

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



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Senate Standing Committee for the Scrutiny of Bills

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.

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009

Introduced into the House of Representatives on 17 June 2009

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Building and Construction Improvement Act 2005* to provide a framework for cooperative and productive workplace relations in the building and construction industry.

In particular, the bill:

- abolishes the Office of the Australian Building and Construction Commissioner;
- creates a new agency, the Office of the Fair Work Building Industry Inspectorate (Building Inspectorate), to ensure compliance with the general workplace relations laws (as prescribed in the *Fair Work Act 2009*) by all building industry participants;
- removes existing building industry specific laws that provide for higher penalties for breaches of industrial law and broader circumstances under which industrial action attracts penalties;
- allows the Director of the Building Inspectorate to compulsorily obtain information (including through requiring a person to attend an examination and answer questions) or documents from a person whom the Director believes has information or documents relevant to an investigation;
- introduces certain safeguards in relation to the use of the power to compulsorily obtain information or documents;
- creates an office, the Independent Assessor, who may, on application from stakeholders, make a determination that the coercive interrogation powers will not apply to a particular project; and

- retains the provisions that establish the Office of the Federal Safety Commissioner and its related Occupational Health and Safety Accreditation Scheme.

The bill also contains consequential and transitional provisions.

Independence of Administrative Appeals Tribunal Schedule 1, item 52, new subsection 44(1)

Proposed new subsection 15(1), to be inserted by item 49 of Schedule 1, provides that the Building Inspectorate will be headed by a Director appointed by the Minister. The Director's functions are set out in proposed new section 10 and include inquiring into, and investigating, 'any act or practice by a building industry participant that may be contrary to a designated building law, a safety net contractual entitlement or the Building Code' (proposed new paragraph 10(c)).

Item 52 of Schedule 1 substitutes a new Part 1 of Chapter 7 of the Building and Construction Improvement Act relating to powers to obtain information. Division 3 of the new Part 1 provides for examination notices that regulate the Director's conduct of certain examinations.

Under proposed new section 45, the Director may apply to a presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice. Proposed new subsection 44(1) provides that '(t)he Minister may, by writing, nominate an AAT presidential member to issue examination notices under this Division'. The explanatory memorandum and the second reading speech provide no explanation for this variation from the usual practice of the President of the AAT constituting members of the tribunal to hear applications to the tribunal.

However, the second reading speech cites the report by the Hon Justice Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (March 2009) (Wilcox Report). The Wilcox Report refers (at paragraph 6.9) to the Ministerial nomination of members of the AAT to determine whether to issue telecommunications interceptions warrants that allow specific investigative powers. Justice Wilcox also lists the President of the AAT as a person he consulted in preparing his report.

Nevertheless, the Committee notes that the *Administrative Appeals Tribunal Amendment Act 2005* repealed a number of special constitution provisions in various Acts requiring the tribunal to be constituted in a particular way, which enhanced the tribunal's independence. The Committee **seeks the Minister's comments** on the reasons for the departure in the bill from the usual practice of allowing the President of the AAT to allocate the work of the tribunal.

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

Drafting note

Schedule 1, item 52, new subsection 47(1)

Proposed new subsection 47(1), to be inserted by item 52 of Schedule 1, provides that a 'nominated AAT presidential member' must issue an examination notice if 'satisfied of the following' and a list of matters is provided in paragraphs (a) to (g). The word 'and' does not link the items in this list to make it clear that the member must be satisfied of all the factors. The explanatory memorandum states (at paragraph 127) that the presidential member must 'consider' certain factors which 'include' factors set out in the list. The use of the word 'consider' is erroneous and the word 'include' suggests that the list is not definitive. However, the Committee notes that the list set out in the explanatory memorandum *is* linked by the word 'and'.

Also, regrettably, this part of the explanatory memorandum does not refer to the Wilcox Report which is the origin of the list (see the Wilcox Report at paragraph 1.25). Having regard to section 15AB of the *Acts Interpretation Act 1901* – which allows reference to extrinsic material (including explanatory memoranda and reports of inquiries) when interpreting legislation – it would be helpful to include specific references to the Wilcox Report in the explanatory memorandum (where relevant) and also to use the precise language of the section.

The Committee **seeks the Minister's advice** on whether the explanatory memorandum might be amended to provide clarity in relation to the

cumulative nature of the factors to be considered by a nominated AAT presidential member, and the reasons for their inclusion in the bill. The Committee also **seeks the Minister's advice** as to whether proposed new subsection 47(1) might be amended to include the word 'and' in order to link the matters the presidential member must consider in deciding whether to issue a notice.

Strict liability

Schedule 1, item 69, new subsections 59B(5) and (6)

Proposed new subsection 59B(1), to be inserted by item 69 of Schedule 1, requires the Director to issue an identity card to a Fair Work Building Industry Inspector appointed under section 59. A person commits a strict liability offence if he/she ceases to be an inspector and does not, within 14 days of so ceasing, return the identity card to the Director or the Minister (proposed new subsections 59B(5) and (6)).

The explanatory memorandum does not refer (at the relevant paragraphs 183-185) to *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. It justifies the imposition of strict liability in this instance 'because of the consequences of a person who is not an inspector misusing an identity card'. The Committee **seeks the Minister's advice** on whether the recommendations in the *Guide* were considered in the drafting of this provision and, if so, whether the explanatory memorandum could be amended to reflect such consideration.

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

Retrospective application

Schedule 2, item 3

Schedule 2 of the bill contains transitional and consequential provisions. Item 3 provides that regulations made under item 1 or 2 of Schedule 2

(dealing with transitional, saving, application or consequential matters) may take effect from a date before the regulations are registered under the *Legislative Instruments Act 2003*.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the explanatory memorandum explains (at paragraphs 235-237) that regulations with retrospective effect are necessary ‘to prevent unforeseen difficulties that may arise in the transition from the system under the Building and Construction Improvement Act before it is amended to the system provided for by the (b)ill’. Further, any regulations made under this power will not retrospectively subject a person to civil liability.

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

Infrastructure Australia Amendment (National Broadband Network and Other Projects) Bill 2009

Introduced into the Senate on 15 June 2009

By Senator Minchin

Background

This bill amends the *Infrastructure Australia Act 2008* to ensure proper assessment of the proposed National Broadband Network and other projects.

In particular, the bill:

- requires that the proposed National Broadband Network be assessed by Infrastructure Australia, in accordance with its existing functions, and the Building Australia Fund evaluation criteria; and
- provides a mechanism whereby, in future, either House of the Parliament can refer a project to Infrastructure Australia for analysis and assessment in accordance with its functions.

Drafting note

Schedule 1, item 1, new subsections 5A(1), (2) and (3)

Schedule 1 contains amendments relating to assessment of the proposed national broadband network. Item 1 of Schedule 1 amends the Infrastructure Australia Act by inserting a new section 5A which requires Infrastructure Australia to give advice about the proposal for a national broadband network (proposed new subsection 5A(4)) and report to the Minister by 30 July 2009 (proposed new subsection 5A(5)).

The Committee notes that proposed new subsections 5A(1), 5A(2) and 5A(3) contain recitations of facts, which might more appropriately be included in a preamble rather than in operative provisions creating positive duties. The Committee **seeks the Senator's advice** on the reason for including descriptive comments in the operative provisions of the bill, and whether consideration might be given to amending the bill to include these comments in a preamble.

Migration Amendment (Abolishing Detention Debt) Bill 2009

Introduced into the House of Representatives on 15 June 2009

Portfolio: Immigration and Citizenship

Background

This bill is identical to a bill introduced into the Senate on 18 March 2009 which the Committee dealt with in its *Alert Digest No. 5 of 2009*. The Committee made no comment on that bill. In his second reading speech to this bill, the Parliamentary Secretary for Multicultural Affairs and Settlement Services explained that the Federal Government has ‘taken the unusual step’ of re-introducing the bill in the House of Representatives to attempt to progress the bill’s passage through the Parliament in the sitting fortnight ending 26 June 2009.

The bill amends the *Migration Act 1958* to remove the liability for immigration detention and related costs for certain persons and liable third parties, and extinguish all outstanding immigration detention debts.

In particular, the bill:

- removes the requirement in Division 10 of Part 2 of the Migration Act for non-citizens who are detained in immigration detention, including liable third parties, to pay the Commonwealth the costs of their transport between where the non-citizen is detained and another place within Australia, and the daily maintenance amount for each day of the non-citizen’s detention;
- extinguishes all outstanding detention debt for non-citizens who are in immigration detention, or persons who have been in immigration detention, and liable third parties at the time of the commencement of the legislation;
- ensures that any immigration detention costs for which a person or third party will be liable under Division 14 of Part 2 of the Migration Act are clearly specified in section 262 by enabling the Minister to make a

legislative instrument determining the daily amount for keeping and maintaining a person in immigration detention at a specified place in a specified period;

- clarifies that the cost of keeping certain non-citizens in Australia in Subdivision B and C of Division 4 of Part 2 of the Migration Act does not include the cost of immigration detention;
- ensures that the regulations can no longer prescribe sponsorship undertakings or obligations that include paying the Commonwealth an amount relating to the cost of a person's immigration detention; and
- ensures that the element of undertakings or obligations made by a sponsor prior to commencement of the bill, that relate to paying the Commonwealth the costs of detaining a visa holder sponsored by the sponsor, will cease to have effect.

The bill also contains transitional provisions.

The Committee has no comment on this bill.

Renewable Energy (Electricity) Amendment Bill 2009

Introduced into the House of Representatives on 17 June 2009

Portfolio: Climate Change and Water

Background

Introduced with the Renewable Energy (Electricity) (Charge) Amendment Bill 2009, this bill amends the *Renewable Energy (Electricity) Act 2000* to implement the Federal Government's commitment to expand its Mandatory Renewable Energy Target (MRET) scheme, which includes a statutory target of 9,500 gigawatt-hours (GWh) in 2010, to a national Renewable Energy Target (RET) scheme, which includes a target of 45,000 GWh in 2020.

The expanded scheme will mean that the equivalent of at least 20 per cent of Australia's electricity will come from renewable sources by 2020. The RET scheme has been designed in cooperation with the states and territories through the Council of Australian Governments (COAG), and brings the MRET and existing and proposed state schemes into a single national scheme.

In particular, the bill:

- clarifies the objectives of the RET scheme;
- increases annual targets for renewable energy generation from 2010, including a target of 45,000 GWh in 2020 maintained until 2030;
- implements a Solar Credits mechanism, based on a renewable energy certificate multiplier, for small-scale renewable energy including solar Photovoltaic (PV), wind and micro-hydro systems;
- mandates a review of the operation of the legislation and regulations underpinning the RET scheme in 2014;
- provides for partial legislative exemptions from liability under the scheme in respect of electricity-intensive, trade-exposed activities; and

- provides for the transition of existing and proposed state renewable energy target schemes.

Delayed commencement

Clause 2

Subclause 2(1) contains the table of commencement information and provides that several items have delayed commencement. Item 3 of the table provides that Schedule 2 commences at the same time as section 3 of the *Carbon Pollution Reduction Scheme Act 2009*, which means commencement on 1 July 2011 (see *Alert Digest No. 6 of 2009*). Item 4 of the table provides that Part 1 of Schedule 3 commences on Proclamation or on 1 July 2011. Items 6 and 9 of the table provide that items 4, 8 and 9 of Schedule 3 commence on 1 February 2010 and item 8 of the table provides that items 6 and 7 of Schedule 3 are to commence on Proclamation, or nine months from Royal Assent.

The explanatory memorandum provides (at page 3) explanations of the delays: for example, commencement of the measures in Part 1 of Schedule 3 in the period to 1 July 2011 ‘is to ensure a smooth transition to the expanded RET scheme, absorbing existing and planned state schemes’; and the nine-month period relating to the measures in items 6 and 7 of Schedule 3 ‘is to allow the passage of relevant provisions of complementary State legislation’.

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

Inappropriate delegation of legislative power

Schedule 1, item 6

The explanatory memorandum explains (at page 1) that the RET scheme has been designed in cooperation with the states and territories through COAG. While the Committee recognises the importance of giving effect to national regulatory schemes, it does not regard passage through the COAG process as a sufficient reason to bypass legislative scrutiny. In this bill, several elements of the legislative scheme are regulated in delegated legislation. While it is appropriate to include technical and procedural matters in regulations – such

as forms (see proposed new paragraph 46A(2)(b), to be inserted by item 14 of Schedule 2) – the Committee regards substantive changes to the law as a matter for the primary Act.

For example, proposed new subsection 23B(2), to be inserted by item 6 of Schedule 1, provides that ‘(t)he regulations may provide that, in the circumstances specified by the regulations’, the number of certificates created in relation to a small generation unit may be multiplied. The Committee considers that this is an unduly broad delegation of legislative power and **seeks the Minister’s advice** on the reasons for delegating the power to determine criteria for issuing certificates.

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

Retrospective application Schedule 1, item 7

Item 7 of Schedule 1 provides for amendments made by items 4, 5 and 6 of Schedule 1, which relate to section 23B of the Renewable Energy (Electricity) Act, to apply only to small generation units that are installed ‘on or after 9 June 2009’. This means that the amendments have retrospective application. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The explanatory memorandum provides no explanation for the retrospective operation of these provisions. Therefore, the Committee **seeks the Minister’s advice** as to the reasons for the retrospective application of the amendments to section 23B.

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.

**Insufficiently defined administrative powers
Schedule 2, item 14, new sections 46A, 46B and 46C**

Schedule 2 of the bill provides for partial exemptions from liability to charge under the RET scheme in respect of electricity-intensive, trade-exposed activities. Proposed new Division 1A of Part 5 of the Renewable Energy (Electricity) Act, to be inserted by item 14 of Schedule 2, provides for partial exemption certificates to be issued. Proposed new section 46A provides that a person may apply for a certificate and regulations will prescribe the information that the person must provide (proposed new paragraph 46A(2)(b)). Proposed new subsection 46B(1) provides that, if an application is made under section 46A, then the certificate must be issued by the Authority (see further discussion of ‘the Authority’ in the ‘Drafting note’ commentary below).

Proposed new section 46C provides for amendment to certificates. The Authority may consider a wider range of factors in relation to amendment than issuance since it ‘may have regard to any other matter that it considers relevant’ (proposed new paragraph 46C(2)(b)). The Authority may also exert control by amending certificates on its own initiative, in accordance with criteria prescribed in regulations (proposed new subsection 46C(3)).

The Committee considers that the explanatory memorandum is misleading when it states (at the first dot point in paragraph 32) that item 14 ‘outlines the criteria’ for obtaining partial exemption certificates since no criteria are provided in the bill. The Committee **seeks the Minister’s advice** on the reasons for providing the Authority with broad power to consider matters in amending certificates while, at the same time, limiting its power to consider matters in relation to the issue of certificates.

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 insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee’s terms of reference.

Drafting note
Schedule 2, item 14

Proposed new Division 1A of Part 5, to be inserted by item 14 of Schedule 2, provides for partial exemption certificates. The proposed new sections (for example, new section 46A) refer to ‘the Authority’ but, in the Act being amended – the Renewable Energy (Electricity) Act – the term ‘the Regulator’ is used (see, for example, section 46). ‘(T)he Authority’ is also referred to in proposed new section 38A (item 8 of Schedule 2) of the bill. Possibly, the proposed Australian Climate Change Regulatory Authority has functions in relation to these provisions but this is not made clear in the explanatory memorandum or the second reading speech. The Committee **draws to the attention of the Minister** this possible drafting error.

Renewable Energy (Electricity) (Charge) Amendment Bill 2009

Introduced into the House of Representatives on 17 June 2009
Portfolio: Climate Change and Water

Background

Introduced with the Renewable Energy (Electricity) Amendment Bill 2009, this bill amends the *Renewable Energy (Electricity) (Charge) Act 2000* to support implementation of the expanded national Renewable Energy Target (RET) scheme to ensure that 20 per cent of Australia's electricity is supplied from renewable sources by 2020.

The bill provides for an increase in the charge payable by non-compliant liable parties (the shortfall charge in respect of a renewable energy certificate) from \$40 per megawatt-hour to \$65 per megawatt-hour.

Setting a long term rate of charge Schedule 1

Together with the Renewable Energy (Electricity) Amendment Bill 2009, the bill implements the RET scheme. The accompanying Renewable Energy (Electricity) Amendment Bill contains annual targets in gigawatt-hours (GWh) of renewable source electricity from 2010 to 2030. The Renewable Energy (Electricity) (Charge) Amendment Bill increases the level of shortfall charge under the expanded RET scheme to encourage compliance with the scheme. Item 1 of Schedule 1 amends subsection 6(1) of the Renewable Energy (Electricity) (Charge) Act to increase the charge from \$40 to \$65. Subitem 2(1) provides that this charge ends on 31 December 2030. This has the effect of fixing a long term rate of charge.

The explanatory memorandum explains (at page 1) that the RET scheme has been designed in cooperation with the states and territories through COAG. This means that the bill gives effect to a national co-operative scheme. However, the Federal Parliament is not automatically obliged to pass the bill, or regulations made pursuant to it, without giving them due consideration in

accordance with federal legislative standards. In the circumstances, therefore, the Committee **leaves to the Senate as a whole** any consideration of this issue.

Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Bill 2009

Introduced into the House of Representatives on 15 June 2009

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill gives effect to a number of measures announced in the 2009-10 Budget, including key elements of the Federal Government's Secure and Sustainable Pension Reform package. The pension reform measures in the bill implement the reforms in social security and aged care. A further bill, to be introduced at a later date, will introduce the pension reform measures for veterans and their dependants, as announced in the Budget.

Schedules 1, 2 and 3 amend the *Social Security Act 1991* to:

- increase the single maximum basic rates of certain social security pensions by \$1,560.00 per annum, or \$30 per week, on 20 September 2009;
- allow for the indexation of the maximum basic rates of certain social security pensions to a new index, the Pensioner and Beneficiary Living Cost Index; and
- provide, from 20 March 2010, for a new 'combined couple benchmark' for maximum basic rates, which will be 41.76 per cent of the annualised Male Total Average Weekly Earnings figure, and benchmark the single pension at 66.33 per cent of the maximum combined couple basic rate of pension, which is 27.7 per cent of the annualised Male Total Average Weekly Earnings figure.

Schedule 4 amends the *Social Security Act 1991*, the *Social Security (Administration) Act 1999* and the *Income Tax Assessment Act 1997* to:

- simplify the payments made to pensioners living in Australia by consolidating a number of smaller payments and allowances into one ‘pension supplement’; and
- provide for an increase to pension payments via the new pension supplement of \$10.14 per week for couples combined and \$2.49 per week for singles.

Schedules 5 to 12 amend the *Social Security Act 1991* to:

- increase the amount of pension supplement payable to individuals to compensate for anticipated increases in the cost of living arising out of the introduction of the Carbon Pollution Reduction Scheme;
- remove the legislative instrument powers that were included in the Carbon Pollution Reduction Scheme (Household Assistance) Bill 2009;
- increase the income test taper rate from 40 cents to 50 cents per dollar of income over the ordinary income-free area and remove the additional income test free area for dependent children from the calculation of the amount of a person’s ordinary income-free area;
- introduce a new Work Bonus into the social security law to allow age pensioners to keep more of the money they earn through work;
- provide for the assessment of employment income for people in receipt of social security pensions and who are of age pension age on the same basis as people who are under age pension age;
- close the existing Pension Bonus Scheme to new entrants from 20 September 2009;
- allow pensioners, who will be affected by changes to the social security law made by the bill on the date of commencement, to transition to the new arrangements;
- increase the qualifying age for age pension for both men and women from 65 to 67 years by six months every two years commencing on 1 July 2017; and

- improve existing arrangements in relation to advance payments, to enable social security recipients to have greater access to advances of certain social security pensions.

Schedule 13 amends the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to provide for adjusted taxable income for the Commonwealth seniors health card to include income salary sacrificed to superannuation.

Schedule 14 amends the *A New Tax System (Family Assistance) Act 1999* to provide for the indexation of the FTB under 13 child rate and the FTB 13-15 child rate so that these rates are indexed on 1 July 2009 and each subsequent 1 July in accordance with movements in the Consumer Price Index only; and provides for the maternity immunisation allowance to be indexed once every year, on 1 July.

Schedule 15 amends the portability arrangements in the *Social Security Act 1991* to allow certain social security recipients, whose overseas absence is for the purpose of undertaking overseas study as part of a full-time Australian course, may be paid for the duration of the overseas study, provided the study can be credited towards their Australian course.

Schedule 16 amends the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to exclude payments made under the Western Australian Cost of Living Rebate Scheme and the value of a Western Australian Country Age Pension Fuel Card from the social security and veterans' affairs income tests.

Schedule 17 amends the *Aged Care Act 1997* as a result of the increase in the rate of age pension on 20 September 2009 to increase the contribution to the cost of living for people in residential aged care.

Schedule 18 amends the *Veterans' Entitlements Act 1986* to add a new 'operational area' to Schedule 2 to allow members of the Australian Defence Force allotted for duty in an operational area to have access to pensions, treatment and other benefits available under that Act.

Delayed commencement

Clause 2

Subclause 2(1) contains the table of commencement information and includes two items with delayed commencement. Item 6 of the table provides that Schedule 5 commences immediately after the commencement of Schedule 1 of the *Carbon Pollution Reduction Scheme Amendment (Household Assistance) Act 2009* which means delayed commencement (see *Alert Digest No. 6 of 2009*).

Item 13 of the table provides that Schedule 12 commences on 1 July 2010. The explanatory memorandum does not explain the reasons for this delayed commencement, although the Committee notes that it is probably due to pension changes at the start of the 2010-11 financial year. The Committee **seeks the Minister's clarification** as to the delayed commencement of Schedule 12.

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.

Retrospective application

Schedule 13, items 2 and 4

Schedule 13 of the bill provides for adjusted taxable income for the Commonwealth seniors health card to include income salary sacrificed to superannuation. Items 2 and 4 of Schedule 13 provide that the substantive amendments in Schedule 13 apply in relation to seniors health cards granted 'before, on or after the commencement' of the relevant amendments but do not affect a person's qualification for a seniors health card before that commencement.

Under principle (1)(a)(i) of its terms of reference, the Committee is required to consider whether legislation trespasses unduly on personal rights and liberties. A person's legitimate expectation that government and its agencies will honour expectations that it has created in relation to property is regarded

as a human right in many jurisdictions, although approaches to its application vary. The Committee looks to extrinsic materials, including explanatory memoranda and second reading speeches, to understand the balancing of human rights that has produced the outcome in the proposed legislation.

The explanatory memorandum states (at page 89) that the amendments will have no adverse retrospective effect. However, the Committee remains concerned about the impact of these provisions on people's legitimate expectations of government, especially when those expectations are affected by the legislation having retrospective effect. Therefore, the Committee **seeks the Minister's advice** as to whether further explanation and justification for the retrospective application of the changes might be provided.

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.

COMMENTARY ON AMENDMENTS TO BILLS

Australian Business Investment Partnership Bill 2009

On 16 June 2009, the Senate agreed to a number of amendments to the bill.

'Henry VIII' clauses

Various amendments

Some of the amendments contain 'Henry VIII' clauses which authorise the amendment of the *Corporations Act 2001* by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to such provisions. However, in this case, since the Senate negatived the bill at the third reading, the Committee makes no further comment. If the bill (as amended) is re-introduced in the future, the Committee intends to provide further commentary on this issue.

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

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

On 17 June 2009, the Senate agreed to a number of further amendments to the bill (see the Committee's comments in *Alert Digest No. 7 of 2009* on government amendments moved in the House of Representatives). None of the further Senate amendments fall within the Committee's terms of reference. On 18 June 2009, the House of Representatives also agreed to the Senate amendments.

Guarantee of State and Territory Borrowing Appropriation Bill 2009

On 18 June 2009, the Senate agreed to one amendment to the bill which does not fall within the Committee's terms of reference. On 18 June 2009, the House of Representatives also agreed to this amendment.

National Health Amendment (Pharmaceutical and Other Benefits—Cost Recovery) Bill 2008 [No. 2]

On 15 June 2009, the Senate agreed to two amendments to the bill, neither of which falls within the Committee's terms of reference. On 16 June 2009, the House of Representatives also agreed to these amendments.

Tax Laws Amendment (Political Contributions and Gifts) Bill 2008

On 3 February 2009, the Senate agreed to 22 amendments to the bill, none of which fall within the Committee's terms of reference. On 18 June 2009, the House of Representatives disagreed to these amendments but made five of its own amendments, none of which fall within the Committee's terms of reference.

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

On 15 June 2009, the Senate agreed to 20 amendments to the bill, none of which fall within the Committee's terms of reference. On 16 June 2009, the House of Representatives also agreed to these amendments.

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.

Renewable Energy (Electricity) Amendment Bill 2009

Renewable Energy (Electricity) (Charge) Amendment Bill 2009

The Council of Australian Governments (COAG) agreed to the design of the national Renewable Energy Target (RET) scheme on 30 April 2009, following community consultation. The RET scheme will bring the Mandatory Renewable Energy Target and existing and proposed state and territory schemes into a single national scheme. The legislative framework aims to ensure a smooth transition into the national scheme for the only existing state-based scheme, the Victorian Renewable Energy Target.

The Renewable Energy (Electricity) Amendment Bill provides for regulations to be made to provide partial exemptions from liability under the expanded RET scheme. As agreed by COAG on 30 April 2009, partial exemptions will apply to those activities that are emissions-intensive trade-exposed activities under the Carbon Pollution Reduction Scheme. The Renewable Energy (Electricity) (Charge) Amendment Bill complements the amendments contained in the Renewable Energy (Electricity) Amendment Bill.

SCRUTINY OF STANDING APPROPRIATIONS

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

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

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

Bills introduced with standing appropriation clauses – 42nd Parliament

*Indicates passed by Senate	Bills and Clauses
	Australian Business Investment Partnership Bill 2009 — clauses 13 and 14
	Car Dealership Financing Guarantee Appropriation Bill — clause 5
	Carbon Pollution Reduction Scheme Bill 2009 — subclauses 103B(5), 139(4) and 291(4)
*	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 of State and Territory Borrowing Appropriation Bill 2009 — clause 5
*	Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008 — clause 5
	International Monetary Agreements Amendment (Financial Assistance) Bill 2009 — Schedule 1, item 4, subsection 8CA(4)
*	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>)
	Safe Work Australia Bill 2008 [No. 2] — 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	12.2.09	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							
Appropriation Bill (No. 2) 2009-2010	6(2.6.09)	12.5.09	23.6.09	Finance and Deregulation	3.6.09	15.6.09	6(17.6.09)
Australian Climate Change Regulatory Authority Bill 2009	6(2.6.09)	14.5.09	15.6.09	Climate Change and Water	3.6.09	18.6.09	7(25.6.09)
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)
Carbon Pollution Reduction Scheme Bill 2009	6(2.6.09)	14.5.09	15.6.09	Climate Change and Water	3.6.09	18.6.09	7(25.6.09)
Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009	6(2.6.09)	14.5.09	15.6.09	Climate Change and Water	3.6.09	18.6.09	7(25.6.09)
<i>Civil Aviation Amendment Act 2009</i>	3(11.3.09)	12.2.09	11.3.09	Infrastructure, Transport, Regional Development and Local Government	12.3.09	12.5.09	4(13.5.09)
Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009	4(18.3.09)	12.3.09	17.3.09	Special Minister of State	19.3.09	22.4.09	4(13.5.09)
Coordinator-General for Remote Indigenous Services Bill 2009	6(2.6.09)	27.5.09		Families, Housing, Community Services and Indigenous Affairs	3.6.09	16.6.09	6(17.6.09)
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)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Employment and Workplace Relations Amendment Bill 2008	1(4.2.09)	3.12.08	12.2.09	Employment and Workplace Relations	5.2.09	16.3.09	3(18.3.09)
Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009	6(2.6.09)		14.5.09	Senator Ludlam	3.6.09	16.6.09	6(17.6.09)
Fair Work (State Referral and Consequential and Other Amendments) Bill 2009	6(2.6.09)	27.5.09	15.6.09	Education, Employment and Workplace Relations	3.6.09		
Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009	5(13.5.09)	19.3.09	15.6.09	Education, Employment and Workplace Relations	14.5.09	12.6.09	6(17.6.09)
Family Assistance Amendment (Further 2009 Budget Measures) Bill 2009	7(17.6.09)	3.6.09	17.6.09	Families, Housing, Community Services and Indigenous Affairs	18.6.09		
Family Assistance Legislation Amendment (Child Care) Bill 2009	6(2.6.09)	14.5.09	15.6.09	Education, Employment and Workplace Relations	14.5.09	17.6.09	7(17.6.09)
Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009	5(13.5.09)	19.3.09	15.6.09	Treasury	14.5.09		
Fuel Quality Standards Amendment Bill 2009	5(13.5.09)	18.3.09	15.6.09	Environment, Heritage and the Arts	14.5.09		
Higher Education Support Amendment (VET FEE-HELP and Providers) Bill 2009	5(13.5.09)	18.3.09	15.6.09	Education	14.5.09	16.6.09	6(17.6.09)
Nation Building Program (National Land Transport) Amendment Bill 2009	6(2.6.09)	13.5.09	15.6.09	Infrastructure, Transport, Regional Development and Local Government	3.6.09	16.6.09	6(17.6.09)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
National Greenhouse and Energy Reporting Amendment Bill 2009	5(13.5.09)	18.3.09		Climate Change and Water	14.5.09	22.6.09	7(24.6.09)
Native Title Amendment Bill 2009	5(13.5.09)	19.3.09	15.6.09	Attorney-General	14.5.09	23.6.09	7(24.6.09)
Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Bill 2009	5(13.5.09)	19.3.09		Resources and Energy	14.5.09	1.6.09	5(2.6.09)
Social Security and Family Assistance Legislation Amendment (2009 Budget Measures) Bill 2009	6(2.6.09)	12.5.09	13.5.09	Families, Housing, Community Services and Indigenous Affairs	3.6.09		
Tax Laws Amendment (2009 Measures No. 2) Bill 2009	5(13.5.09)	19.3.09	15.6.09	Treasury	14.5.09	28.5.09	5(2.6.09)
Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008	1(4.2.09)	4.12.08	12.2.09	Treasury	5.2.09	11.3.09	3(18.3.09)
Therapeutic Goods Amendment (2009 Measures No. 1) Bill 2009	5(13.5.09)	19.3.09	15.6.09	Health and Ageing	14.5.09	15.6.09	6(17.6.09)
Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008	1(4.2.09)	12.5.09	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	11.3.09	3(18.3.09)
<i>Transport Safety Investigation Amendment Act 2009</i>	3(11.3.09)	12.2.09	11.3.09	Infrastructure, Transport, Regional Development and Local Government	12.3.09	5.5.09	4(13.5.09)