an agency, or an officer of a Commonwealth authority, or a senior manager of a company that is the subject of the report, and also allows the Auditor-General to provide a copy to any person who has a special interest in a report;

- updates penalty provisions in the Auditor-General Act in accordance with current criminal law policy; and
- corrects errors in provisions relating to the omission of information from reports on public interest grounds.

The bill also contains application provisions.

The Committee has no comment on this bill.

Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill amends the *Aviation Transport Security Act 2004*, the *Civil Aviation Act 1988* and the *Transport Safety Investigation Act 2003* to further strengthen Australia's aviation security and safety.

The bill amends the *Aviation Transport Security Act 2004* to:

- broaden the existing information collection power under that Act so that the Secretary of the Department can require aviation industry participants to provide aviation security information if the Secretary believes, on reasonable grounds, that a participant has such information (and provides for penalties for failure to provide such information); and
- allow the Secretary to delegate his/her powers and functions under that Act to another agency head, where that other agency's functions and responsibilities relate to national security matters, and allows the agency head to sub-delegate these powers and functions to a Senior Executive Service employee, or acting Senior Executive Service employee of the relevant agency.

The bill amends the *Civil Aviation Act 1998* to allow for copying and disclosure of aircraft Cockpit Voice Recorder information for testing and maintenance purposes, subject to certain conditions.

The bill amends the *Transport Safety Investigation Act 2003* to:

- provide changes to penalties for offences for failing to report prescribed aviation, marine and rail accidents/incidents in accordance with Part 3 of that Act; and

- allows the Executive Director of Transport Safety Investigation to require further information from the industry in relation to transport safety matters after receiving an initial report.

The bill also contains application and savings provisions.

**Abrogation of the privilege against self-incrimination
Schedule 1, item 7, new subsection 112(1)**

Proposed new subsection 112(1) of the *Aviation Transport Security Act 2004*, to be inserted by item 7 of Schedule 1, would abrogate the privilege against self-incrimination for a person required to provide aviation security information under new section 111 of that Act. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation that interferes with this common law privilege trespasses on personal rights and liberties.

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

In this case, the Committee notes that proposed new subsection 112(2) limits the circumstances in which information so provided is admissible in evidence in proceedings against the affected (natural) person: such information; the giving of the information; and any information, document or thing obtained as a direct or indirect consequence of giving the information are not admissible in evidence against the person in a criminal proceeding, or any other proceeding for the recovery of a penalty (other than a proceeding under section 137.1 or 137.2 of the *Criminal Code* that relates to the giving of the information).

The Committee therefore accepts that this provision strikes a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

**Regulations – incorporating material as in force from time to time
Schedule 1, item 13, new subsection 3(2)**

Proposed new subsection 3(2) of the *Transport Safety Investigation Act 2003*, to be inserted by item 13 of Schedule 1, would permit regulations made for the purposes of the definition of ‘immediately reportable matter’ or ‘routinely reportable matter’ to prescribe the matter ‘by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force from time to time’. The provision, therefore, seeks to delegate this aspect of legislative power.

The Committee notes that the explanatory memorandum states (at paragraph 48) that, in providing the definitions of the above matters in regulations, ‘it is necessary to refer to other legislative instruments and industry manuals and standards which define certain technical terms’, and that, if those other documents are changed, the regulations ought to be amended to reflect those changes.

However, it appears (judging by the example given in paragraph 49 of the explanatory memorandum) that such changes do not often occur. The Committee **seeks the Minister’s advice** as to whether more information could be provided about the extent of the difficulty which the Transport Safety Investigation Act poses in its current form in relation to these matters; the rationale for why such a delegation of legislative power might be regarded as appropriate in these circumstances; and whether some limit might be included in the bill as to the scope of matters which may be applied, adopted or incorporated in the regulations.

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

Corporations Amendment (No. 1) Bill 2008

Introduced into the Senate on 3 December 2008

Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* to fulfil a requirement under the Australian and New Zealand Governments' Memorandum of Understanding on Business Law Coordination. In so doing, the bill represents a further incremental step towards achieving the policy goal of a single trans-Tasman economic market based on common regulatory frameworks.

The bill provides a mechanism for automatically recognising, in Australia, the disqualifications from managing corporations that occur in foreign jurisdictions. In addition, the bill extends the power of Australian courts to disqualify people from managing corporations. Initially, mutual recognition of disqualifications will extend only to New Zealand; however, the bill allows for other jurisdictions to be added at a later date.

The bill also contains application, consequential and transitional provisions.

The Committee has no comment on this bill.

Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* and the *Financial Transaction Reports Act 1988* to ensure that the Australian Customs Service can effectively perform its operational law enforcement and regulatory roles/functions.

Schedule 1 amends arrival reporting requirements and stores/prohibited goods reporting requirements to also exclude Saturdays from the reporting period.

Schedule 2 requires an infringement notice to state that if a person pays to the CEO the penalty specified in the notice and – in the case of an alleged offence against section 243T of the Customs Act – any unpaid duty or any unrepaid refund or drawback of duty within 28 days of service of the notice, the person cannot be prosecuted for the alleged offence and will not be regarded as having been convicted of the offence.

Schedule 3 provides an exception to the offence of failing to make a cargo report.

Schedule 4 inserts new provisions, including offences, to deal with missing goods and goods delivered into home consumption without authority.

Schedule 5 harmonises the boarding powers with the United Nations Convention of the Law of the Sea.

Schedule 6 amends the impending arrival reporting requirements in relation to pleasure craft.

Schedule 7 clarifies the types of devices that can be used to stop or impede a ship.

Schedule 8 inserts a new circumstance in which the commander of a Commonwealth aircraft can request the pilot of another aircraft to land.

Schedule 9 extends the regime for the storage or taking into custody of prohibited weapons to all prohibited imports; and extends the power to seize goods without a warrant to 'unaccounted for' goods on board a ship.

Schedule 10 provides for arrest powers in the Customs Act to be consistent with those currently contained in the *Crimes Act 1914*.

Schedule 11 makes a technical amendment to the matters that must be included in a search or seizure warrant.

Schedule 12 inserts a new offence for obstructing or interfering with Customs equipment.

Schedule 13 extends the power to moor a Customs vessel to man-made structures.

Schedule 14 requires the owner or operator of a port or port facility to facilitate the boarding of Customs officials to conduct Customs and Immigration clearance of the ship and crew, and to verify information by the ship's master or the ship's agent prior to arrival.

Schedule 15 updates the wording in section 58 of the Customs Act.

Schedule 16 extends the circumstances in which Customs officers may enter and remain upon certain areas.

Schedule 17 extends the matters that can be authorised in a search or seizure warrant and the powers that can be exercised by Customs officers and persons assisting when executing a warrant.

The bill also contains application provisions.

Arrest without warrant
Schedule 10, item 2, new section 210

Proposed new section 210 of the *Customs Act 1901*, to be inserted by item 2 of Schedule 10, makes extensive provision for Customs officers and police officers to make arrests without a warrant. The Committee notes that the explanatory memorandum states (at paragraph 161) that the purpose of this amendment is to make the arrest powers in the Customs Act consistent with those contained in the *Crimes Act 1914*. Nevertheless, the Committee **seeks the Minister's clarification** in relation to whether making the arrest powers in the Customs Act consistent with those in the Crimes Act includes any extension of the current powers of Customs officers and, if so, the justification for such an extension.

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

Retrospective application
Schedule 10, subitem 4(3)

Subitem 4(3) of Schedule 10 provides that '(s)ubsections 210(3) and (4) of the *Customs Act 1901* as in force after the commencement of this Schedule apply in relation to a person arrested under section 210 of that Act before the commencement of this Schedule as if he or she had been arrested under that section after that commencement'.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that the explanatory memorandum states (at paragraph 192) that subsection 210(3) relates to the power of a Customs officer to release a person arrested if there are 'no longer reasonable grounds to detain the person'. Therefore, the possible retrospective application of this subsection is clearly beneficial to any person who has been arrested pursuant to it.

However, the explanatory memorandum further notes (at paragraph 192) that subsection 210(4) relates to 'the power to arrest [without a warrant] a person

who is believed to have escaped lawful custody', but gives no explanation for the reason for that new subsection to apply in relation to a person arrested before it has commenced. The Committee **seeks the Minister's advice** as to the reason for this retrospective application.

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.

Defence Legislation (Miscellaneous Amendments) Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Defence

Background

This bill amends the *Geneva Conventions Act 1957*, the *Criminal Code Act 1995*, the *Defence Act 1903* and the *Defence (Special Undertakings) Act 1952* to provide for three separate measures.

First, the bill amends the *Geneva Conventions Act 1957* to incorporate the Third Additional Protocol to the Geneva Conventions which establishes a third universal and distinctive emblem called a 'Red Crystal' for the Red Cross/Red Crescent Movement. The bill also amends the *Criminal Code Act 1995* to ensure that the new Geneva emblem is covered by existing offences relating to the improper use of the emblems of the Geneva Conventions.

Second, the bill amends the *Defence Act 1903* to explicitly enable the making of regulations to cover the provision of medical and dental treatment (including pharmaceuticals) to an Australian Defence Force (ADF) member or cadet, or a member of the family of an ADF member.

Third, the bill amends the *Defence (Special Undertakings) Act 1952* to strengthen the Commonwealth's ability to successfully prosecute existing offences under that Act in relation to the Joint Defence Facility Pine Gap.

The Committee has no comment on this bill.

Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

Introduced into the House of Representatives on 3 December 2008
Portfolio: Attorney-General

Background

This bill amends the *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004* and the *Human Rights and Equal Opportunity Act 1986* to:

- implement recommendations made by the Productivity Commission in 2004;
- implement a recommendation made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in 2007 to remove the ‘dominant purpose’ test from the Age Discrimination Act to prevent discrimination on the basis of a person’s age; and
- improve the general operation of human rights law in Australia.

The bill amends the *Disability Discrimination Act 1992* to:

- introduce an explicit and positive duty to make reasonable adjustments for people with disability;
- make the defence of unjustifiable hardship available in relation to all unlawful discrimination on the ground of disability, except harassment and victimisation;
- clarify matters to be considered when determining unjustifiable hardship;
- clarify that the onus of proving unjustifiable hardship falls on the person claiming it;
- clarify the definition of disability;

- replace the ‘proportionality test’ in the definition of indirect discrimination;
- clarify obligations regarding carers, assistants, assistance animals and disability aids; and
- shift the onus of proving the reasonableness of a requirement or condition in the context of indirect discrimination from the person with disability to the respondent.

The bill amends the *Human Rights and Equal Opportunity Commission Act 1986* to:

- formally change the name of the Human Rights and Equal Opportunity Commission to the Australian Human Rights Commission;
- extend the period within which a person can take a terminated complaint to the Federal or Federal Magistrates Court from 28 days to 60 days; and
- improve the efficiency of the complaints handling process.

The bill also contains application provisions.

Retrospective commencement

Subclause 2(1)

Item 4 in the table to subclause 2(1) provides that items 101 and 102 of Schedule 2 are to commence at the same time as Schedule 5 to the *Workplace Relations Amendment (Work Choices) Act 2005* (27 March 2006). Item 6 in the same table provides that item 106 of Schedule 2 is to commence immediately before the commencement of Schedule 35 to the *Workplace Relations Amendment (Work Choices) (Consequential Amendments) Regulations 2006 (No. 1)*.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. However, in this case the explanatory memorandum explains (at paragraph 6) that ‘(t)hese items together correct an error. There is no impact on any person’s rights or liabilities’.

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

Retrospective application Schedule 3, items 130, 148 and 153

Item 130 of Schedule 3 provides that the amendment made by item 129 ‘applies in relation to complaints made to the [Human Rights] Commission before, on or after the commencement of this Part’. Similarly, item 148 of Schedule 3 provides that the amendment made by item 147 ‘applies in relation to complaints made to the [Human Rights] Commission before, on or after the commencement of this Part’ and item 153 of Schedule 3 provides that the amendment made by item 152 ‘applies in relation to complaints made to the President [of the Human Rights Commission] before, on or after the commencement of this Part’.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that the explanatory memorandum (at paragraphs 157, 164 and 171 respectively) merely repeats the substance of the three items, and does not explain whether the retrospective application of the three sets of amendments will adversely affect any person. Therefore, the Committee **seeks the Minister’s advice** as to the effect of these application provisions.

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.

Employment and Workplace Relations Amendment Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Employment and Workplace Relations

Background

This bill amends the *Safety, Rehabilitation and Compensation Act 1988*, the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Social Security (International Agreements) Act 1999* and the *Social Security Legislation Amendment (2007 Budget Measures for Students) Act 2007* to provide for a range of measures.

The bill amends the *Safety, Rehabilitation and Compensation Act 1988* to bring the federal workers' compensation scheme into line with state workers' compensation schemes by increasing the amount of benefits payable to an employee's dependants in the event of a work-related death.

The bill amends the *Social Security Act 1991* to extend to Sickness Allowance and Parenting Payment (single) the provisions which prevent a person from receiving payment while there is an Assurance of Support in force and the assurer is willing and able to provide support to the person, and it would be reasonable for them to accept that support.

The bill makes minor technical amendments to the *Social Security Act 1991* to:

- ensure that Rent Assistance received by the partners of recipients of Austudy is taken into account in the calculation of the recipient's own Rent Assistance;
- clarify that a partner with a rent-increased benefit includes a partner who is in receipt of a payment under the ABSTUDY scheme which includes an amount of living allowance increased to take account of rent; and
- clarify the method of calculating the amount of youth disability supplement that is to be added to a person's rate of youth allowance.

The bill also makes other minor technical amendments to the *Social Security Act 1991*, the *Social Security (Administration) Act 1991*, the *Social Security (International Agreements) Act 1999* and the *Social Security Legislation Amendment (2007 Budget Measures for Students) Act 2007*.

Retrospective commencement Subclause 2(1)

Item 6 in the table to subclause 2(1) provides that item 42 of Schedule 2 is to commence immediately after the commencement of item 18 of Schedule 2 to the *Social Security Legislation Amendment (2007 Budget Measures for Students) Act 2007*, on 28 September 2007.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that the explanatory memorandum (at page 3) merely repeats the substance of the contents of item 6 in the table, and (at page 14) describes the effect of the amendment to be made by item 42 of Schedule 2. However, in neither place does the explanatory memorandum indicate whether the retrospective commencement will adversely affect any person. Therefore, the Committee **seeks the Minister's advice** as to the effect of this retrospective commencement.

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.

Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Attorney-General

Background

Introduced with the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, this bill amends the *Director of Public Prosecutions Act 1983*, the *Federal Court of Australia Act 1976* and the *Judiciary Act 1903*. The bill will provide a procedural framework to allow the Federal Court to exercise the indictable criminal jurisdiction which it will be given to deal with serious cartel offences if the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 is enacted.

The bill also makes consequential amendments to the *Bankruptcy Act 1966*, the *Crimes Act 1914*, the *Federal Court of Australia Act 1976*, the *Judiciary Act 1903*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Proceeds of Crime Act 2002* and the *Transfer of Prisoners Act 1983*.

The Committee has no comment on this bill.

Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Attorney-General

Background

This bill amends the *Federal Court of Australia Act 1976*, the *International Arbitration Act 1974*, the *Administrative Appeals Tribunal Act 1975*, the *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, the *Native Title Act 1993* and the *Public Order (Protection of Persons and Property) Act 1971* to improve the conduct of business in the federal courts.

Schedule 1 amends the *Federal Court of Australia Act 1976* to provide the Federal Court with the power to refer a proceeding, or one or more questions arising in a proceeding, to a referee for report. Schedule 1 will also allow a single Federal Court judge to make an interlocutory order in the original or appellate jurisdiction of the court in proceedings that would otherwise be required to be heard and determined by a Full Court.

Schedule 2 amends the *International Arbitration Act 1974* to give the Federal Court concurrent jurisdiction with state and territory Supreme Courts for matters arising under Parts III and IV of that Act. Schedule 2 also clarifies the Federal Court's existing jurisdiction for matters arising under Part II of that Act.

Schedule 3 amends the *Federal Court of Australia Act 1976*, the *Family Law Act 1975*, the *Native Title Act 1993* and the *Administrative Appeals Tribunal Act 1975* to remove the current restrictions on Chief Justices and Presidents acquiring an interest in land for the purposes of the *Lands Acquisition Act 1989*. However, the Chief Justices and Presidents will still be required to seek the Attorney-General's approval in order to enter into a contract exceeding \$1 million.

Schedule 4 amends the *Public Order (Protection of Persons and Property) Act 1971* to allow an authorised, non-judicial officer of the Federal Court to

make an order specifying that certain premises are ‘court premises’ for the purposes of that Act.

Schedule 5 amends the binding financial agreement and termination agreement provisions of the *Family Law Act 1975* to relax certain technical requirements that must be strictly satisfied in order for financial and termination agreements to be binding. These amendments respond to concerns about the binding financial agreement provisions of the Family Law Act that have arisen following the decision by the Full Court of the Family Court in *Black v Black* [2008] FamCAFC 7.

The bill also contains application and savings provisions.

The Committee has no comment on this bill.

Foreign Evidence Amendment Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Attorney-General

Background

This bill amends the *Foreign Evidence Act 1994* to streamline the process for adducing business records obtained from a foreign country as evidence in Australian court proceedings. The bill provides that a business record obtained through mutual assistance will be presumed to be admissible in evidence unless the court is satisfied that the business record is not reliable or probative, or is privileged.

The bill also:

- provides that testimony may also be taken under an obligation to tell the truth imposed, whether expressly or implied, by or under a law of the relevant foreign country;
- creates a presumption that the requirements as to the form of the testimony have been met, unless evidence sufficient to raise a doubt is adduced to the contrary;
- clarifies the application of the Foreign Evidence Act to non-conviction based proceeds of crime matters;
- modernises references to audio and video tape;
- gives the court discretion to limit the use that may be made of foreign evidence; and
- removes an anomaly whereby the Attorney-General, in certifying that material has been received in response to a mutual assistance request, must also certify that the material satisfies the requirements for testimony.

The amendments will apply to Commonwealth criminal proceedings, related civil proceedings, and all proceedings under the *Proceeds of Crime Act 2002*

and the *Proceeds of Crime Act 1987*. The amendments could also apply, through regulations, to state and territory criminal proceedings, related civil proceedings specified in regulations, and proceeds of crime proceedings.

The bill also contains application and transitional provisions.

The Committee has no comment on this bill.

Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2008

Introduced into the House of Representatives on 3 December 2008
Portfolio: Home Affairs

Background

This bill amends the *Criminal Code Act 1995*, the *Crimes Act 1914*, the *Privacy Act 1988*, the *Australian Federal Police Act 1979*, the *Director of Public Prosecutions Act 1983*, the *Judiciary Act 1903*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Federal Court of Australia Act 1976*, the *International Criminal Court Act 2002*, the *International Transfer of Prisoners Act 1997*, the *International War Crimes Tribunals Act 1995*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Telecommunications (Interception and Access) Act 1979*, and the *Transfer of Prisoners Act 1983*.

The bill implements the identity crime offences recommended by the Model Criminal Law Officers' Committee (MCLOC) which identified deficiencies in the current law applicable to identity crime. The bill also contains a range of other amendments to clarify and improve the operation of justice legislation in the Commonwealth.

In particular, the bill:

- inserts into the Criminal Code the three offences recommended by the MCLOC which are directed at dealing in identification information, possessing identification information, and possession of equipment to make identification documentation;
- corrects a drafting error in subsection 477.1(5) of the Criminal Code, and repeals section 55D of the *Judiciary Act 1903*;
- amends the definition of 'enforcement body' in the Privacy Act to include the Victorian Office of Police Integrity;

- allows for the delegation of powers and functions to certain persons and provides legal immunity to the Director or a member of staff carrying out functions and duties under the *Director of Public Prosecutions Act 1983*;
- streamlines the processes for alcohol and other drug testing under the *Australian Federal Police Act 1979* and expands the range of conduct for which the Commissioner may make awards;
- improves the operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and establishes a more consistent approach to the restrictions placed on the disclosure of sensitive AUSTRAC information; and
- reframes the administration of justice offences in Part III of the *Crimes Act 1914* to bring them into line with the Criminal Code.

The bill also contains application provisions.

The Committee has no comment on this bill.

Migration Legislation Amendment Bill (No. 2) 2008

Introduced into the Senate on 3 December 2008

Portfolio: Immigration and Citizenship

Background

This bill amends the *Migration Act 1958* to clarify and enhance provisions relating to merits and judicial review of migration decisions.

In particular, the bill:

- clarifies that the Migration Review Tribunal and the Refugee Review Tribunal may seek information from review applicants or third parties, either orally or in writing;
- reinstates effective and uniform time limits for applying for judicial review of migration decisions in the Federal Magistrates Court, the Federal Court and the High Court; and
- limits appeals against judgements by the Federal Magistrates Court and the Federal Court that make an order or refuse to make an order to extend time to apply for judicial review of migration decisions.

The bill also contains application provisions.

The Committee has no comment on this bill.

Saving the Goulburn and Murray Rivers Bill 2008

Introduced into the House of Representatives on 1 December 2008

By Fran Bailey MP

Background

This bill amends the *Water Act 2007* to provide for a national management plan that:

- prevents unauthorised extraction of water from the Murray-Darling Basin by preventing the construction of the north-south pipeline as the means of delivering saved water to Melbourne;
- ensures that Victoria, South Australia and New South Wales comply with obligations to return audited, saved water to the Living Murray Initiative; and
- regulates the usage of this water.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Member's bill, was accompanied only by a statement made on presentation of the bill 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. In this instance, the Committee notes that the accompanying statement provides an explanation of the intent and effect of the bill.

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

Tax Laws Amendment (2008 Measures No. 6) Bill 2008

Introduced into the House of Representatives on 3 December 2008
Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997*, the *Taxation Administration Act 1953*, the *Superannuation Guarantee (Administration) Act 1992*, the *A New Tax System (Goods and Services Tax) Act 1999*, the *Fringe Benefits Tax Assessment Act 1986*, the *Income Tax Assessment Act 1936*, the *Income Tax Rates Act 1986*, the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, the *Tax Laws Amendment (Budget Measures) Act 2008* and the *Pay-roll Tax Act 1941* to implement a range of improvements to Australia's taxation laws.

Schedule 1 amends the capital gains tax (CGT) provisions in the *Income Tax Assessment Act 1997* for corporate restructures to prevent a market value cost base from arising when shares and certain other interests in an entity are acquired by another entity following a scrip for scrip CGT roll-over under an arrangement that is taken to be a restructure (effective 13 May 2008).

Schedule 2 amends the *Taxation Administration Act 1953* to address a number of issues with the assistance in collection provisions to overcome legal and administrative problems associated with deeming foreign tax debts 'never to have been payable' in the event that such debts are removed from the foreign claims register, or otherwise reduced. These amendments will also expand the types of payments that the Commissioner of Taxation can make to the relevant foreign country to include certain funds that the Commissioner recovers in the course of legal proceedings; and will clarify that the role of the foreign claims register is to transform foreign tax debt into Australian tax debts rather than to act as a day-to-day record of the debtor's liability.

Schedule 3 amends the *Superannuation Guarantee (Administration) Act 1992* to vary the period within which an employer can make a superannuation contribution after the due date for a quarter, and still elect to use the late payment offset to reduce their superannuation guarantee charge liability for

the quarter. Schedule 3 also amends the calculation of the general interest charge on an unpaid superannuation guarantee charge where an employer elects to use the late payment offset.

Schedule 4 makes technical corrections and other minor amendments to the taxation laws.

The bill also contains application and transitional provisions.

Retrospective application Schedule 1, item 6

Item 6 of Schedule 1 provides that the amendments proposed in Schedule 1 will apply to arrangements entered into after 7:30pm on 13 May 2008 and, therefore, to some extent retrospectively.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. However, in this case the explanatory memorandum states (at page 3) that the financial impact of the amendments is unquantifiable, and that they are expected to have a low compliance cost impact.

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

Retrospective application Schedule 4, subitem 4(1); items 25, 36 and 44

Subitem 4(1) of Schedule 4 provides that the amendments to be made by items 2 and 3 in relation to fringe benefits tax apply from the year starting on 1 April 2000. Item 25 of Schedule 4 provides that the amendment proposed by item 24 applies 'to CGT events happening after the start of the 2006-07 income year'. Item 36 of Schedule 4 provides that the amendment proposed by item 35 applies 'to assessments for the 2007-08 income year and later income years'. Item 44 of Schedule 4 provides that the amendments proposed

by items 40 to 43 apply ‘to assessments for the 2007-08 income year and later income years’.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. However, the explanatory memorandum notes (at page 5) that the financial impact of these amendments is either unquantifiable, but expected to involve a minimal to small cost to revenue, or will have a nil to minimal cost to revenue. The compliance cost impact of the amendments in Schedule 4 will be nil to low.

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

Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008

Introduced into the House of Representatives on 4 December 2008

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* to introduce a comprehensive framework for the taxation of financial arrangements (TOFA) designed to reduce tax-induced distortions to investment and financing, to facilitate efficient risk management, and to reduce compliance and administration costs. The bill is the final stage of the TOFA reforms which were first announced in the 1992 Budget and have been implemented progressively since 2001.

In particular, the bill:

- establishes criteria that determine how different financial arrangements are assigned to, and treated under, the different tax-timing methods;
- removes the capital/revenue distinction for most financial arrangements by treating the gains and losses on revenue account, except where specific rules apply;
- increases the post-tax efficiency and effectiveness of hedging, and provides for effective and efficient risk management by permitting alignment of character and tax-timing of eligible hedging arrangements;
- reduces the complexity of accruals calculations present in current tax rules on discounted and deferred interest securities, and reduces compliance and administration costs by permitting close alignment between tax and accounting outcomes on an elective basis; and
- allows eligible taxpayers to use results from their financial reports for tax purposes.

The bill also makes consequential amendments to the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997*, the *Taxation Administration Act 1953* and the *New Business Tax System (Taxation of Financial Arrangements) Act (No. 1) 2003*.

The bill also contains application and transitional provisions.

Retrospective commencement and application
Subclause 2(1); Schedule 1, item 114

Item 3 in the table to subclause 2(1) provides that Part 4 of Schedule 1 is to commence immediately after the commencement of the *New Business Tax System (Taxation of Financial Arrangements) Act (No. 1) 2003*, on 17 December 2003. Item 114 of Schedule 1 provides that the amendments to be made by Part 4 of Schedule 1 ‘apply on and after 17 December 2003’.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that the explanatory memorandum, which apparently deals with the changes proposed to be made by Part 4 of Schedule 1 [at paragraphs 11.152-11.161] does not appear to indicate whether this retrospective commencement and application will adversely affect anyone other than the Commonwealth. Therefore, the Committee **seeks the Treasurer’s advice** whether these amendments will have an adverse effect on any individual.

Pending the Treasurer’s advice, the Committee draws Senators’ attention to these 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.

Telecommunications Interception Legislation Amendment Bill (No. 2) 2008

Introduced into the House of Representatives on 3 December 2008
Portfolio: Attorney-General

Background

This bill amends the *Telecommunications (Interception and Access) Act 1979* to facilitate the introduction of the Queensland Public Interest Monitor (PIM) into the national telecommunications interception regime. This will enable Queensland to legislate for the PIM to be given specific oversight functions for the Queensland Police Service and the Queensland Crime and Misconduct Commission, and will allow for those agencies to be declared interception agencies under section 34 of the *Telecommunications Interception and Access Act*.

The bill will allow the PIM to make submissions to the eligible judge or nominated Administrative Appeals Tribunal member considering an application by a Queensland agency for an interception warrant, and to question the agency applying for the warrant or any other party required to give further information on the application. The PIM's power to make submissions will be complemented by a requirement on the decision-maker to consider any view put forward by the PIM in deciding whether or not to issue an interception warrant.

The bill also makes minor and technical amendments to correct an error introduced by the *Telecommunications Interception Legislation Amendment Act 2008*, and to amend certain definitions in the *Telecommunications Interception and Access Act* and the *Surveillance Devices Act 2004*.

The Committee has no comment on this bill.

Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008

Introduced into the Senate on 3 December 2008
Portfolio: Health and Ageing

Background

This bill amends the *Therapeutic Goods Act 1989* to:

- allow the Minister to exempt medical devices from the operation of that Act so that they can be lawfully stockpiled for use in a health emergency;
- reformulate the test of whether a person is a ‘fit and proper person’ to hold a manufacturing licence or a medical device conformity assessment certificate;
- adopt the European Pharmacopoeia and United States Pharmacopeia as additional default standards under the Therapeutic Goods Act;
- provide public access to a much wider range of information held by the Therapeutic Goods Administration;
- clarify the operation of the advertising provisions to ensure that controls over restricted representations and prohibited representations apply to advertisements in all media; and
- amend penalty provisions across the Therapeutic Goods Act to align them with current policy on how these are formulated.

The bill also contains application, savings and transitional provisions.

Delegation of legislative power

Schedule 1, item 2, new subsection 41GS(1)

Proposed new subsection 41GS(1) of the Therapeutic Goods Act, to be inserted by item 2 of Schedule 1, would give the Minister an unfettered

discretion to exempt specified kinds of medical devices from the operation of various parts of the Act. The Minister's exercise of this discretion is limited to the extent that the Minister must be satisfied that it is in the national interest for such an exemption to be made (proposed new subsection 41GS(2)), but there is no forum in which the fact of the Minister's satisfaction as to the national interest can be tested.

The only check on the exercise of the Minister's discretion is that, under proposed new subsection 41GW(2), the Minister must table particulars of an exemption – made to allow medical devices to be supplied because of an actual threat to public health caused by an emergency that has occurred – in both Houses of the Parliament within five sitting days of the exemption being made. In addition, the Secretary must cause a notice setting out the particulars of such an exemption to be published in the Commonwealth Gazette within five working days after the day on which it is made. Therefore, it would appear that proposed new subsection 41GS(1) delegates legislative power to the Minister, while subjecting the exercise of that power to only a limited scrutiny. The Committee **leaves for the Senate as a whole** the question of whether this delegation of legislative power is appropriate, and whether the level of parliamentary scrutiny is sufficient in the circumstances.

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

Legislative Instruments Act—exemption Schedule 1, item 2, new subsection 41GS(6)

Proposed new subsection 41GS(6) of the Therapeutic Goods Act, to be inserted by item 2 of Schedule 1, provides that a Ministerial exemption of specified kinds of medical devices under subsection (1) of that section '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.

In this case, the explanatory memorandum (at page 4) states that the exemption referred to 'is not a legislative instrument within the meaning of the *Legislative Instruments Act 2003*' and that subsection (6) 'explains rather than creates the exemption' from registration on the Federal Register of Legislative Instruments or from parliamentary scrutiny.

The Committee considers that the statement in the explanatory memorandum is open to question, because, for one thing, a Ministerial exemption under new subsection 41GS(1) appears to change the law with respect to the types of medical devices to which it refers; and, in addition, existing Ministerial emergency exemptions for therapeutic goods, which may be made under section 18A, are stated in current subsection 18A(9A) of the Therapeutic Goods Act to be 'disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*' (and therefore subject to parliamentary scrutiny and possible disallowance). Further, the explanatory memorandum notes (at page 1) that the amendments in the bill relating to exemptions for specified kinds of medical devices 'largely mirror the exemption provisions that currently apply to therapeutic goods, other than medical devices'. The Committee, therefore, **seeks the Minister's advice** about whether this apparent inconsistency can be resolved.

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.

Strict liability

Schedule 1, item 35, new subsection 41MNB(6)

Proposed new subsection 41MNB(6) of the Therapeutic Goods Act, to be inserted by item 35 of Schedule 1, provides that an offence against proposed new subsection 41MNB(5) (breaching a condition of an exemption relating to a device) 'is an offence of strict liability'.

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

The Committee notes that the explanatory memorandum, when discussing new section 41MNB as a whole (at pages 7-8), does not refer to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, and seeks to justify the imposition of strict liability in this instance on the ground that it 'will support the integrity of the exemption mechanism by ensuring that persons involved in the storage and supply of these devices comply with the relevant conditions attached to the exemption'.

The Committee does not consider that this is an adequate explanation for the imposition of strict liability in these circumstances and **seeks the Minister's advice** whether the recommendations in the *Guide* were considered in the drafting of this provision, and whether a fuller explanation can be provided as to the reasons why strict liability is considered appropriate in the circumstances.

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.

Legislative Instruments Act—exemption Schedule 2, item 1, new subsection 18A(9A)

Proposed new subsection 18A(9A) of the Therapeutic Goods Act, to be inserted by item 1 of Schedule 2, provides that an emergency Ministerial exemption of specified kinds of therapeutic goods under subsection (1) of that section 'is not a legislative instrument'. The Committee notes that the explanatory memorandum states (at page 10) that the purpose of new subsection 18A(9A) is 'to explain, for the benefit of readers, that an exemption made under subsection (1) is not a legislative instrument. As the exemption is not a legislative instrument within the meaning of the *Legislative Instruments Act 2003*, it is not subject to requirements of that Act such as

registration or parliamentary scrutiny. This subsection explains rather than creates the exemption’.

This statement is open to question, because subsection 18A(9A), as currently in force, provides that an exemption under subsection (1), and a revocation or variation of such an exemption under subsection (8), ‘are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*’. Since the bill seeks to amend only subsection 18A(9A) of the Therapeutic Goods Act, it is difficult to see how an exemption under subsection 18A(1) can change from being a legislative instrument to a non-legislative instrument. The Committee **seeks the Minister’s advice** about whether this apparent inconsistency can be resolved.

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.

Retrospective application

Schedule 3, subitems 23(2), 23(5), 23(6) and 23(9)

Subitems 23(2), 23(5), 23(6) and 23(9) of Schedule 3 apply the amendments of sections 40 and 41, 41EJ, 41ET and subsection 41JA(1C) of the Therapeutic Goods Act, to be made by Schedule 3 to licences granted and certificates issued ‘before, on or after the commencement’ of item 23. The Committee notes that the explanatory memorandum does not indicate whether the retrospective application in these circumstances will adversely affect any person other than the Commonwealth. Therefore, the Committee **seeks the Minister’s advice** as to whether these amendments will have an adverse effect on any individual.

Pending the Minister’s advice, the Committee draws Senators’ attention to these 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.

Delegation of legislative power

Schedule 4, item 14, subparagraph 10(2)(a)(iv)

Subparagraph 10(2)(a)(iv) of the Therapeutic Goods Act, to be amended by item 14 of Schedule 4, will provide that a Ministerial order ‘establishing a standard for therapeutic goods may: (a) be specified by reference to: ... (iv) a monograph in the British Pharmacopoeia, the European Pharmacopoeia or the United States Pharmacopoeia-National Formulary’.

Current section 12 of the Therapeutic Goods Act provides that ‘(s)tandards under section 10 and orders revoking, varying or modifying standards of that kind are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*’ and would now, by virtue of current subparagraph 6(d)(i) of the *Legislative Instruments Act 2003*, be regarded as legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

These two provisions must be read in conjunction with items 1, 4 and 10 of Schedule 4, which provide definitions of, respectively, ‘British Pharmacopoeia’, ‘European Pharmacopoeia’ and ‘United States Pharmacopoeia-National Formulary’. In each case, the definition refers to the publication of each respective Pharmacopoeia as in force immediately before the commencement of the current bill. However, the definitions go on to provide that ‘if additions or amendments of that publication are made after that commencement, or new editions of that publication are published after that commencement, [the relevant publication] includes those additions or amendments, or those new editions, from the effective date’ published by the respective publishers of the Pharmacopoeias.

It therefore appears that the Ministerial order adopts each of the respective Pharmacopoeias as in force from time to time, with the result that the legislative power to make standards for therapeutic goods has been delegated, to some extent, to the British Pharmacopoeia, the European Pharmacopoeia and the United States Pharmacopoeia-National Formulary. However, the Committee **leaves for the Senate as a whole** the question of whether this delegation of legislative power is appropriate in the circumstances.

Excluding merits review

Schedule 4, item 15, new subsection 13(6)

Proposed new subsection 13(6) of the Therapeutic Goods Act, to be inserted by item 15 of Schedule 4, provides that a Ministerial order determining that a particular standard is not applicable to certain goods under proposed new subsection 13(5) 'is not a legislative instrument'. The Committee notes that the explanatory memorandum states (at page 19) that '(a)s the exemption is not a legislative instrument within the meaning of the *Legislative Instruments Act 2003*, it is not subject to requirements of that Act such as registration or Parliamentary scrutiny. This subsection explains rather than creates the exemption'.

Since the Ministerial order is not legislative in character, it may be assumed that the Minister's decision to make the order is an administrative decision. If that is correct, the Committee **seeks the Minister's advice** as to why that decision is not subject to merits review under the *Administrative Appeals Tribunal Act 1975*, when so many other decisions of the Secretary to the Department, and of the Minister, are reviewable under section 60 of the Therapeutic Goods Act.

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

Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Treasury

Background

Introduced with the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008, this bill amends the *Trade Practices Act 1974*, the *Telecommunications (Interception and Access) Act 1979* and the *Proceeds of Crime Act 2002* to establish criminal penalties and parallel civil sanctions for serious cartel conduct.

The bill also:

- provides exemptions from the criminal and parallel civil prohibitions on cartel conduct in certain circumstances;
- enables individuals to be held directly liable for criminal and civil prohibitions in relation to cartel conduct in certain circumstances;
- incorporates statutory bars in the Trade Practices Act to protect against double jeopardy;
- modifies existing investigatory powers and remedies to apply them to the criminal offences and parallel civil penalty prohibitions;
- enables the Australian Consumer and Competition Commission (ACCC) to use intercepted material in relation to cartel investigations;
- provides for the protection of cartel information provided by whistleblowers to the ACCC under the ACCC's leniency and immunity policies;
- provides that a breach of the proposed cartel offences will fall under Commonwealth legislation dealing with the proceeds of crime;

- ensures that the search, seizure and information gathering provisions in the Trade Practices Act are better aligned with equivalent provisions in the *Crimes Act 1914*; and
- provides the Federal Court, together with the state and territory Supreme Courts, jurisdiction to deal with the new offences.

The bill also makes minor and technical amendments to the Trade Practices Act and contains application, consequential and transitional provisions.

**Abrogation of the privilege against exposure to a penalty
Schedule 2, item 5, new section 86F**

Proposed new section 86F of the Trade Practices Act, to be inserted by item 5 of Schedule 2, would abrogate the privilege against being exposed to the penalty of being disqualified from managing a corporation for a person required to answer a question, produce a document or do any other act in civil or criminal proceedings under, or arising out of, the Trade Practices Act. The explanatory memorandum does not appear to refer to this particular amendment. The Committee **seeks the Treasurer's advice** as to the reasons for the abrogation of the privilege against exposure to a penalty 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.

**Abrogation of the privilege against exposure to a penalty
Schedule 2, item 30, subsection 154R(4)**

Subsection 154R(4) of the Trade Practices Act is to be amended by item 30 of Schedule 2, so that any person who is required to answer a question or produce evidential material during the execution of a search warrant can no longer claim the privilege against exposure to a penalty in any subsequent civil proceedings, and can claim that privilege only in subsequent criminal

proceedings. The explanatory memorandum states (at paragraph 5.33) that this amendment is ‘consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*’. The Committee notes that statement is not incorrect, in that the *Guide* accepts (at page 104 of the 2007 Interim New Edition) that legislation governing the ACCC and other corporate enforcement agencies may need to abrogate the privilege against self-incrimination (only) and only in respect of criminal proceedings. The *Guide* does not mention the privilege against exposure to a penalty. However, while the Committee notes the extension of the abrogation of the privilege against exposure to a penalty in subsection 154R(4), the Committee makes no further comment on it.

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

Abrogation of the privilege against exposure to a penalty Schedule 2, items 43 to 47, subsection 155(7)

Subsection 155(7) of the Trade Practices Act is to be amended by items 43 to 47 of Schedule 2, with the effect that the abrogation of the privilege against self-incrimination is extended to also abrogate the privilege against being exposed to a penalty. The subsection is further amended so as to no longer provide any immunity for any document produced in pursuance of section 155, although it continues to provide ‘use immunity’ to the information so provided.

The Committee notes that the explanatory memorandum (at paragraphs 8.9 to 8.12, and at paragraph 8.13) explains the effect of the relevant items in Schedule 2, but does not provide a reason for either the abrogation of the privilege against being exposed to a penalty, nor for the removal of the immunity which currently attaches to the production of a document under section 155. The Committee **seeks the Treasurer’s advice** as to these reasons.

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.

**Abrogation of the privilege against exposure to a penalty
Clarification of statement in explanatory memorandum
Schedule 2, items 48 and 49, section 159**

Section 159 of the Trade Practices Act is to be amended by items 48 and 49 of Schedule 2, with the effect that any person appearing before the ACCC who is required to give evidence or produce a document can no longer claim the privilege against exposure to a penalty in any subsequent civil proceedings, and can claim that privilege only in subsequent criminal proceedings.

The explanatory memorandum states (at paragraph 8.15) that these amendments will 'align [section 159] with Commonwealth policy relating to other corporate enforcement agencies (such as the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority), and with current section 154R' of the Trade Practices Act.

Similar to its comments in relation to subsection 154R(4) (above), the Committee notes that the first part of this statement is correct, in that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* accepts (at page 104 of the 2007 Interim New Edition) that legislation governing the ACCC and other corporate enforcement agencies may need to abrogate the privilege against self-incrimination. The Committee also notes that the *Guide* says nothing about abrogating the privilege against exposure to a penalty. However, while noting the extension of the abrogation of the privilege against exposure to a penalty in section 159, the Committee makes no further comment on it.

In relation to paragraph 8.15 of the explanatory memorandum, the Committee suggests that it should refer to 'section 154R of the *Trade Practices Act 1974* as proposed to be amended by item 30 of Schedule 2', rather than to 'current section 154R'. The Committee **brings this matter to the Treasurer's attention** and **seeks his advice** as to whether it might be possible to amend the explanatory memorandum.

Uranium Royalty (Northern Territory) Bill 2008

Introduced into the House of Representatives on 3 December 2008

Portfolio: Resources and Energy

Background

This bill seeks to apply, as Commonwealth law, the existing profits-based mineral royalty regime under the Northern Territory's *Mineral Royalty Act 1982* to new projects in the Northern Territory containing designated substances, including uranium, on Aboriginal land (as defined by the *Aboriginal Land Rights (Northern Territory) Act 1976*) and non-Aboriginal land. The Northern Territory Government will administer the royalty regime on behalf of the Commonwealth, retain the royalties collected, and repay any overpayment of royalties on behalf of the Commonwealth.

The bill excludes the application of certain Commonwealth laws, makes certain modifications to the application of the Mineral Royalty Act as a Commonwealth law and applies other relevant Northern Territory laws to:

- keep the administration of the bill as consistent as possible with the administration of the Mineral Royalty Act;
- restrict the amount of additional burden on Northern Territory officials to administer the two pieces of legislation; and
- limit any increase in regulatory burden on industry in complying with two sets of regulation for separate projects and/or for poly-metallic projects containing designated substances.

The bill also:

- requires the Commonwealth to make payments of amounts equivalent to royalties to the Aboriginal Benefits Account where mining occurs on Aboriginal land, in addition to the payment to the Northern Territory of amounts equivalent to the royalties collected under the bill;

- requires administrative arrangements to be *Gazetted* following agreement between the Minister for Resources and Energy and the Northern Territory Treasurer; and
- ensures consistency of process between action arising from offences under the bill and action arising from offences under the Mineral Royalty Act.

Standing appropriation

Clause 18

Clause 18 provides that any money payable by the Commonwealth under the Northern Territory's Mineral Royalty Act (which applies, by virtue of this measure, as a law of the Commonwealth), or under the provisions of the bill, is to be appropriated from the Consolidated Revenue Fund.

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.

In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see:

- some limitation placed on the amount of funds that may be so appropriated; and
- a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to the Parliament.

In this instance, the Committee notes that there is no limit as to time or amount specified in clause 18. However, the explanatory memorandum notes (at paragraph 56) that the payments referred to in clause 18 'will be revenue neutral for the Commonwealth as the Northern Territory is required by

subclause 17(2) to repay overpayments into the [Consolidated] Revenue Fund’.

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

Water Amendment (Saving the Goulburn and Murray Rivers) Bill 2008

Introduced into the Senate on 3 December 2008

By Senator Birmingham

Background

This bill amends the *Water Act 2007* to provide for a national management plan that:

- prevents unauthorised extraction of water from the Murray-Darling Basin by preventing the construction of the north-south pipeline as the means of delivering saved water to Melbourne;
- ensures that Victoria, South Australia and New South Wales comply with obligations to return audited, saved water to the Living Murray Initiative; and
- regulates the usage of this water.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Member's bill, was accompanied only by a statement made on presentation of the bill 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. In this instance, the Committee notes that the accompanying statement provides an explanation of the intent and effect of the bill.

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

COMMENTARY ON AMENDMENTS TO BILLS

Broadcasting Legislation Amendment (Digital Television Switch-over) Bill 2008

On 3 December 2008, the Senate agreed to three Opposition amendments to the bill, none of which fall within the Committee's terms of reference. On 4 December 2008, the House of Representatives agreed to seven Government amendments, three of which reversed the Opposition amendments agreed to by the Senate the previous day.

On 5 December 2008 (am), the Senate agreed to two of the seven amendments made by the House of Representatives; disagreed to the remaining five amendments made by the House of Representatives; and agreed to a further consequential amendment. On 5 December (am), the House of Representatives agreed not to insist on its five amendments disagreed to by the Senate, and agreed to the consequential amendment made by the Senate.

COAG Reform Fund Bill 2008

On 1 December 2008, the House of Representatives agreed to one amendment to the bill, which does not fall within the Committee's terms of reference. On 4 December 2008, the Senate agreed to the amendment made by the House of Representatives.

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

On 1 December 2008, the Senate agreed to eight amendments to the bill, none of which fall within the Committee's terms of reference. On 2 December 2008, the House of Representatives agreed to the amendments made by the Senate.

Nation-building Funds Bill 2008

On 4 December 2008, the Senate agreed to 78 amendments to the bill. On 4 December 2008, the House of Representatives disagreed to the amendments. On 5 December 2008 (am), the Senate agreed not to insist on its amendments.

Nation-building Funds (Consequential Amendments) Bill 2008

On 4 December 2008, the Senate agreed to two amendments. On 4 December 2008, the House of Representatives disagreed to the amendments made by the Senate. On 5 December 2008 (am), the Senate agreed not to insist on its amendments.

Road Charges Legislation Repeal and Amendment Bill 2008

On 4 December 2008, the Senate agreed to 11 requests for amendments in the House of Representatives. On 4 December 2008, the House of Representatives agreed to the Senate's requests for amendments, none of which fall within the Committee's terms of reference.

Schools Assistance Bill 2008

On 2 December 2008, the Senate agreed to nine amendments to the bill, none of which fall within the Committee's terms of reference. On 3 December 2008, the House of Representatives agreed to eight of the amendments made by the Senate and disagreed to one of them. On 4 December 2008, the Senate agreed not to insist on the amendment made by the Senate to which the House of Representatives had disagreed.

Temporary Residents' Superannuation Legislation Amendment Bill 2008

On 4 December 2008, the Senate agreed to three Government requests for amendments in the House of Representatives and agreed to 12 Government amendments. On 5 December 2008 (am), the House of Representatives agreed to both the requests for amendments and the amendments. None of these amendments fall within the Committee's terms of reference.

Water Amendment Bill 2008

On 25, 26 and 27 November 2008, the Senate agreed to a number of amendments to the bill, none of which fall within the Committee's terms of reference. On 1 December 2008, the House of Representatives agreed to some of these amendments, but disagreed to the majority of them.

On 2 December 2008, the Senate resolved not to insist on the amendments made by the Senate to which the House of Representatives had disagreed; and agreed to an amendment made by the House of Representatives to one amendment which had been made previously by the Senate.

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.

Bill/Act	Section/Subsection	Offence	Penalty
Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008	Schedule 1, item 7, proposed new subsection 111(6) of the <i>Aviation Transport Security Act 2004</i>	Failure to provide information to a public authority	45 penalty units
	Schedule 1, item 20, proposed new subsection 19(6) of the <i>Transport Safety Investigation Act 2003</i>	Failure to provide information to a public authority	30 penalty units

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

The Chairs and Deputy Chairs of Commonwealth, and state and territory Scrutiny Committees have noted (most recently in 2000) difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because ‘national scheme’ bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the identification of national schemes of legislation, the Committee’s practice is to note bills that give effect to such schemes as they come before the Committee for consideration.

Corporations Amendment (No. 1) Bill 2008

This bill amends the *Corporations Act 2001* to fulfil a requirement under the Australian and New Zealand Governments’ Memorandum of Understanding on Business Law Coordination.

In his second reading speech, the Minister for Superannuation and Corporate Law informed the Senate that the Ministerial Council for Corporations (MINCO) was consulted in relation to the amendments to the laws in the national corporate regulation scheme, and had approved them as required under the Corporations Agreement.

The Minister also advised that he has commenced consultation with MINCO on the regulations which will accompany the bill. If approval is received, the regulations should be ready to commence contemporaneously with the provisions of the bill.

Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2008

This bill implements the identity crime offences recommended in the 2008 report of the Model Criminal Law Officers’ Committee (MCLOC) entitled *Final Report on Identity Crime*. In his second reading speech, the Minister for Home Affairs noted that, while some departures from the MCLOC model

have been necessary because of 'Constitutional limits on the Commonwealth's power', the 'spirit and intention' of the MCLOC offences have been maintained. The Committee notes that Queensland and South Australia have identity crime offences, however the remainder of the states and territories will need to enact identity crime laws in order to achieve uniform national coverage.

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:

- (vi) inappropriately delegate legislative powers; or
- (vii) 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 42nd Parliament.

Bills introduced with standing appropriation clauses – 42nd Parliament

*Indicates passed by Senate	Bills and Clauses
*	COAG Reform Fund Bill 2008 — clause 5 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Commonwealth Securities and Investment Legislation Amendment Bill 2008 — Schedule 1, item 10, subsection 5BA(7)
*	Defence Home Ownership Assistance Scheme Bill 2008 — Clause 84
*	Dental Benefits Bill 2008 — Clause 65
*	Education Legislation Amendment Bill 2008 — Schedule 1, item 6, section 14B
	Fair Work Bill 2008 — Subclause 559(4)
*	Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008 — Schedule 1, item 29
*	Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008 — Schedule 1, item 49, section 54A, and Schedule 2, item 23, section 70E (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008 — Schedule 1, item 79, section 94B (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)

*	Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 — Schedule 5, item 141, section 65A
*	Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008 — clause 5
*	Nation-building Funds Bill 2008 — clauses 13, 61, 68, 75, 82, 132, 181, 188, 215 and 255 — (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Protection of the Sea Legislation Amendment Bill 2008 — Schedule 1, item 20, section 46N
*	Safe Work Australia Bill 2008 — clause 64 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Schools Assistance Bill 2008 — clause 167
	Uranium Royalty (Northern Territory) Bill 2008 – clause 18
*	Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008 — Schedule 1, item 1
*	Wheat Export Marketing Bill 2008 — clause 58 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)

Other relevant appropriation clauses

*Indicates passed by Senate	Bills and Clauses
*	Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008 — Schedule 4, item 4: special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year)
*	Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008 — Schedule 2, items 1 and 2, and Schedule 4, item 1: special appropriation clauses – for a finite period of time (ie. for circumstances arising in a particular financial year).

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2008/2009

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills dealt with in 2008							
Corporations Amendment (Short Selling) Bill 2008	13(26.11.08)	13.11.08	27.11.08	Treasury	26.11.08	7.1.09	1(4.2.09)
Drink Container Recycling Bill 2008	2(19.3.08)		13.3.08	Senator Fielding	20.3.08		
Environment Protection and Biodiversity Conservation Amendment (Control of Power Station Emissions) Bill 2008	6(25.6.08)		19.6.08	Senator Allison	26.6.08		
Fair Work Bill 2008	14(3.12.08)	25.11.08	4.12.08	Education, Employment and Workplace Relations	4.12.08	19.1.08	1(4.2.09)
<i>Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008</i>	12(12.11.08)	15.10.08	16.10.08	Treasury	13.11.08	4.12.08	1(4.2.09)
National Commissioner for Children Bill 2008	3(14.5.08)		18.3.08	Senator Bartlett	15.5.08		
Nation-building Funds (Consequential Amendments) Bill 2008	13(26.11.08)	13.11.08	3.12.08	Finance and Deregulation	27.11.08	23.1.09	1(4.2.09)
Tax Agent Services Bill 2008	13(26.11.08)	13.11.08		Treasury	27.11.08	3.2.09	1(4.2.09)

