

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



Alert Digest

No. 3 of 2009

11 March 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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Any Senator who wishes to draw matters to the attention of the
Committee under its terms of reference is invited to do so.

Appropriation Bill (No. 5) 2008-2009

Introduced into the House of Representatives on 26 February 2009
Portfolio: Finance and Deregulation

Background

This bill appropriates additional funding of \$384 million to meet payments for the ordinary annual services of the Federal Government for the financial year ending 30 June 2009. The bill proposes additional appropriation that will complement the Nation Building and Jobs Plan (including implementation costs), giving effect to certain elements of the December 2008 Nation Building package and providing for enhancements to employment and apprenticeship programs, and other urgent measures and variations.

The Committee has no comment on this bill.

Appropriation Bill (No. 6) 2008-2009

Introduced into the House of Representatives on 26 February 2009
Portfolio: Finance and Deregulation

Background

This bill appropriates additional funding of \$1.83 billion for payments of a capital nature, such as for the purchase of administered assets and for payments to the states, territories and local government authorities for the financial year ending 30 June 2009. The appropriation will complement the Nation Building and Jobs Plan by providing funding for the Australian Rail Track Corporation to improve the reliability and competitiveness of Australia's rail freight network; by providing funding for certain roads projects; and by bringing forward expenditure totalling \$500 million over four years to assist in expediting the return of water and to deliver long-term benefits to the Murray-Darling Basin.

The Committee has no comment on this bill.

Australian Energy Market Amendment (AEMO and Other Measures) Bill 2009

Introduced into the House of Representatives on 12 February 2009
Portfolio: Resources, Energy and Tourism

Background

This bill amends the *Renewable Energy (Electricity) Act 2000* and the *Trade Practices Act 1974* to make minor consequential amendments resulting from co-operative energy reform legislation being passed in other jurisdictions.

In particular, the bill replaces references to the National Energy Market Management Company Limited (NEMMCO) with the Australian Energy Market Operator Limited (AEMO) to reflect a further reform of the energy sector overseen by the Ministerial Council on Energy: the proposed commencement of a single national energy market operator for both the electricity and gas sectors. The AEMO is scheduled to commence operations on 1 July 2009.

The bill also amends the *Administrative Decisions (Judicial Review) Act 1977*, the *Australian Energy Market Act 2004* and the *Trade Practices Act 1974* to reflect a change in the name of Western Australian gas legislation.

The Committee has no comment on this bill.

Civil Aviation Amendment Bill 2009

Introduced into the House of Representatives on 12 February 2009

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

Introduced with the Transport Safety Investigation Amendment Bill 2009, this bill amends the *Civil Aviation Act 1988* (Civil Aviation Act) to implement recommendations of the National Aviation Policy Green Paper and a recommendation by the Senate Standing Committee on Rural and Regional Affairs and Transport to enhance the corporate governance of the Civil Aviation Safety Authority (CASA), and to improve the administration of CASA's core functions.

In particular, the bill:

- creates a small expert Board of up to five members to be appointed by the Minister for up to three years (the CASA Director of Aviation Safety will be an *ex officio* member);
- provides for the Minister to terminate the appointments of non-Director Board members or the entire Board (other than the Director) in certain circumstances, and for the Board to terminate the appointment of the Director in consultation with the Minister;
- strengthens CASA's enforcement powers across a number of areas, particularly in relation to the negligent consignment or carriage of dangerous goods on aircraft;
- extends the period of Enforceable Voluntary Undertakings (a written undertaking from a holder of a 'civil aviation authorisation' obliging the holder to take specific action demonstrating a meaningful commitment to redress identified safety deficiencies) from six months to one year;
- aligns CASA's investigative powers, and search and seizure procedures, with current Commonwealth criminal justice procedures and practices,

and extends powers to allow CASA investigators to use search and seizure powers under Chapter 7 of the Criminal Code;

- ensures that any extension beyond five days of an automatic stay of a CASA decision to vary, suspend or cancel certain civil aviation authorisations is the result of an application to the Administrative Appeals Tribunal (AAT) for a stay, and the AAT's determination of that application; and
- strengthens CASA's capacity to more effectively oversee foreign aircraft operations into, out of, and within Australia.

The bill also makes consequential amendments to the *Aviation Transport Security Act 2004* to ensure consistency with the amendments to the Civil Aviation Act.

The bill also contains application, saving and transitional provisions.

Strict liability

Schedule 2, item 7, new subsection 23(2AA)

Schedule 2 of the bill contains enforcement provisions, including amendments to existing investigation powers. Proposed new subsection 23(2AA), to be inserted by item 7 of Schedule 2, provides that a person 'must not carry or consign for carriage any goods on board an aircraft and be negligent as to whether the goods are dangerous goods'. The subsection goes on to list exceptions, including carriage or consignment in accordance with the regulations and the written permission of CASA.

The explanatory memorandum notes (at page 10) that negligent action is the most common basis on which dangerous goods are consigned or carried, and a strict liability offence with negligence as the fault element provides a sound basis for pursuing action. In its 2002 report, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation (Sixth Report of 2002)*, the Committee noted the need for clarity in framing offences. In this instance, the Committee notes that the effect of proposed new subsection 23(2AA) is reduced by authorising negligence by reference to approved exceptions.

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

Entry and search powers
Legislative Instruments Act—directions
Schedule 2, items 11-14

Item 11 of Schedule 2 of the bill inserts new Division 1 into Part IIIA of the Civil Aviation Act and items 12-14 enhance current provisions relating to the appointment of investigators and the issue of identity cards. Under the Civil Aviation Act investigators have broad powers which include entry and search powers. In December 2006, the Committee released a report entitled *Entry, Search and Seizure Provisions in Commonwealth Legislation (Twelfth Report of 2006)*. The Federal Government's response to that report is dated January 2008. In 2004, the Minister for Justice and Customs issued a *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The entry and search provisions in the *Aviation Transport Security Act 2004* were among the first provisions scrutinised by the Committee in accordance with the *Guide* (see the Committee's Twelfth Report at paragraph 2.60). A previous report of the Committee on *Entry and Search Provisions in Commonwealth Legislation* was published in 2000 (*Fourth Report of 2000*).

Item 13 of Schedule 2 of the bill provides for new subsections in section 32AA, requiring investigators to comply with a direction of CASA in exercising their powers. Investigators are officers of CASA and are not non-government employees (section 32AA and section 3 of the Civil Aviation Act). Proposed new subsection 32AA(4) provides that such a direction by CASA is not a legislative instrument but the explanatory memorandum does not explain the reason for the benefit of readers.

Further, in its Twelfth Report the Committee recommended (Recommendation 7 at paragraph 3.63) that the *Guide* be revised to require legislative provision for the development of guidelines for the implementation of entry, search and seizure powers, and that any such guidelines be tabled in both Houses of the Parliament and published on the relevant agency's website. The Federal Government responded that such material should be at the discretion of individual agencies. The Committee **seeks the Minister's advice** as to whether any consideration was given to making a direction given by

CASA to an investigator under proposed new subsection 32AA(3) available for scrutiny.

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.

Entry and search powers

Schedule 2, item 21, new sections 32AHC and 32AHD

Proposed new sections 32AHC and 32AHD, to be inserted by item 21 of Schedule 2, provide (respectively) for a copy of a search warrant to be shown to the occupier of premises and for the occupier to be entitled to watch the search. In its *Fourth Report of 2000, Entry and Search Provisions in Commonwealth Legislation*, the Committee referred (at pages 53 and 79) to the principle that an occupier should be given a genuine opportunity to have an independent third party, legal adviser or friend present throughout a search. However, this recommendation was not included in the Committee's later report on entry and search provisions in Commonwealth legislation (*Twelfth Report of 2006*). Since other principles contained in the Committee's *Twelfth Report of 2006* are recognised in the bill (such as showing a copy of the warrant to the occupier (proposed new section 32AHC)), the Committee makes no further comment.

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

Trespass on personal rights and liberties

Schedule 3, item 8, new subsections 30DX(2) and (3)

Under the Civil Aviation Act and regulations, a 'civil aviation authorisation' enables particular activities. The authorisation may be called an Air

Operator's Certificate, permission, authority, licence, certificate, rating, endorsement or other name (see section 3 of the Civil Aviation Act). Holders of authorisations may incur demerit points for offences and an authorisation may be cancelled (and reinstated).

New subsections 30DX(2) and (3), to be inserted by item 8 of Schedule 3, extend the accrual of demerit points to persons who do not hold authorisations, but who commit an offence prescribed by the regulations in the three-year period beginning on the day the demerit points would have been incurred, had the authorisation been held at the time the offence was committed.

The explanatory memorandum explains (at pages 15-16) that this ensures 'that a person who would have incurred demerit points against a civil aviation authorisation, but those points are not incurred because the person has not yet acquired that authorisation, or has taken steps to temporarily surrender or transfer such authorisation (so as to prevent demerit points from being incurred), will incur those demerit points in respect of any such after-acquired, or re-acquired authorisation, for a 3 year period after the date on which those points would initially have been incurred, had the person held the authorisation at the time'.

This means that the demerits scheme could be applied to people who are not currently participants in the regulatory scheme and receive no benefit from it. If, and when, they seek authorisation in the future there will be a retrospective accrual of demerits dating back for a three-year period (even though they might have had no intention of holding an authorisation during that period). The Committee **seeks the Minister's advice** as to whether further explanation might be provided as to the circumstances in which it is envisaged that the retrospectivity of the scheme might apply and how the scheme will apply consistently with any retrospective operation.

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.

Review of decisions Schedule 3, items 16-20, section 31A

Section 31A of the Civil Aviation Act, to be amended by items 16 to 20 of Schedule 3, will provide for the automatic stay of certain ‘reviewable decisions’ taken by CASA (decisions to vary, suspend or cancel certain ‘civil aviation authorisations’) for a period of five days after such a decision has been taken.

Existing provisions in the Civil Aviation Act provide that the automatic stay continues for a period of 90 days if an affected person files an application for review of the decision in the AAT. Item 16 of Schedule 3 amends subsection 31A(4) with the effect that, after CASA has made a decision, it must notify the holder of the civil aviation authorisation of that decision, and there will be a stay on the decision for five business days. The holder must lodge an appeal for review of the decision in the AAT within that five-day period and the stay then has effect until the AAT makes a determination on the stay application.

In his second reading speech, the Minister stated that, where CASA takes enforcement action on safety grounds, holders of civil aviation authorisations will still have the benefit of the five-day stay (and a further automatic stay after that), but only until the AAT can determine the stay application. The Minister explained that the proposed amendments seek to overcome the current situation in which “the routine application of the ‘automatic stay’ provisions of safety-related decisions have effectively nullified CASA’s ability to suspend or cancel the authorisations of operators found to have fallen well below an acceptable level of safety”.

While acknowledging that the amendments are critically important to safety, the Committee remains concerned that the right of review for holders of civil aviation authorisations will be effectively limited to a period of only five business days from the time of notification of any decision. The Committee **seeks the Minister’s advice** as to why the five-day period was chosen and whether some further context for the proposed changes might be provided.

Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-

reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Legislative instrument—incorporating material as in force from time to time

Schedule 3, item 27, new subsection 98(5D)

Proposed new subsection 98(5D), to be inserted by item 27 of Schedule 3, provides that, despite section 14 of the *Legislative Instruments Act 2003*, a legislative instrument made under the Civil Aviation Act or regulations may apply, adopt or incorporate any matter contained in any instrument or other writing, as in force at a particular time or existing from time to time, even if it does not exist when the legislative instrument is made. The explanatory memorandum explains (at page 18) that the purpose of this provision is to enable instruments issued by CASA to make use of matter in Australian or international standards, or in manufacturers' standards or manuals, as they are revised and reissued from time to time, 'as long as they are in existence when the legislative instrument and the matter is used'.

The Committee has, in the past, expressed concern about such provisions which allow a change in obligations imposed by regulation without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise and (if so minded) disallow the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. However, the Committee is satisfied that in this case the explanatory memorandum clearly explains the need and justification for the provision.

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

Customs Tariff Amendment (2009 Measures No. 1) Bill 2009

Introduced into the House of Representatives on 11 February 2009

Portfolio: Home Affairs

Background

This bill amends the *Customs Tariff Act 1995* to increase the excise and excise-equivalent customs duty rate applying to alcoholic beverages not exceeding 10 per cent by volume of alcohol ('alcopops' and 'ready-to-drink beverages'), from \$39.36 to \$66.67 per litre of alcohol content, on and from 27 April 2008. This will ensure that imported beverages are subject to the same excise equivalent customs duty as the excise duty imposed on these beverages when manufactured locally.

The amendments contained in the bill implement changes that are complementary to amendments contained in the Excise Tariff Amendment (2009 Measures No. 1) Bill 2009.

On 25 February 2009, the House of Representatives agreed to several amendments to the bill to alter definitions in the Customs Tariff Act of 'beer' and 'grape wine product' for taxation purposes; these amendments are yet to be considered by the Senate.

Retrospective commencement

Clause 2

Clause 2, in the initial version of the bill, provides that the amendments are taken to have commenced on 27 April 2008. Item 2 in the table to subclause 2(1) of the amended version of the bill provides that Schedule 1 (containing the 'alcopops' amendments) is taken to have commenced on 27 April 2008. 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 explanatory memorandum and the Minister's second reading speech indicate that an increase in the excise and excise-equivalent customs duty rate applying to 'other excisable beverages not exceeding 10 per cent by volume of alcohol', commonly referred to as 'alcopops', was gazetted on 26 April 2008. The Excise and Customs Tariff Proposals were tabled in the House of Representatives on 13 May 2008. Further, the Australian Taxation Office and the Australian Customs Service have been collecting excise and excise-equivalent customs duty at the higher rate since 27 April 2008. While in this case there is retrospective effect, the Committee notes that the increased rate of taxation was clearly gazetted and tabled and the bill simply seeks to confirm the higher rate of taxation in legislation.

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

Excise Tariff Amendment (2009 Measures No. 1) Bill 2009

Introduced into the House of Representatives on 11 February 2009

Portfolio: Treasury

Background

Complementary to the Customs Tariff Amendment (2009 Measures No. 1) Bill 2009, this bill amends the *Excise Tariff Act 1921* to increase, from \$39.36 to \$66.67 per litre of alcohol content, the excise and excise-equivalent customs duty rate applying from 27 April 2008 to ‘other excisable beverages not exceeding 10 per cent by volume of alcohol’ (known as ‘alcopops’ or ‘ready-to-drink beverages’).

On 25 February 2009, the House of Representatives agreed to several amendments to the bill to alter the definition in the Excise Tariff Act of ‘beer’ for taxation purposes; these amendments are yet to be considered by the Senate.

Retrospective commencement

Clause 2

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Office and the Australian Customs Service have been collecting excise and excise-equivalent customs duty at the higher rate since 27 April 2008. While in this case there is retrospective effect, the Committee notes that the increased rate of taxation was clearly gazetted and tabled and the bill simply seeks to confirm the higher rate of taxation in legislation.

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

Federal Financial Relations Bill 2009

Introduced into the House of Representatives on 12 February 2009

Portfolio: Treasury

Background

Introduced with the Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009, this bill appropriates funds to provide financial assistance to the states and territories; and implements the Federal Government's reforms to modernise federal financial relations, in accordance with the new financial framework agreed by the Council of Australian Governments (COAG) in the *Intergovernmental Agreement on Federal Financial Relations*.

The bill provides for ongoing financial support for the states' and territories' delivery of services through:

- general revenue assistance, including the ongoing provision of GST payments, to be used by the states and territories for any purpose;
- National Specific Purpose Payments to be spent in the key service delivery sectors of healthcare, schools, skills and workforce development, disability services, and affordable housing; and
- National Partnership payments to support the delivery of specified outputs or projects, to facilitate reforms, or to reward those jurisdictions that deliver on national significant reforms.

Legislative Instruments Act—determinations

Subclauses 6(6), 8(3), 9(5), 11(3), 12(3), 13(3), 14(3), 16(5), 19(2) and 20(3)

With three exceptions, provision is made in the bill for determinations made by the Minister (in relation to various payments and grants of financial assistance to the states and territories) to be registered as legislative instruments, although some are appropriately not disallowable because the

Minister can only make such determinations in certain circumstances: for example, in prescribed ways under the Intergovernmental Agreement; and/or after consultation with the states and territories.

The three exceptions relate to determinations in relation to payments of grants pursuant to subclauses 6(6), 19(1) and 20(1). Subclauses 6(6), 19(2) and 20(3) provide that a Ministerial determination made under subclauses 6(1), 19(1) and 20(1) in relation to, respectively, GST revenue, the fixing of amounts and timing of financial assistance payments, and repayment of amounts to the Commonwealth where conditions are not fulfilled, 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 explanatory memorandum explains (at paragraphs 1.9, 5.4 and 5.9) that determinations under subclauses 6(6), 19(1) and 20(1) are not legislative instruments within the meaning of the Legislative Instruments Act and are included only to assist readers.

More generally, the explanatory memorandum clearly explains the reasons for registration, non-registration, disallowance and non-disallowance of the various Ministerial determinations to be made under the legislation. In light of the attention paid throughout both the bill and the explanatory memorandum to the need for transparency and accountability to the Parliament, the Committee considers that sufficient justification for the relevant provisions is provided. The Committee would like to specifically commend the high quality of the bill's explanatory memorandum in this context.

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

Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009

Introduced into the House of Representatives on 12 February 2009
Portfolio: Treasury

Background

Introduced with the Federal Financial Relations Bill 2009, this bill provides for relevant consequential amendments and transitional matters arising from the measures contained in the main bill, including the repeal or amendment of inconsistent legislation.

The Committee has no comment on this bill.

Higher Education Legislation Amendment (Student Services and Amenities, and Other Measures) Bill 2009

Introduced into the House of Representatives on 11 February 2009
Portfolio: Education

Background

This bill amends the *Higher Education Support Act 2003* and the *Income Tax Assessment Act 1936* to ensure the availability of quality student services at tertiary education institutions.

Schedule 1 of the bill amends the *Higher Education Support Act 2003* to:

- provide for a fee to be imposed by higher education providers (HEPs) from 1 July 2009 for a compulsory student services and amenities fee, to be capped at \$250 per student per annum and indexed annually;
- provide for the establishment of a new component of the Higher Education Loan Program (HELP): Services and Amenities-HELP (SA-HELP) which will provide eligible students with an option to access a loan for the fee through SA-HELP; and
- require HEPs that receive funding for student places under the Commonwealth Grant Scheme to comply with new benchmarks, from 2010 onwards, for the provision of information on, and access to, basic student support services of a non-academic nature, and to comply with requirements relating to the representation and advocacy of the interests of students (included in the Student Services, Amenities, Representation and Advocacy Guidelines made by the Minister).

Schedule 2 of the bill amends:

- the VET FEE-HELP scheme provisions of the *Higher Education Support Act 2003* to broaden the guidelines-making powers to vary the

VET FEE-HELP debt by a percentage of less than 120% for a particular class of students; and

- Schedule 1A of the *Higher Education Support Act 2003* to allow for differential requirements to apply to different classes of providers, and also within courses, according to different classes of students for them to be entitled to VET FEE-HELP assistance.

Schedule 3 of the bill amends the *Higher Education Support Act 2003* to provide that Tertiary Admissions Centres (TACs) have the same status, and duty of care, as officers of HEPs in relation to the processing of students' personal information for the purposes of determining applications for student places and Commonwealth Scholarships. The amendment will allow for the sharing of relevant information between the Department, HEPs and TACs, as appropriate and in accordance with the *Higher Education Support Act 2003*.

The bill also contains application, consequential and transitional provisions.

The Committee has no comment on this bill.

Social Security and Veterans' Entitlements Amendment (Commonwealth Seniors Health Card) Bill 2009

Introduced into the House of Representatives on 12 February 2009
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to implement a 2008 Budget measure relating to the adjusted taxable income test for the Commonwealth social security and veterans' entitlements-based seniors health card.

Specifically, the bill will provide for the adjusted taxable income test for the seniors health card to include income from a superannuation stream with a taxed source (gross superannuation), and income being salary sacrificed to superannuation. This will ensure that all income received by seniors is treated in a similar way, will align the treatment of income salary sacrificed to superannuation with the age pension, and will ensure that the income test is applied to all cardholders consistently.

The bill also contains application provisions.

The Committee has no comment on this bill.

Tax Laws Amendment (2009 Measures No. 1) Bill 2009

Introduced into the House of Representatives on 12 February 2009

Portfolio: Treasury

Background

This bill amends various Acts to implement a range of improvements to Australia's taxation laws.

Schedule 1 amends section 45-400 of Schedule 1 of the *Taxation Administration Act 1953* to provide a 20 per cent reduction of the pay as you go (PAYG) instalment for the quarter that includes 31 December 2008 for certain small business taxpayers. Schedule 1 also provides for a regulation-making power to allow the amount of the PAYG instalment worked out under section 45-400 to be reduced in the future, in circumstances specified by regulations.

Schedule 2 amends various Acts as a consequence of the amendments required to support the temporary residents' unclaimed superannuation regime, including the income tax legislation, small superannuation accounts legislation, superannuation guarantee legislation and co-contribution legislation. Schedule 2 also amends the *Superannuation (Unclaimed Money and Lost Members) Act 1999* to facilitate the administration of the broader unclaimed money regime.

Schedule 3 amends various Acts to give effect to measures, announced in the 2008-09 Budget, to amend income tests across the tax and transfer systems to enhance fairness in the application of income tests and to better ensure that government assistance is targeted to those most in need.

The bill also amends various Acts in relation to payment summary provisions, income tests, exclusion of certain employer superannuation contributions from the test for exceptional circumstances relief payment, and dependency tax offsets.

The bill also contains application, saving and transitional provisions.

The Committee has no comment on this bill.

Telecommunications Amendment (Integrated Public Number Database) Bill 2009

Introduced into the House of Representatives on 23 February 2009

Passed by the House of Representatives on 26 February 2009

Introduced and passed (with Government amendments) by the Senate on 10 March 2009

Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Telecommunications Act 1997* to allow information contained in the Integrated Public Number Database (IPND) to be disclosed to authorised persons to facilitate state and territory government initiated telephony-based emergency warning systems, and for the supply of Location Dependent Carriage Services (LDCSS).

In particular, the bill:

- provides the Attorney-General with powers to specify, by legislative instrument, offices or persons who are able to use IPND information in the event of an emergency or disaster (anticipated to be senior level officials within state and territory agencies responsible for emergency management);
- stipulates that subscriber data obtained from the IPND is not to be used or disclosed for any other purpose than to provide telephony-based emergency warnings in specific instances;
- provides for offences and penalties of up to two years imprisonment for use or disclosure of any IPND information for any purpose not directly connected with the provision of telephony-based emergency warnings;
- requires any agency that activates a telephony-based emergency warning using IPND information to report each incident to the Attorney-General and the Australian Communications and Media Authority (ACMA);

- requires agencies responsible for issuing alerts to report annually to ACMA and the Office of the Privacy Commissioner; and
- clarifies provisions in the *Telecommunications Act 1997* which relate to the disclosure and use of IPND data for providing LDCSs.

Personal rights and liberties

Schedule 1, item 2, new section 285A

Sections 276 and 277 of the existing Telecommunications Act contain offences for disclosing certain information or documents. Proposed new section 285A, to be inserted by item 2 of Schedule 1, provides for an exception to these provisions where information from the IPND is disclosed to an emergency management person. The IPND contains all Australian telephone numbers (including unlisted numbers) and customer information. Any disclosure of such personal information may infringe rights such as the right to privacy.

Under its terms of reference (principle 1(a)(i)), the Committee is required to report on whether bills trespass unduly on personal rights and liberties. In this case, the Committee notes that the bill limits the provision of data to emergency management persons (proposed new section 275B) for emergency warning purposes (Division 3B). Further, there are offence provisions in relation to misuse of information (proposed new sections 295Z and 295ZA), and strict reporting requirements relating to any use of information (proposed new section 295ZC).

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

Transport Safety Investigation Amendment Bill 2009

Introduced into the House of Representatives on 12 February 2009

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

Introduced with the Civil Aviation Amendment Bill 2009, this bill amends the *Transport Safety Investigation Act 2003* (Transport Safety Investigation Act) to establish the Australian Transport Safety Bureau (ATSB) as a statutory agency within the meaning of the *Public Service Act 1999*. The ATSB will be established with a Commission structure and will come into existence on 1 July 2009.

In particular, the bill:

- abolishes the position of Executive Director of Transport Safety Investigation and provides for the appointment of a Chief Commissioner and two part-time Commissioners to be responsible for administering the functions of the Transport Safety Investigation Act and exercising its investigation powers;
- allows the Minister to provide notice of his or her views on the appropriate strategic direction for the ATSB, to which the ATSB must have regard;
- allows the ATSB to have operational independence with respect to the exercise of its investigation powers, and functional independence with respect to the administration of its resources; and
- requires that any formal recommendations made by the ATSB must be responded to within 90 days.

The bill also makes consequential amendments to the *Air Services Act 1995*, the *Australian Maritime Safety Authority Act 1990*, the *Civil Aviation Act 1988* and the *Inspector of Transport Security Act 2006* where there are references to the Executive Director of Transport Safety Investigation. These references will be replaced with references to the ATSB or the Chief

Commissioner as required for the circumstances of the exercise of the relevant power or performance of the function.

The bill also provides for transitional provisions so that investigations commenced under legislation existing before the new laws come into effect on 1 July 2009 can be continued by the ATSB.

Wide delegation of power

Schedule 1, item 62, new section 63B

Proposed new subsection 63B(1), to be inserted by item 62 of Schedule 1, permits the ATSB to delegate ‘to any person all or any of its powers under this Act, other than the power to publish a report under section 25’. The only limitation on the delegation power is that the ATSB must be satisfied that the person to whom the delegation is made satisfies criteria prescribed by the regulations (proposed new subsection 63B(2)). In relation to the delegation of powers under section 32, those to whom the ATSB can delegate powers is limited to specific persons, including the Chief Commissioner, persons at the Senior Executive Service level or Executive Level 1 or 2 (or equivalent positions), and special investigators (proposed new subsection 63B(3)). The Chief Commissioner may also sub-delegate any powers delegated to him or her under proposed new subsection 63B(3) (proposed new subsection 63B(4)) to a prescribed range of persons.

The Chief Commissioner and the Chief Executive Officer may also delegate to ‘any person’ all or any of their powers under the Transport Safety Investigation Act – subject to similar limitations as those outlined above, in the case of the Chief Commissioner, and subject to more restrictive limitations in the case of the Chief Executive Officer – under proposed new sections 63C and 63D.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee’s preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the wide delegation in proposed new subsection 63B is explained at paragraph 85 of the explanatory memorandum as follows: ‘A suitably qualified person may be a Commonwealth or State/Territory officer or a private individual with appropriate qualifications and experience. This is an acknowledgement of the need to maintain transport safety as a priority over what might otherwise be considered in other statutes as unacceptable protocol to delegate powers to anyone other than a Commonwealth officer and allows Australia to meet international obligations in respect of aviation and marine safety investigations’. The explanatory memorandum also refers to the need for flexibility in remote locations to delegate powers to an appropriately qualified person in order to protect perishable evidence and interview witnesses quickly before their memory becomes less reliable.

The ATSB is able to invoke further limitations on the manner in which the delegated powers are exercised by making the delegation conditional upon the delegate complying with the ATSB’s directions given under subclause 63B(6). The ATSB may also limit the scope of any delegation by limiting the powers to be delegated depending on the qualification and experience of the individual concerned. The explanatory memorandum also provides (at paragraph 86) a useful example of particular criteria which might be prescribed in the regulations for the purpose of subclause 63B(2). The Committee considers that the delegation and associated limitations are appropriate and adequately explained.

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

Insufficient parliamentary scrutiny Schedule 1, item 62, new subsection 63E

The Chief Commissioner may appoint special investigators if they satisfy criteria specified by the regulations (proposed new subsection 63E). A person to whom a power is delegated (including powers delegated to special investigators) under new subsection 63B (discussed above) is a staff member

of the ATSB (see item 16 of Schedule 1 which amends section 3) so certain benefits follow, including legal representation at coronial inquiries (proposed new section 68).

While the bill provides for an annual report by the ATSB on various matters, including prescribed particulars of matters investigated and a description of investigations (proposed new section 63A), there appears to be no specific mechanism in the bill which provides for any reporting to the Parliament on the use of special investigators. The Committee therefore **seeks the Minister's advice** in relation to whether heightened parliamentary scrutiny might be appropriate in the circumstances. In particular, given the breadth of the bill's delegation power in relation to special investigators, the Committee **seeks the Minister's advice** as to whether a specific reporting mechanism – for example, a separate document tabled in both Houses of the Parliament on an annual basis containing details of all relevant activities of special investigators – might be considered in order to promote transparency and openness in this area.

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.

Delegation of administrative power

Schedule 1, items 84 and 89, new subsections 52(5) and 64(5)

Paragraph 94 of the explanatory memorandum explains that items 71 to 103 of Schedule 1, which contain amendments to the *Inspector of Transport Security Act 2006*, concern the transfer of powers and functions from the Executive Director of Transport Safety Investigations to the ATSB and the Chief Commissioner. Item 89 refers to proposed new subsection 64(5) which provides that the Minister must not give a person or government agency, or table in the Parliament, any part of a final report that contains restricted information given to the Inspector of Transport Security by the ATSB without the prior 'agreement' of the Chief Commissioner if the disclosure may compromise an investigation or have a substantial adverse effect on the conduct of operations of the ATSB. Similarly, item 84 refers to proposed new

subsection 52(5) which repeats the requirement that the Minister obtain the 'agreement' of the Chief Commissioner before giving information in any part of an interim report to a person or government agency or tabling the interim report in the Parliament in similar circumstances.

There is some limit on the exercise of the Minister's discretion in these circumstances and the Committee **seeks the Minister's advice** whether these provisions contain an unnecessary fetter on the Minister and, if so, whether 'advice' or 'recommendations' from the Chief Commissioner to the Minister might also be considered.

The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Correspondence received by the Committee in relation to the Fair Work Bill 2008

Introduced into the House of Representatives on 25 November 2008

Passed by the House of Representatives on 4 December 2008

Portfolio: Education, Employment and Workplace Relations

The Committee considered this bill in *Alert Digest No. 14 of 2008* and commented on issues of standing appropriations, strict liability and the abrogation of the privilege against self-incrimination.

A letter has since been received from the Investment and Financial Services Association (IFSA) raising concerns in relation to paragraph 139(1)(i) of the bill which provides that terms about superannuation may be included in modern awards.

The Committee considers that the matters raised by IFSA relate to policy issues that must be determined prior to the drafting of provisions in legislation. It is not the practice of the Committee to examine or comment upon the detail of policy underpinning particular bills. Accordingly, the Committee considers that the matters raised are beyond the scope of its terms of reference.

A copy of this *Alert Digest* will be forwarded to IFSA for its information.

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

COMMENTARY ON AMENDMENTS TO BILLS

Economic stimulus package of bills

Household Stimulus Package Bill 2009

On 12 February 2009, the Senate agreed to six amendments to the bill, none of which fall within the Committee's terms of reference. However, the bill as a whole (along with the other bills in the economic stimulus package) was negatived at the third reading stage in the Senate. The bill, including the six Senate amendments, was subsequently re-introduced into, and passed by, the House of Representatives on 12 February 2009 (pm). The Senate passed the bill without amendment on 13 February 2009.

Tax Bonus for Working Australians Bill 2009

On 12 February 2009, the Senate agreed to three amendments to the bill, none of which fall within the Committee's terms of reference. However, the bill as a whole (along with the other bills in the economic stimulus package) was negatived at the third reading stage in the Senate. The bill, including the three Senate amendments, was subsequently re-introduced into, and passed by, the House of Representatives on 12 February 2009 (pm). The Senate passed the bill without amendment on 13 February 2009.

Note: The other bills in the economic stimulus package (which were also initially negatived at the third reading stage in the Senate) were re-introduced into, and passed by, the House of Representatives in their original form on 12 February 2009 (pm). The Senate also passed these bills without amendment on 13 February 2009.

Other bills

Customs Tariff Amendment (2009 Measures No. 1) Bill 2009

Refer to Committee's comments page 15.

Excise Tariff Amendment (2009 Measures No. 1) Bill 2009

Refer to Committee's comments page 17.

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

On 25 February 2009, the House of Representatives agreed to several amendments to the bill, none of which fall within the Committee's terms of reference.

Telecommunications Amendment (Integrated Public Number Database) Bill 2009

Refer to Committee's comments page 27.

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 |
|--|--|--|------------------|
| Transport Safety Investigation Amendment Bill 2009 | Schedule 2, item 6, proposed new subsection 25A(3) | 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.

Australian Energy Market Amendment (AEMO and Other Measures) Bill 2009

This bill, although making only minor amendments to the *Renewable Energy (Electricity) Act 2000* and the *Trade Practices Act 1974*, reflects the agreement of the Council of Australian Governments (COAG) to establish a single national energy market operator for both the electricity and gas sectors, the Australian Energy Market Operator (AEMO).

The broader functions, powers and duties of AEMO will be conferred by way of amendments to the National Electricity Law (a schedule to the *National Electricity (South Australia) Act 1998*) (NEL) and the National Gas Law (a schedule to the *National Gas (South Australia) Act 2008*) (NGL).

The NEL and the NGL form part of a complementary scheme of regulation in which they are ‘templates’ enacted by South Australian law, to be adopted and applied (as amended from time to time) by South Australia and other participating jurisdictions.

Federal Financial Relations Bill 2009

This bill implements the Federal Government’s reforms to modernise federal financial relations, in accordance with the new financial framework agreed by the Council of Australian Governments (COAG) in the *Intergovernmental*

Agreement on Federal Financial Relations on 29 November 2008. The new framework of cooperative funding arrangements aims to provide a foundation for collaboration on policy development and service delivery, and facilitate the implantation of economic and social reforms.

Telecommunications Amendment (Integrated Public Number Database) Bill 2009

This bill reflects a policy agreement reached between the Commonwealth and the states and territories during the latter half of 2008, flowing from a COAG meeting in July 2008. In accordance with the agreement, the bill authorises access to the Integrated Public Number Database (IPND) (which is currently managed by Telstra Corporation) to the states and territories for the purpose of developing and implementing warning systems for emergencies and disasters.

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 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 |
| | Federal Financial Relations Bill 2009 — clause 22 |
| | Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009 — Schedule 4, subitem 2(3) |
| * | 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 |
|-----------------------------|---|
| * | Household Stimulus Package Bill 2009 — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year). |
| * | 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) |

| NAME OF BILL | ALERT DIGEST | INTRODUCED | | MINISTER | RESPONSE | | REPORT NUMBER |
|--|--------------|------------|---------|--|----------|----------|---------------|
| | | HOUSE | SENATE | | SOUGHT | RECEIVED | |
| Bills dealt with in 2009 | | | | | | | |
| Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008 | 1(4.2.09) | 3.12.08 | 12.2.09 | Infrastructure, Transport, Regional Development and Local Government | 5.2.09 | 10.3.09 | 2(11.3.09) |
| Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008 | 1(4.2.09) | 3.12.08 | 10.3.09 | Home Affairs | 5.2.09 | 23.2.09 | 2(11.3.09) |
| Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 | 1(4.2.09) | 3.12.08 | 12.2.09 | Attorney-General | 5.2.09 | 27.2.09 | 2(11.3.09) |
| Employment and Workplace Relations Amendment Bill 2008 | 1(4.2.09) | 3.12.08 | 12.2.09 | Employment and Workplace Relations | 5.2.09 | | |
| Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008 | 1(4.2.09) | 4.12.08 | 12.2.09 | Treasury | 5.2.09 | | |
| Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008 | 1(4.2.09) | 3.12.08 | 3.12.08 | Health and Ageing | 5.2.09 | 12.2.09 | 2(11.3.09) |
| Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 | 1(4.2.09) | 3.12.08 | 12.2.09 | Treasury | 5.2.09 | | |

