

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



Alert Digest

No. 9 of 2009

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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.

TABLE OF CONTENTS

Commentary on bills

- Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 5
- ACIS Administration Amendment Bill 2009 7
- Anti-Terrorism Laws Reform Bill 2009 9
- Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009 12
- Australian Wine and Brandy Corporation Amendment Bill 2009 13
- Automotive Transformation Scheme Bill 2009 17
- Aviation Transport Security Amendment (2009 Measures No. 1) Bill 2009 19
- Banking Amendment (Keeping Banks Accountable) Bill 2009 22
- Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009 24
- Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 28
- Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 34
- Customs Tariff Amendment (2009 Measures No. 1) Bill 2009 [No. 2] 39
- Excise Tariff Amendment (2009 Measures No. 1) Bill 2009 [No. 2] 41

- **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.

• Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009	42
Higher Education Support Amendment Bill 2009	45
Marriage Equality Amendment Bill 2009	46
• Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009	47
Midwife Professional Indemnity (Run-off Cover Support Payment) Bill 2009	52
• Migration Amendment (Immigration Detention Reform) Bill 2009	53
• National Consumer Credit Protection Bill 2009	55
National Consumer Credit Protection (Fees) Bill 2009	65
• National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009	66
• National Health Security Amendment Bill 2009	70
• National Security Legislation Monitor Bill 2009	73
• Personal Property Securities Bill 2009	76
• Quarantine Proclamation Amendment Bill 2009	82
Road Transport Reform (Dangerous Goods) Repeal Bill 2009	83
• Statute Stocktake (Regulatory and Other Laws) Bill 2009	84
• Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009	86
• Tax Laws Amendment (2009 Measures No. 4) Bill 2009	89

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• Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009	92
• Therapeutic Goods Amendment (2009 Measures No. 2) Bill 2009	97
Trade Practices Amendment (Australian Consumer Law) Bill 2009	99
• Trade Practices Amendment Bill 2009	100
• Trade Practices Amendment (Guaranteed Lowest Prices—Blacktown Amendment) Bill 2009	102
Commentary on amendments to bills	103
Provisions of bills which impose criminal sanctions for a failure to provide information	104
Bills giving effect to National Schemes of Legislation	109
Scrutiny of standing appropriations	112

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Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

Introduced into the House of Representatives on 22 June 2009
Portfolio: Attorney-General

Background

This bill amends the *Federal Court of Australia Act 1976* to clarify the case management powers of the Federal Court and to streamline the appeals pathways for civil proceedings.

The bill also amends the *Family Law Act 1975*, the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* to clarify the powers of the Chief Justices of the Federal Court and the Family Court, as well as the Chief Federal Magistrate, with the object of enhancing public confidence in the administration of justice and further enhancing the reputation of the federal judiciary.

Retrospective application Schedule 1, item 12

Schedule 1 of the bill contains amendments seeking to improve case management in the Federal Court. Item 12 of Schedule 1 provides that these amendments apply in relation to proceedings commenced 'before, on or after the commencement' of Schedule 1.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that the explanatory memorandum (at paragraph 47) explains that this gives the court the capacity to use the active case management provisions in any case before the court when the amendments commence (where beneficial). However, the court will have the discretion to disregard behaviour that is inconsistent with the overarching purpose if such behaviour took place prior to the commencement of the new provisions. Since a thorough explanation for the retrospective application has been provided and, in any case, it is the court that will be

applying the retrospective provisions, the Committee makes no further comment.

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

ACIS Administration Amendment Bill 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Innovation, Industry, Science and Research

Background

Introduced with the Automotive Transformation Scheme Bill 2009, this bill amends the *ACIS Administration Act 1999* and the *ACIS Administration Amendment Act 2003* to ensure the smooth transition from the current Automotive Competitiveness and Investment Scheme (ACIS) to the newly established Automotive Transformation Scheme (ATS), as announced in the Federal Government's automotive policy, *A New Car Plan for a Greener Future*.

In particular, the bill:

- repeals ACIS Stage 3;
- provides increased uncapped assistance for persons registered under ACIS as motor vehicle producers in 2010, as part of the transitional arrangements prior to the establishment of the ATS; and
- corrects an anomaly in ACIS where the level of assistance for vehicles sold for export is less than assistance for vehicles sold domestically.

Delayed commencement

Clause 2

Subclause 2(1) contains the table of commencement information and item 2 of the table provides that the bill commences when section 3 of the Automotive Transformation Scheme Bill 2009 commences. Section 3 of that bill commences on 1 July 2010. The Committee notes that the delay in commencement is explained in the second reading speech to the Automotive Transformation Scheme Bill 2009 as being necessary 'to allow for pre-registration of existing ACIS participants' in order to 'guarantee continuity of assistance when payments under the new scheme commence' (see also the

discussion on the Automotive Transformation Scheme Bill 2009 in this *Alert Digest*).

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

Anti-Terrorism Laws Reform Bill 2009

Introduced into the Senate on 23 June 2009

By Senator Ludlam

Background

This bill seeks to amend and, in some cases, repeal provisions of the *Criminal Code Act 1995*, the *Crimes Act 1914* and the *Australian Security Intelligence Organisation Act 1979*.

In particular, the bill amends:

- the *Criminal Code Act 1995* to amend the definitions relating to terrorism offences, provisions relating to the proscription of ‘terrorist organisations’, offences relating to interaction with ‘terrorist organisations’, offences relating to ‘reckless possession of a thing’, and to repeal the offence of sedition;
- the *Crimes Act 1914* in relation to detention of terrorism suspects (including changes to the periods of detention of persons suspected of terrorism offences) and bail conditions of such persons; and
- the *Australian Security Intelligence Organisation Act 1979* in relation to the questioning of terrorism suspects and the detention of terrorism suspects.

The bill also repeals the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Trespass unduly on rights and liberties Schedule 1, item 5

Principle 1(a)(i) of the Committee’s terms of reference requires it to examine whether a proposed provision trespasses unduly on rights and liberties, which involves a balancing of rights. Item 5 of Schedule 1 provides for the repeal of section 101.4 of the *Criminal Code Act 1995* which contains an offence for

possessing things connected with terrorist acts. The second reading speech for the bill states that the current provision is deficient because it lacks ‘(p)arameters for what may be included with[in] the scope of ‘thing’.

The Committee considers that repeal of section 104.1 may go further than necessary in response to the stated need. For example, there could be inclusion of a non-exhaustive list of ‘things’ (see Parliamentary Library, *Bills Digest No 62, 2005-06*, Anti-Terrorism Bill 2005, at pages 6-7) or intention to use the thing as an element of the offence. The Committee **seeks the Senator’s advice** as to whether amendment of section 101.4, rather than repeal, might be sufficient to balance rights and liberties in the circumstances.

Pending the Senator’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.

Drafting note

Schedule 1, item 8, new paragraph 102.1(2AB)(a)

Item 8 of Schedule 1 repeals subsection 102.1(2) of the *Criminal Code Act 1995* and substitutes new subsections 102.1(1AA), (2), (2AA), (2AB), (2AC), (2AD) and (2AE). These subsections give effect to a recommendation in the Sheller Report (cited in the second reading speech) that the proscription of an organisation as a terrorist organisation should meet the requirements of administrative law.

Proposed new paragraph 102.1(2AB)(a) provides for notification to an organisation, ‘if it is practical to do so’, that a regulation has been made listing it as a terrorist organisation. Proposed new paragraph 102.1(2AB)(b) provides for the publication of information about the listing. Proposed new subsection 102.1(2AC) provides that, if a regulation is made that lists an organisation, and a foreign country has requested the listing, that information must be included in the published notice.

Practical and other considerations (including national security) may influence actions associated with notification and listing pursuant to proposed new

subsections 102.1(2), 102.1(2AB) and 102.1(2AC). Therefore, as a drafting matter, the Committee considers that the words ‘if it is practical to do so’ in proposed new paragraph 102.1(2AB)(a) might be moved to the start of the subsection, following the word ‘must.’ The Committee **seeks the Senator’s advice** on whether the subsection might be amended to allow the Minister more discretion in notification and listing.

Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009

Introduced into the Senate on 25 June 2009
Portfolio: Immigration and Citizenship

Background

This bill amends the *Australian Citizenship Act 2007* to implement the recommendations of the Australian Citizenship Test Review Committee and to strengthen the eligibility requirements for citizenship by conferral for applicants under 18 years of age.

In particular, the bill:

- provides that certain applicants may be eligible for citizenship without sitting the citizenship test if, at the time of application, they have a physical or mental incapacity that is as a result of suffering torture or trauma outside Australia;
- provides that the citizenship test must be successfully completed within a period specified by the Minister in a written determination; and
- provides that to be eligible for citizenship by conferral, applicants who are under 18 years of age must be permanent residents at both the time of application and the time of decision.

The Committee has no comment on this bill.

Australian Wine and Brandy Corporation Amendment Bill 2009

Introduced into the House of Representatives on 22 June 2009

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Australian Wine and Brandy Corporation Act 1980* to allow the Australia-European Community Agreement on Trade in Wine – signed by the Australian Government and the European Community on 1 December 2008 – to enter into force. The bill clarifies the intention of the original 1994 agreement by redefining, expanding and strengthening a number of its provisions; makes changes to the Label Integrity Program; and updates the compliance provisions in the Australian Wine and Brandy Corporation Act.

The bill also amends the *Trade Marks Act 1995* to amend definitions relevant to the agreement; enables the Registrar of Trade Marks to amend the representation of a trade mark or an application to register a trade mark; and ensures that trade marks that include a common English word that coincides with a geographical indication can be registered.

Regulations – incorporating material as in force from time to time Schedule 1, item 42, new paragraph 40M(1C)(b)

Schedule 1 contains amendments relating to the Agreement between Australia and the European Community on trade in wine. For wine originating in a foreign country, any requirement in a national food standard in relation to oenological practices, processes, or compositional requirements may now be governed by regulations.

Proposed new subsection 40M(1C), to be inserted by item 42 of Schedule 1, provides that the regulations may prescribe oenological practices, processes or compositional requirements by applying, adopting or incorporating (with or without modification) a written instrument or other document as in force or

existing at a particular time, or as in force or existing from time to time (proposed new paragraph 40M(1C)(b)).

The Committee has, in the past, expressed concern about 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. In this case, the reason for incorporation by reference is not explained in the explanatory memorandum. Therefore, the Committee **seeks the Minister's advice** on the need and justification for including incorporation by reference in the regulation-making power.

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

'Henry VIII' clauses Schedule 1, items 47 and 54

There are two 'Henry VIII' clauses in Schedule 1 which enable regulations to change responsibilities and entitlements conferred by the principal Act.

Proposed new subsection 40PA(3), to be inserted by item 47 of Schedule 1, provides for regulations to 'modify the operation of this Division to remove any inconsistency with the operation of regulations made for the purposes of Division 4B'. This allows 'modification' by regulation to provisions in Division 4 of the Australian Wine and Brandy Corporation Act relating to Australian geographical indications. Proposed new Division 4B, to be inserted by item 55 of Schedule 1, relates to foreign geographical indications and translations determined by the Geographical Indications Committee (established under section 40N of the Australian Wine and Brandy Corporation Act).

Proposed new section 40ZAA, to be inserted by item 54 of Schedule 1, provides for regulations to ‘modify the operation of this Division to remove any inconsistency with the operation of regulations made for the purposes of Division 4B’. This allows ‘modification’ by regulation to provisions in Division 4A relating to omission of Australian registered geographical indications.

In both cases, the explanatory memorandum refers (at pages 33 and 34) to the need to ensure consistency with Australia’s international obligations. Nevertheless, the Committee **seeks the Minister’s advice** on why it is considered necessary to use regulations to amend provisions in Divisions 4 and 4A in the event of any inconsistency with the operation of regulations made for the purposes of Division 4B.

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

Retrospective application Schedule 1, item 82

Item 82 of Schedule 1 provides for the amendment made by item 76 to apply to trade marks registered ‘before, on or after the commencement of this Schedule’. Item 76 of Schedule 1 inserts new section 83A into the Trade Marks Act to enable amendment of registered trade marks that are inconsistent with international agreements. The explanatory memorandum explains (at page 40) that a small number of registered trade marks include certain wine terms that, if used after the agreed phase-out date, may leave the trade mark owner liable to prosecution under the Australian Wine and Brandy Corporation Act. The explanatory memorandum also clarifies (at page 42) that item 82 applies only to trade marks affected by international obligations not in force at the time of their registration.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the

explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth. In this case, the Committee is satisfied that there is a clear need for retrospective application to protect trade mark owners from potential prosecution.

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

Automotive Transformation Scheme Bill 2009

Introduced into the House of Representatives on 24 June 2009

Portfolio: Innovation, Industry, Science and Research

Background

Introduced with the ACIS Administration Amendment Bill 2009, this bill establishes the legislative framework for the Automotive Transformation Scheme (ATS) which replaces the Automotive Competitiveness and Investment Scheme (ACIS) and is the centrepiece of the Federal Government's automotive policy, *A New Car Plan for a Greener Future*.

In particular, the bill:

- provides assistance to participants in the ATS to encourage competitive investment and innovation in the Australian automotive industry, with the aim of ensuring its long-term economic and environmental sustainability;
- ensures that debts under the ATS may be recovered by the Commonwealth; and
- provides for a monitoring regime, including provision for authorised officers to obtain a monitoring warrant to check compliance with the ATS.

Delayed commencement

Clause 2

Subclause 2(1) contains the table of commencement information and item 2 of the table provides that sections 3 to 29 commence on 1 July 2010. This means a delay in commencement. (The commencement of the ACIS Administration Amendment Bill 2009, discussed earlier in this *Alert Digest*, is linked to the commencement of section 3). Where a delay in commencement is longer than six months, the Committee generally expects that the explanatory memorandum to the bill will provide an explanation for the delay.

In this case, the explanatory memorandum does not explain the delayed commencement but the second reading speech states that it will ‘allow for pre-registration of existing ACIS participants’ and that ‘(t)his will guarantee continuity of assistance when payments under the new scheme commence from the 1st of January 2011’. The Committee considers that the second reading speech clearly explains the reason for the delayed commencement of the relevant provisions.

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

Standing appropriation

Clause 10

Clause 10 provides for capped assistance under the ATS to be paid out of the Consolidated Revenue Fund. In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see some limitation placed on the amount of funds that may be appropriated or a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

In this instance, the explanatory memorandum explains (at paragraph 21) that the appropriation is limited in amount by the ATS caps (clause 8); and in duration since the ATS ends on 31 December 2020 (clause 4, definition of ‘stage 2’). The explanatory memorandum also explains (at paragraph 20) that a standing appropriation will ensure the effective administration of the ATS operating on calendar years; will give the industry the certainty it needs to plan long-term investment; and will allow capped assistance that is recovered or capped assistance that is unspent in a calendar year to be returned to the ATS in each stage for redistribution.

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

Aviation Transport Security Amendment (2009 Measures No. 1) Bill 2009

Introduced into the House of Representatives on 24 June 2009

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill amends the *Aviation Transport Security Act 2004* to further strengthen the framework of Australia's aviation security regime.

In particular, the bill:

- enables the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government to designate security controlled airports (SCAs) as a particular category of airport, according to their risk profiles;
- allows unannounced inspections of businesses involved in air cargo;
- allows the Secretary of the Department to enter into enforceable undertakings with aviation industry participants in relation to any matter dealt with under the Aviation Transport Security Act; and
- expands the scope of 'compliance control directions' to cover operators of SCAs, screening authorities and screening.

Delayed commencement

Clause 2

Subclause 2(1) contains the table of commencement information and item 2 of the table provides that Part 1 of Schedule 1, which contains provisions relating to categories of security controlled airports, commences on the date of Proclamation but no later than 12 months after Royal Assent.

The Committee will generally not comment where any delay in commencement is six months or less in duration. However, where the delay is longer, the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with paragraph 19 of Drafting Direction No 1.3.

In this case, the explanatory memorandum and second reading speech do not explain the delayed commencement. Therefore, the Committee **seeks the Minister's advice** on the reasons for the potential delay in commencement of Part 1 of Schedule 1.

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.

Determination of important matters by regulation Schedule 1, item 3, proposed new section 28A

Proposed new section 28A, to be inserted by item 3 of Schedule 1, provides for a broad regulation-making power to prescribe different categories of security controlled airports. The explanatory memorandum states (at page 2) that such a regulation-making power is consistent with the current framework of the Aviation Transport Security Act as a whole; and that it also reflects the 'unpredictability of the aviation security environment'.

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

Retrospective application Schedule 1, item 6

Item 2 of Schedule 1 allows the Secretary to assign a particular security controlled airport a category prescribed under section 28A by a notice

published in the *Gazette*, and to notify the operator of the airport about the specific category that has been assigned to the airport. Item 6 of Schedule 1 provides that '(t)he amendment made by item 2 applies in relation to airports, or parts of airports, declared to be security controlled airports before, on or after the commencement of that item'.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee has long taken the view that the explanatory memorandum to a bill should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth. In this case, while the provision has retrospective effect which has not been articulated in the explanatory memorandum, the Committee is satisfied that the rationale for the retrospectivity is clear in the context of the overall intent and purpose of the bill.

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

Banking Amendment (Keeping Banks Accountable) Bill 2009

Introduced into the Senate on 25 June 2009

By Senator Fielding

Background

This bill amends the *Banking Act 1959* to ensure banks are accountable for setting mortgage interest rates. The bill requires banks to satisfy the Treasurer that any decision to withhold an interest rate cut or to raise interest rates beyond the Reserve Bank's official interest rate change is not contrary to the public interest. If a bank is unable to satisfy this criterion and does not comply with a direction to set its standard variable rate at a different rate before the end of a specified period, the Treasurer may determine that the Financial Claims Scheme will cease to apply in relation to that bank from a specified time.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The second reading speech contains some explanation of the broad background to, and intent of, the proposed amendments but the Committee's preference is that bills be accompanied by explanatory memoranda.

An explanatory memorandum would have assisted the Committee in its consideration of, for example, proposed new subsection 18H(3), to be inserted by item 1 of Schedule 1. This provision provides that the Treasurer may make an instrument revoking a determination that the Financial Claims Scheme will cease to apply to a bank where the bank subsequently complies with a direction under proposed new paragraph 18G(2)(b). An explanatory memorandum could assist readers to determine whether this is a legislative instrument enabling parliamentary scrutiny. The Committee **requests the Senator** to table an explanatory memorandum in order to provide a more comprehensive explanation of the operation of the bill's provisions.

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

Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009

Introduced into the House of Representatives on 24 June 2009

Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* to strengthen the regulatory framework relating to the payment of termination benefits to company directors and executives.

In particular, the bill:

- introduces a significantly lower threshold at which termination benefits to company executives (including directors, senior executives and key management personnel) must be approved by shareholders;
- clarifies and expands the definition of a termination benefit;
- better empowers shareholders to disallow excessive termination benefits, particularly where they are a reward for poor performance;
- requires unauthorised termination benefits to be repaid immediately;
- provides that retiring company directors and executives, who hold shares in the company, can no longer participate in a shareholder vote on their own termination benefit, except when acting as a proxy; and
- increases the penalties applicable to unauthorised termination benefits.

Determination of important matters by regulation Schedule 1, item 7, new paragraph 200AB(e)

Proposed new section 200, to be inserted by item 7 of Schedule 1, provides guidance on interpretation regarding termination benefits. It states that ‘a broad interpretation’ must be given to ‘benefits being given, even if criminal

or civil penalties may be involved’. This runs counter to the usual principle of interpreting provisions imposing criminal penalties strictly. The meaning of ‘benefit’ is defined in proposed new section 200AB, also inserted by item 7 of Schedule 1, with proposed new paragraph 200AB(1)(e) providing that a benefit includes ‘a thing specified in regulations’ (see also new subsection 200AB(2)).

The Committee notes that the explanatory memorandum provides a comprehensive explanation for the broad regulation-making power; that is, it is designed to overcome legal ambiguity as to whether certain types of payments are considered to be termination benefits requiring shareholder approval. The explanatory memorandum explains further that the draft regulations will offer guidance and certainty by providing clear examples of payments that will require such approval. The Committee welcomes the detailed explanation provided, along with the accompanying examples, which provide clarity and certainty in relation to the operation of the provision.

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

Determination of important matters by regulation Schedule 1, item 10, new subsection 200A(1A)

Similarly, proposed new subsection 200A(1A), to be inserted by item 10 of Schedule 1, allows for regulations to specify circumstances that would constitute the giving of a benefit ‘in connection with a person’s retirement from an office or position’. However, in this case, the explanatory memorandum explains (at page 13) that the regulations will be used to provide guidance and certainty. The explanatory memorandum also provides examples of relevant circumstances which will be prescribed in the regulations (the automatic or accelerated vesting of options and payments in lieu of notice). The Committee again welcomes the provision of such details in explanatory memoranda, and considers this type of explanation to be a useful model that might be provided in relation to all similar provisions arising in future legislation.

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

‘Henry VIII’ clause

Schedule 1, item 22, new subsection 200E(2C)

Item 22 of Schedule 1 inserts new subsections after subsection 200E(2) to restrict the right of a retiring director or executive, or their associate, from participating in a shareholder vote that includes their termination payment, although they can cast a vote if acting as a proxy. Proposed new subsection 200E(2C) provides that regulations may prescribe cases where subsection (2A) does not apply; that is, where the retiree *can* participate in a shareholder vote. The explanatory memorandum explains (at page 14) that this is to provide flexibility in the event that circumstances arise which give valid cause for retirees to exercise their vote. While recognising the need for flexibility in certain circumstances, the Committee, nevertheless, **seeks the Treasurer’s advice** on the justification for the inclusion of a power to create regulations in response to specific individual circumstances.

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

Retrospective application

Schedule 1, subitem 43(2)

Subitem 43(2) of Schedule 1 provides for some retrospective application of amendments made by the bill in relation to a person’s retirement from an office or position in a company. Subitem 43(2) provides that, for the purposes of sections 200F and 200G of the Corporations Act, a person’s relevant period applies in relation to managerial or executive offices held ‘before, on or after the commencement’ of the relevant amendments. People currently occupying managerial and executive positions would be affected on commencement of the new provisions. While cognisant of the stated purpose of the proposed

amendments, the Committee nevertheless **seeks the Treasurer's advice** as to the impact of their retrospective application on contractual entitlements.

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

Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009

Introduced into the House of Representatives on 25 June 2009

Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to provide for the national regulation of margin lending and trustee corporations, as agreed by the Council of Australian Governments (COAG) on 26 March 2008. The bill implements the transfer of trustee company regulation from the states and territories to the Commonwealth.

The bill also amends the Corporations Act to require that promissory notes valued at \$50,000 or over come under the same regulatory regime as debentures, and to require the Australian Securities and Investments Commission (ASIC) to establish and maintain a publicly available register of debenture trustees.

Strict liability

Schedule 1, item 12

Schedule 1 amends the Corporations Act to regulate margin loans. Item 12 of Schedule 1 inserts a new Division 4A providing for 'Special provisions relating to margin lending facilities' with Subdivision A relating to 'Responsible lending conduct for margin lending facilities'.

The provider of a margin lending facility is required to assess its suitability for a retail client (proposed new sections 985E, 985F and 985G) and provide a written copy of the assessment to the client if requested to do so (proposed new subsections 985J(1) and 985J(2)). The provider must not request or demand payment for giving the retail client a copy of the assessment (proposed new subsection 985J(4)). If a provider fails to comply with subsections 985(J)(1), (2) or (4), it is an offence of strict liability (proposed new subsection 985J(5)).

The Committee generally draws to the Senate's attention any provisions that create offences of strict liability and has expressed the view that, where a bill creates such an offence, the reasons for its imposition should be set out in the explanatory memorandum. In this case, paragraph 1.92 of the explanatory memorandum draws attention to the relatively low penalty amount of 50 penalty units (see item 16 of Schedule 1) and the need to include a deterrent for breaches of these provisions.

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

'Henry VIII' clause

Schedule 1, item 12, new subsection 985K(4)

There are 'Henry VIII' clauses in the bill which provide for regulations to change entitlements, responsibilities and obligations conferred by the principal Act.

Proposed new section 985K of the Corporations Act, to be inserted by item 12 of Schedule 1, provides for requirements regarding unsuitable margin lending facilities. Proposed new subsection 985K(4) provides that regulations may prescribe particular situations in which a margin lending facility is taken not to be unsuitable for a retail client, despite subsection (2). The explanatory memorandum states merely (at paragraph 1.95) that this is to allow 'particular situations to be prescribed'. In light of the lack of explanation for this 'Henry VIII' clause, the Committee **seeks the Treasurer's advice** in relation to the need and justification for the use of such a regulation-making power to amend the principal legislation.

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

**Determination of important matters by regulation
Schedule 2, item 3, new subsection 12BAB(1B)**

Several provisions in the bill enable the inclusion of definitions of terms and delineation of responsibilities in delegated legislation.

Proposed new subsection 12BAB(1A) of the ASIC Act, to be inserted by item 3 of Schedule 2, amends the meaning of ‘financial service’ to ensure it includes the provision by a trustee company of a traditional trustee company service. Proposed new subsection 12BAB(1B) provides for regulations to prescribe the person or persons to whom a service of a traditional trustee company service of a particular class is taken to be provided or supplied. Subsection 12BAB(1B) also provides that it does not limit, and is not limited by, subsection (2). The explanatory memorandum merely describes the provision (at paragraph 2.227). In light of the lack of explanation for the delegation, without any accompanying examples, the Committee **seeks the Treasurer’s advice** in relation to the need and justification for the use of such a broad regulation-making power in these circumstances.

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

**Determination of important matters by regulation
Schedule 2, item 9, new sections 601RAC and 601SAB**

Proposed new section 601RAC of the Corporations Act, to be inserted by item 9 of Schedule 2, provides the meaning of ‘traditional trustee company services’ and ‘estate management functions’. Paragraphs 601RAC(1)(e), (2)(f) and (3)(f) allow regulations to prescribe ‘any other services’ or persons ‘acting in any other capacity’ as an extension to the specified services and capacities included in the definitions. The explanatory memorandum fails to explain the need for such broad potential additions to the definitions.

Further, proposed new section 601SAB, also inserted by item 9 of Schedule 2, provides that the regulations may prescribe ‘such other powers, functions,

liabilities and obligations, and such privileges and immunities’ to licensed trustee companies in relation to the provision of traditional trustee company services. The explanatory memorandum also fails to explain the need for this provision.

By contrast, the explanatory memorandum states (at paragraph 2.37) that proposed new subsection 601RAE(4) (also inserted by item 9 of Schedule 2) contains a specific regulation-making power to provide that the trustee company provisions are, or are not, intended to exclude prescribed state or territory laws. Similarly, item 12 of Schedule 1 inserts provisions establishing new requirements for responsible lending conduct for margin lending facilities. Proposed new paragraphs 985G(1)(c) and (d) provide for regulations to prescribe the inquiries and steps that may be taken in inquiring about a retail client (‘any inquiries [or steps] prescribed by the regulations about any matter prescribed by the regulations’). The explanatory memorandum provides (at page 25) a comprehensive explanation of the need for flexibility and timeliness in responding to changing needs.

The Committee **seeks the Treasurer’s advice** on the need and rationale for the proposed use of delegated legislation in new sections 601RAC and 601SAB; and whether explanations such as those provided in the explanatory memorandum for new subsection 601RAE(4) and new paragraphs 985G(1)(c) and (d) might also be provided in relation to new sections 601RAC and 601SAB.

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

Wide delegation of power

Schedule 2, item 9, new subsection 601WAA(2)

Proposed new subsection 601WAA(2), to be inserted by item 9 of Schedule 2, provides that ASIC may authorise ‘a person who is a member of ASIC, or of its staff, to perform or exercise the functions or powers of an authorised ASIC officer under a particular provision of this Part’. The relevant Part relates to

cancellation of Australian financial services licences and includes exercise of the Minister's powers. The Committee generally prefers that senior officers exercise any functions and powers of the Minister. Therefore, the Committee **seeks the Treasurer's advice** in relation to the level, position or qualifications of ASIC staff members who are expected to exercise functions and powers under this Part of the Corporations Act, and whether more specificity might be provided in the bill or the explanatory memorandum in this regard.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it 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.

'Henry VIII' clause

Schedule 2, item 9, new subsection 601YAB(1)

Proposed new subsection 601YAB(1) of the Corporations Act, to be inserted by item 9 of Schedule 2, provides for exemption and modification by regulation of all or specified provisions in new Chapter 5D (which relates to licensed trustee companies). The explanatory memorandum states (at paragraph 2.204) that there may be certain situations that may give rise to a need to modify a provision in Chapter 5D, or to exempt a person from a provision of Chapter 5D. Examples are given of exempting persons from fee-charging provisions, and modifying the duties of officers and employees of licensed trustee companies.

While recognising the need for flexibility, the Committee nevertheless **seeks the Treasurer's advice** in relation to the need and justification for the use of a 'Henry VIII' clause to amend the principal legislation in these circumstances (rather than putting forward amendments to the Act itself, if necessary).

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

**Determination of important matters by regulation
Schedule 2, item 19, new subsection 766A(1B)**

Proposed new subsection 766A(1A) of the Corporations Act, to be inserted by item 19 of Schedule 2, states that a traditional trustee company service provided by a trustee company is a financial service. Proposed new subsection 766A(1B), also inserted by item 19 of Schedule 2, provides that regulations may prescribe the person or persons to whom a service of a traditional trustee company service of a particular class is taken to be provided or supplied. Subsection 766A(1B) also provides that it does not limit, and is not limited by, subsection (2). The explanatory memorandum does not explain the need for the provision. In light of the lack of explanation for the regulation-making power, and the lack of accompanying examples, the Committee **seeks the Treasurer's advice** in relation to the need and justification for such a broad delegation of legislative power in these circumstances.

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

**'Henry VIII' clause
Schedule 5, item 1, new subsection 1492(2)**

Proposed new subsection 1492(2) of the Corporations Act, to be inserted by item 1 of Schedule 5, provides for regulations to modify provisions of the Corporations Act regarding transitional, application or saving matters. The explanatory memorandum explains (at paragraph 1.116) that such a provision is necessary to deal with unexpected or minor transitional matters arising after the legislation is passed. The Committee notes that this type of provision is regularly included in legislation to facilitate a smooth transition.

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

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Attorney-General

Background

In April 2009, the Standing Committee of Attorneys-General (SCAG) agreed to a set of resolutions for a comprehensive national legislative and operational response to combat organised crime. This bill implements the Commonwealth's commitment as part of the SCAG agreement to enhance its legislation to combat organised criminal activity.

Schedules 1 and 2 amend the *Proceeds of Crime Act 2002*, the *Bankruptcy Act 1966*, the *Crimes Act 1914* and the *Family Law Act 1975* to strengthen the Commonwealth criminal assets confiscation regime, in response to recommendations of law enforcement agencies and to the *Report of the Independent Review of the Operation of the Proceeds of Crime Act* by Mr Tom Sherman AO (tabled in Parliament in October 2006).

Specifically, Schedule 1 introduces unexplained wealth provisions to target wealth that a person cannot demonstrate that he or she has lawfully acquired. Schedule 2:

- introduces freezing orders to ensure assets are not dispersed;
- removes time limitations on orders;
- provides for non-conviction-based restraint and forfeiture of instruments of serious crime;
- enhances information-sharing under the Proceeds of Crime Act, and
- reimburses legal aid commission legal costs from the Confiscated Assets Account.

Schedule 3 amends the *Crimes Act 1914* and the *Customs Act 1901* to implement model laws for controlled operations, assumed identities and witness identity protection.

Schedule 4 amends the *Criminal Code Act 1995* to extend criminal liability to persons who jointly commit offences, or engage in criminal activity as part of a group, to enable the prosecution to obtain higher penalties for such offenders by aggregating the conduct of offenders who operate together. Schedule 4 also amends the *Telecommunications (Interception and Access) Act 1979* to facilitate greater access to telecommunications interception for criminal organisation offences.

Reversal of the onus of proof

Schedule 1, item 13, new subsection 179E(3)

Item 13 of Schedule 1 inserts a new Part 2-6 on ‘Unexplained wealth orders’ into the Proceeds of Crime Act. Proposed new subsection 179E(3) reverses the usual burden of proof. Current section 317 of the Proceeds of Crime Act provides that the applicant, who would be the Director of Public Prosecutions, bears the onus of proving the matters necessary to establish the grounds for making a relevant order. Proposed new subsection 179E(3) provides that the person against whom the order is sought has the burden of proving that their wealth is *not* derived from one or more of the specified offences in proposed new paragraph 179E(1)(b). The court must be satisfied on reasonable grounds that the order should be granted (new paragraphs 179B(1)(b) and 179E(1)(a)). The explanatory memorandum does not explain this reversal of the onus of proof. The Committee is concerned about the potential impact of such an onerous provision on a person’s civil liberties (for example, the right to privacy) and **seeks the Attorney-General’s advice** on the reasons for the reversal of the onus of proof in these circumstances.

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

Retrospective application
Schedule 2, various items; Schedule 4, item 18

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. There are several application provisions in the bill which apply whether conduct constituting the particular offence occurred *before*, on or after commencement of the relevant amendment: items 8, 15, 18, 29, 31, 35, 42, 48, 50, 52, 54, 60, 63, 69 and 71 relating to amendments to the Proceeds of Crime Act; and item 18 of Schedule 4 relating to an amendment to the Telecommunications (Interception and Access) Act.

The explanatory memorandum does not explain the reasons for the retrospective effect of these provisions. Therefore, the Committee **seeks the Attorney-General's advice** on whether the reasons for the retrospective application of the provisions might be provided and also included in the explanatory memorandum to assist readers.

Pending the Attorney-General'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.

Drafting note
Definition of 'law enforcement officer'
Schedule 3, item 10, new section 15GC

Proposed new Part 1AB and Part 1AC of the Crimes Act, to be inserted by item 10 of Schedule 3, deal with amendments relating to controlled operations and assumed identities (respectively). Item 10 inserts a new section 15GC containing definitions for Part 1AB. The Committee notes that the term 'law enforcement officer' is not defined for the purposes of Part 1AB, even though the term is used in that Part (for example, in proposed new section 15GH regarding applications to conduct controlled operations).

The term *is* defined for the purposes of new Part 1AC in proposed new section 15K. The explanatory memorandum refers (at page 53) to use of the

current definition in section 3 of the Crimes Act but it is unclear whether use of that definition throughout new Part 1AB is approved. The Committee **seeks the Attorney-General's advice** on whether a definition of 'law enforcement officer' should be specifically included in proposed new section 15GC.

Abrogation of the privilege against self-incrimination
Schedule 3, item 10, new paragraph 15HV(1)(c)

Proposed new paragraph 15HV(1)(c) would abrogate the privilege against self-incrimination for a person required to give information, answer a question, or give access to a document as and when required under new Division 3 of Part 1AB (relating to controlled operations). The Committee does not view the privilege against self-incrimination as absolute, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of the incriminating disclosures.

In this case, under proposed new paragraph 15HV(2)(a), any information provided by a person under the new Division will not be admissible in evidence against the person, except in the prosecution of the person for an offence against new sections 15HK or 15HL (which relate to the unauthorised disclosure of information relating to a controlled operation) or Parts 7.4 or 7.7 of the Criminal Code (which creates offences relating to making false and misleading statements and forgery). The Committee considers that these limitations strike a reasonable balance between the competing interests of obtaining information and protecting people's individual rights.

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

Wide delegation of powers
Schedule 3, item 10, new subsection 15HX(1)

Item 10 of Schedule 3 also provides new powers to the Ombudsman in relation to the new regime for controlled operations. Proposed new

subsection 15HX(1) of the Crimes Act would permit the Ombudsman to delegate powers under new Division 3 of Part 1AB to ‘an APS employee responsible to the Ombudsman’ (paragraph 15HX(1)(a)) or to ‘a person having similar oversight functions to the Ombudsman under the law of a State or Territory or to an employee responsible to that person’ (paragraph 15HX(1)(b)).

As a consequence, the delegations in new subsection 15HX(1) may be to any APS employee, regardless of the position which such an employee holds, or of his or her qualifications; or to a person in a similar position in a state or territory. This is a delegation to a large class of persons with very limited specificity. Generally, the Committee prefers to see a limit set on the sorts of powers that might be delegated, or on the categories of people to whom these 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. Therefore, the Committee **seeks the Attorney-General’s advice** as to the justification for such a wide discretion, and whether it might be appropriate to limit the delegation in some way.

Pending the Attorney-General’s advice, the Committee draws Senators’ attention to the provision, as it 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.

Customs Tariff Amendment (2009 Measures No. 1) Bill 2009 [No. 2]

Introduced into the House of Representatives on 22 June 2009

Portfolio: Home Affairs

Background

Introduced with the Excise Tariff Amendment (2009 Measures No. 1) Bill 2009 [No. 2], this bill is similar to another bill of the same name which was introduced into the House of Representatives on 11 February 2009 but subsequently negatived by the Senate on 18 March 2009. The Committee commented on the earlier version of the bill in *Alert Digest No. 3 of 2009*.

The 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 bill also alters the definitions in the Customs Tariff Act of 'beer' and 'grape wine product' for taxation purposes.

Retrospective commencement

Clause 2

Subclause 2(1) contains the table of commencement information and item 2 of the table provides that Schedule 1 commenced on 27 April 2008, resulting in retrospective commencement. 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 explains (at page 3) that the excise and customs notices were published in the *Gazette* on 26 April 2008. In

the circumstances, the Committee **leaves to the Senate as a whole** any consideration of the retrospective effect of the bill.

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

Excise Tariff Amendment (2009 Measures No. 1) Bill 2009 [No. 2]

Introduced into the House of Representatives on 22 June 2009
Portfolio: Treasury

Background

Introduced with the Customs Tariff Amendment (2009 Measures No. 1) Bill 2009 [No. 2], this bill is similar to another bill of the same name which was introduced into the House of Representatives on 11 February 2009 but subsequently negated by the Senate on 18 March 2009. The Committee commented on the earlier version of the bill in *Alert Digest No. 3 of 2009*.

The 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’ (‘alcopops’ or ‘ready-to-drink beverages’).

The bill also alters the definition in the Excise Tariff Act of ‘beer’ for taxation purposes.

Retrospective commencement

Clause 2

Subclause 2(1) contains the table of commencement information and item 2 of the table provides that Schedule 1 commenced on 27 April 2008, resulting in retrospective commencement. 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 explains (at page 3) that the excise and customs notices were published in the *Gazette* on 26 April 2008. In the circumstances, the Committee **leaves to the Senate as a whole** any consideration of the retrospective effect of the bill.

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

Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Health and Ageing

Background

This bill amends the *Health Insurance Act 1973* and the *National Health Act 1953* to enable nurse practitioners, and appropriately qualified and experienced midwives, to request appropriate diagnostic imaging and pathology services for which Medicare benefits may be paid; and allows these health professionals to prescribe certain medicines under the Pharmaceutical Benefits Scheme (PBS).

The bill also makes amendments to the *Health Insurance Act 1973*, the *Medical Indemnity Act 2002*, the *Medicare Australia Act 1973* and the *National Health Act 1953* which are consequential to, and commence at the same time as, the proposed *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2009*.

Delayed commencement

Schedule 1, various items

Schedule 1 amends the Health Insurance Act to, among other things, provide for nurse practitioners and midwives to request certain diagnostic imaging and pathology services (for example, new paragraph 16A(1)(aa), to be inserted by item 10 of Schedule 1). Item 11 of Schedule 1 provides that the amendment made by item 10 applies in relation to a pathology service requested on or after 1 November 2010. Similarly, items 15, 21 and 24 of Schedule 1 provide for delayed commencement, on or after 1 November 2010, for various provisions of the Health Insurance Act relating to particular services and referrals.

Where a delay in commencement is longer than six months, the Committee generally expects that the explanatory memorandum to the bill will provide an explanation. In this case, no explanation is provided in the explanatory

memorandum for the various delays. Therefore, the Committee **seeks the Minister's advice** on the reasons for the delayed commencement of these provisions.

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

Strict liability

Schedule 1, item 23, paragraph 20BA(1)(a)

Item 23 of Schedule 1 amends paragraph 20BA(1)(a) of the Health Insurance Act by changing the word 'practitioner' to 'person'. The effect of this provision is explained in the explanatory memorandum (at page 8) as requiring a consultant physician or specialist to retain a written referral from a person and produce it to Medicare, if so requested. Failure to produce the referral, without reasonable excuse, is an offence of strict liability. The Committee notes that this is a consequential drafting amendment which merely adjusts a strict liability offence already in existence.

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

Indeterminate ministerial power

Schedule 1, item 25, new subsections 21A(2) and 22(2)

Proposed new section 21A of the Health Insurance Act, to be inserted by item 25 of Schedule 1, provides for a common form of undertaking to be given by an eligible midwife who wishes to become a participating midwife. Proposed new subsection 21A(2) provides that the common form of undertaking is to 'make provision for any matters that the Minister thinks appropriate'. Proposed new subsection 22(2), also inserted by item 25 of Schedule 1, contains a similar ministerial power in relation to a common form

of undertaking to be provided by a nurse practitioner. The Committee notes that this is a broad power; however, proposed new subsections 21A(4) and 22(4) provide that a common form of undertaking is a legislative instrument. In the circumstances, therefore, the Committee considers that sufficient scrutiny and accountability is provided in relation to the exercise of this broad power by the Minister.

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

Higher Education Support Amendment Bill 2009

Introduced into the House of Representatives on 24 June 2009

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Higher Education Support Act 2003* to streamline the application and assessment process for higher education and training organisations applying for approval to offer FEE-HELP and VET FEE-HELP assistance to students.

Specifically, the bill removes the administrative requirement for higher education and training organisations to have tuition assurance arrangements in place at the date of their application for approval to offer FEE-HELP or VET FEE-HELP assistance to students; and allows recommendations from approved national or state-based agencies to be used as part of the assessment and approval of training organisations to deliver VET FEE-HELP assistance.

The Committee has no comment on this bill.

Marriage Equality Amendment Bill 2009

Introduced into the Senate on 24 June 2009

By Senator Hanson-Young

Background

This bill amends the *Marriage Act 1961* to remove all discrimination on the basis of sexuality and gender identity; and to permit marriage regardless of sex, sexuality and gender equality. The bill also provides for the recognition of same-sex marriages entered into under the laws of another country.

The Committee has no comment on this bill.

Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009

Introduced into the House of Representatives on 24 June 2009

Portfolio: Health and Ageing

Background

Introduced with the Midwife Professional Indemnity (Run-off Cover Support Payment) Bill 2009, this bill establishes a professional indemnity scheme to provide indemnity insurance to eligible privately practising midwives.

Delayed commencement

Clause 2

Clause 2 of the bill provides for commencement on 1 July 2010. Where a delay in commencement is longer than six months, the Committee generally expects that the explanatory memorandum to the bill will provide an explanation. In this case, the explanatory memorandum states (at page 1) that making insurance available to eligible midwives from 1 July 2010 is 'in line with proposed new requirements of the National Accreditation and Registration Scheme'. The explanatory memorandum also states (at page 3) that the bill does not cover any incident that occurs before 1 July 2010. However, there is no explanation for the delay in commencement itself. The Committee **seeks the Minister's clarification** as to the specific reasons for the delay in commencement of the bill.

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.

Inappropriate delegation of legislative power
Incorporation of material as in force from time to time
Clause 90

Paragraph 90(1)(b) provides for the Minister, by legislative instrument, to make Rules ‘necessary or convenient’ to give effect to the Act. Under subclause 90(2), the Rules may confer a power on the Minister or the CEO of Medicare Australia. Subclause 90(3) provides that the Rules may apply, adopt or incorporate any matter contained ‘in any other instrument or writing’ that is ‘in force or existing from time to time’. Although the Rules are a legislative instrument, the Committee notes that this provision gives very broad power and also incorporates material by reference. The explanatory memorandum does not explain the need or rationale for the breadth of the provision. The Committee **seek the Minister’s advice** on the reasons why such broad powers are required in the circumstances.

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; and may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.

Strict liability
Various clauses

The Committee generally draws to the Senate’s attention any provisions that create offences of strict liability and has expressed the view that, where a bill creates such an offence, the reasons for its imposition should be set out in the explanatory memorandum. Two new clauses in the bill create offences for failing to provide information. In both cases, the explanatory memorandum states (at page 32) that the privilege against self-incrimination applies but does not explain why the provision is necessary; nor does the explanatory memorandum refer to the *Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers*.

First, Division 6 of Part 4 of Chapter 2 contains offence provisions in relation to the payment of Commonwealth contributions. Clause 66 creates an offence for failing to provide information in response to a request from the CEO of Medicare Australia (pursuant to subclause 62(1)). Failure to comply is an offence of strict liability under subclause 66(3) but the explanatory memorandum does not explain the reason for the imposition of strict liability in these circumstances. Similarly, Part 3 of Chapter 3 contains provisions providing information-gathering powers in relation to run-off cover payments. Clause 84 creates an offence for failing to provide information in response to a request from the CEO of Medicare Australia pursuant to subclause 82(1). Failure to comply is an offence of strict liability under subclause 84(3) but, again, the explanatory memorandum does not explain the reason for the imposition of strict liability.

Other provisions in the bill also impose strict liability offences and the explanatory memorandum does not explain why the provisions are necessary, nor do they refer to the *Guide*. The provisions relate to: failure to comply with a direction to pay money to Medicare Australia (subclause 65(7)); failure to notify the CEO of Medicare Australia of certain information (subclauses 67(3) and 85(3)); failure to keep and retain records (subclause 68(3)); failure to include information in an invoice (subclause 69(3)); and failure to comply with a direction from the CEO of Medicare Australia (subclause 80(3)).

The Committee **seek the Minister's advice** on the reasons for the imposition of strict liability in each case and whether the *Guide* was considered in the course of framing these offences.

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.

Standing appropriations

Subclause 43(2), clause 70 and subclause 78(2)

There are three standing appropriations in the bill. In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an

explanation of the reason for the standing appropriation. In addition, the Committee likes to see some limitation placed on the amount of funds that may be appropriated or a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to the Parliament.

Subclause 43(2) provides that the Consolidated Revenue Fund is appropriated for the payment of amounts under Division 4 for Commonwealth liabilities if a run-off cover termination date has been set in relation to affected eligible midwives. The explanatory memorandum does not explain the appropriation, although the bill provides limitations of Commonwealth contributions on run-off claims under clause 35 (which is noted in the explanatory memorandum at page 2). There is no sunset clause on the appropriation.

Clause 70 provides that the Consolidated Revenue Fund is appropriated for the purposes of paying level one, level two and run-off cover Commonwealth contributions. The explanatory memorandum does not explain the appropriation, although the limits of Commonwealth contributions on level one, level two and run-off claims are provided (see clauses 17, 21 and 35) and noted in the explanatory memorandum (at pages 1-2). There is no sunset clause on the appropriation.

Subclause 78(2) provides that the Consolidated Revenue Fund is appropriated for the purposes of paying refunds under section 78 relating to overpayments. The explanatory memorandum states (at page 34) that such overpayments may relate to a run-off cover support payment or late payment penalty.

In his *Review of Operation Sunlight: Overhauling Budgetary Transparency* (June 2008), former Senator Andrew Murray (a previous long-standing member of this Committee) reported that more than 80% of all appropriations drawings for 2002-03 was spent from the Consolidated Revenue Fund under the authority of special (or standing) appropriations. Mr Murray drew attention to the need for parliamentary scrutiny of special or standing appropriations; and suggested that any such appropriations included in a bill be put in the Chamber as a separate question from the Chair in the committee-of-the-whole stage to ensure a separate vote on each appropriation. He recommended regular review of standing appropriations (recommendation 12).

In its June 2008 response to Mr Murray's report, the Federal Government agreed that review is needed but considered that such review be in a more

limited form than that recommended. In light of the Federal Government's response to Mr Murray's report that it intends to be more accountable on the issue of standing appropriations, the Committee seeks **the Minister's advice** as to why more detailed explanations of the standing appropriations were not included in the bill's explanatory memorandum. The Committee also **seeks the Minister's advice** in relation to how parliamentary scrutiny of expenditure under the three standing appropriations will be achieved.

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.

Midwife Professional Indemnity (Run-off Cover Support Payment) Bill 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Health and Ageing

Background

Introduced with the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009, this bill imposes a tax – the Run-off Cover Support Payment – which will apply to premium payments for professional indemnity insurance by eligible midwives to help cover the costs of run-off cover claims against midwives who cease to practise due to retirement, disability or maternity.

The Committee has no comment on this bill.

Migration Amendment (Immigration Detention Reform) Bill 2009

Introduced into the Senate on 25 June 2009

Portfolio: Immigration and Citizenship

Background

This bill amends the *Migration Act 1958* to support the implementation of the Federal Government's New Directions in Detention policy, announced on 29 July 2008. The New Directions in Detention policy includes the introduction of seven key Immigration Detention Values to guide and drive new detention policy and practice into the future.

Insufficiently defined administrative powers Schedule 1, item 12, new section 194A

Proposed new section 194A, to be inserted by item 12 of Schedule 1, provides for an authorised officer to grant a temporary community access permission to a person in immigration detention if the officer considers that it would involve minimal risk to the community (proposed new subsection 194A(2)). The authorised officer does not have a duty to consider whether to exercise the power to make, vary or revoke such a permission, whether he or she is requested to do so by any person, or in any other circumstances (proposed new subsection 194A(4)).

The decision of an officer not to exercise, or not to consider the exercise of this power, is a privative clause decision (see proposed new paragraph 474(7)(aa), to be inserted by item 19 of Schedule 1). This means that judicial review of the decision is limited. The explanatory memorandum and second reading speech do not explain the level of officers who will be making such decisions, although the Committee notes that the second reading speech refers to three-monthly senior officer reviews of the appropriateness of continued detention.

This contrasts with the information in the extrinsic material relating to proposed new section 197AF, to be inserted by item 13 of Schedule 1, which

provides for the Minister's non-compellable residence determination power in Division 7 of Part 2 of the Migration Act to be delegated to departmental officers. The second reading speech states that this delegation will be exercised by a senior departmental officer.

The Committee generally prefers that senior officers exercise delegations and make decisions such as those contained in proposed new sections 194A and 197AF. In the circumstances, the Committee **seeks the Minister's advice** on the level, position or qualifications of authorised officers who are expected to make decisions pursuant to proposed new section 194A, and whether this information might be specified in the explanatory memorandum.

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

National Consumer Credit Protection Bill 2009

Introduced into the House of Representatives on 25 June 2009

Portfolio: Treasury

Background

This bill, along with the National Consumer Credit Protection (Fees) Bill 2009 and the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009, establishes a new national consumer credit regime. The new regime gives effect to the Council of Australian Governments' (COAG) agreements of 25 March 2008 and 3 July 2008 to transfer responsibility for regulation of consumer credit, and a related cluster of additional financial services, to the Commonwealth. It also implements the first phase of a two-phase Implementation Plan to transfer credit regulation to the Commonwealth, as agreed by COAG on 2 October 2008.

Key components of the proposed national credit regime include:

- a comprehensive licensing regime for those engaging in credit activities via an Australian credit licence (ACL), to be administered by the Australian Securities and Investments Commission (ASIC) as the sole regulator;
- industry-wide responsible lending conduct requirements for licensees;
- improved sanctions and enhanced enforcement powers for the regulator; and
- enhanced consumer protection through dispute resolution mechanisms, court arrangements and remedies.

Schedule 1 contains the new National Credit Code. It largely replicates the Uniform Consumer Credit Code (UCCC), enacted in the *Consumer Credit (Queensland) Act 1994* (Qld), and applied in the states and territories since 1996.

‘Henry VIII’ clauses

General commentary

There are a large number of ‘Henry VIII’ clauses in the bill which provide for regulations to change entitlements and obligations conferred by the principal legislation. Since its establishment, the Committee has consistently drawn attention to ‘Henry VIII’ clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

The Committee does not condone the use of ‘Henry VIII’ clauses as a standard drafting practice. However, such clauses have been used so extensively in this bill that it is not possible to provide commentary in relation to all of them. The Committee **leaves to the Senate as a whole** any consideration of the legislative approach taken regarding ‘Henry VIII’ clauses in this particular bill, as well as the question of the apparent increasing reliance on such provisions in legislation more generally.

Where the need and justification for ‘Henry VIII’ clauses in the bill have been explained in the explanatory memorandum (noting, in this context, that the bill gives effect to COAG agreement), the Committee has not made any specific comments. Instead, the Committee has focused its commentary on those clauses that have not been accompanied by any explanations in the explanatory memorandum.

‘Henry VIII’ clauses

Paragraphs 14(3)(b) and 15(5)(b)

Part 1-2 of Chapter 1 contains definitions and clause 14 defines ‘person’ to generally include a partnership. Paragraph 14(3)(b) provides that regulations may exclude or modify the effect of subsections 14(1) and 14(2). Similarly, clause 15 defines ‘person’ to generally include multiple trustees. Paragraph 15(5)(b) provides that regulations may exclude or modify the effect of subsections 15(2), 15(3) and 15(4). The explanatory memorandum provides no explanation for the use of regulations to change definitions. The Committee **seek the Treasurer’s advice** on the need for the use of the regulation-making power to change definitions in the principal Act.

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

'Henry VIII' clause

Clause 28

Division 2 of Part 2-2 of Chapter 2 pertains to the prohibition on engaging in credit activities without a licence. Clause 28 allows regulations to prescribe a day for commencement of Division 2: '(t)his Division applies on or after 1 July 2011, or a later day prescribed by the regulations. The Committee **seeks the Treasurer's advice** on the need for the use of the regulation-making power to prescribe commencement.

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

'Henry VIII' clause

Clause 110

Part 2-6 of Chapter 2 provides for exemptions and modifications relating to the Chapter (Licensing of persons who engage in credit activities). Clause 110 enables regulations to allow exemptions from licensing provisions and credit activities; and to omit, modify or vary provisions. The Committee **seeks the Treasurer's advice** on the need for this very broad regulation-making power in these particular circumstances.

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

‘Henry VIII’ clauses
Subclauses 123(5) and 124(5)

Division 6 of Part 3-1 of Chapter 3 contains a prohibition on licensees suggesting, or assisting with, unsuitable credit contracts. Clause 123 prohibits suggesting, or assisting consumers to enter, or increase the credit limit under, unsuitable contracts; and subclause 124 prohibits suggesting to consumers to remain in unsuitable credit contracts. Subclauses 123(2) and 124(2) prescribe when a contract will be unsuitable for a consumer.

Subclause 123(5) provides that regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subclause (2). Similarly, subclause 124(5) provides that regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subclause (2). The explanatory memorandum does not explain why regulations are to be used for these purposes. The Committee **seek the Treasurer’s advice** on the need for the use of the regulation-making power in subclauses 123(5) and 124(5).

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

‘Henry VIII’ clause
Clause 326

Chapter 7 of the bill contains miscellaneous clauses and Division 2 concerns the liability of persons for conduct of their agents. Clause 326 provides that regulations may modify Division 2 ‘for the purposes prescribed in the regulations’. The explanatory memorandum provides no explanation for this provision. The Committee **seeks the Treasurer’s advice** on the need for the use of this extremely broad regulation-making power.

Pending the Treasurer’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to delegate

legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

'Henry VIII' clauses
Subclauses 333(2) and (3)

Subclause 333(1) provides that a contravention of a requirement in the Act does not affect the validity or enforcement of any transaction, contract, instrument or other arrangement. Subclause 333(2) provides that this is subject to any express provision to the contrary in regulations. Subclause 333(3) provides that regulations can provide that a failure to comply with a specified requirement in subclause (1) has a specified effect on the validity or enforcement of a transaction, contract, instrument or arrangement. The explanatory memorandum provides no explanation for the necessity of these provisions. The Committee **seeks the Treasurer's advice** on the need for the use of this broad regulation-making power.

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

'Henry VIII' clause
Schedule 1, paragraph 45(2)(d)

Schedule 1 of the bill contains the National Credit Code. Part 3 of the National Credit Code concerns related mortgages and guarantees. Clause 45 refers to mortgage of property acquired after the mortgage is entered into but paragraph 45(2)(d) provides that the clause does not apply to a provision specified by the regulations. The explanatory memorandum provides no explanation for this 'Henry VIII' clause. The Committee **seeks the Treasurer's advice** on the need for the use of the regulation-making power in paragraph 45(2)(d) of the National Credit Code.

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

Strict liability

Various clauses

There is a substantial number of strict liability offences included in the bill. The Committee generally draws to the Senate's attention any provisions that create offences of strict liability and has expressed the view that, where a bill creates such an offence, the reasons for its imposition should be set out in the explanatory memorandum. In most cases in the explanatory memorandum to this bill, explanations are provided for the imposition of strict liability. However, the Committee notes that there appears to be no reference to the *Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers*.

The following clauses contain strict liability offences identified by the Committee that have not been accompanied by specific or clear explanation in the explanatory memorandum: subclauses 258(3), 274(5), 284(5), 300(2) and 319(4); Schedule 1 (National Credit Code), subclauses 33(5), 36(7), 38(9), 51(4), 53(3), 64(6), 65(4), 66(4), 67(3), 68(3), 71(6), 72(4), 73(3), 85(11), 87(4), 88(7), 90(2), 91(3), 94(3), 95(4), 108(4), 109(5), 136(3), 143(3), 145(4), 173(4), 174(4), 175(3), 178(3), 190(3).

The Committee **seeks the Treasurer's advice** on the reasons for the imposition of strict liability in each case. The Committee also **seeks the Treasurer's advice** as to whether the explanatory memorandum might be amended to include the relevant explanations.

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

Wide discretion

Inappropriate delegation of legislative power

Paragraphs 55(2)(d) and (e)

Chapter 2 governs the licensing of persons who engage in credit activities. Division 6 of Part 2-2 of Chapter 2 provides for the suspension, cancellation or variation of a person's credit licence after offering them a hearing. In suspending or cancelling a licence, ASIC must have regard to the matters listed in clause 55 but can, pursuant to paragraphs 55(2)(d) and (e), have regard to any other matter it considers relevant, and any other matter prescribed by the regulations. This combination may create some uncertainty for persons engaging in credit activities about the behaviour expected of them due to the broad delegation of power. Therefore, the Committee **seeks the Treasurer's advice** in relation to the rationale for the broad discretion and delegation of power provided for in paragraphs 55(2)(d) and (e).

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

Wide delegation of power

Clauses 206 and 337

Clause 206 provides that, in any proceedings for an offence under the Act, any information, charge, complaint or application may be laid or made by a delegate of ASIC or 'another person authorised in writing by the Minister to bring the proceedings'. Similarly, clause 337 provides that the Minister may delegate such of the Minister's functions and powers under the Act as are prescribed to 'an ASIC staff member'. The Committee generally prefers that senior officers exercise the Minister's functions and powers. In the circumstances, therefore, the Committee **seeks the Treasurer's advice** on the level, position or qualifications of ASIC staff members who are expected to

exercise functions and powers under the Act; and those delegates of ASIC and ‘other persons’ who are expected to bring proceedings pursuant to clause 206.

Pending the Treasurer’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.

Abrogation of the privilege against self-incrimination Clause 295

Subclause 295(1) provides that, for the purposes of the relevant Chapter (relating to compliance and enforcement), it is not a reasonable excuse to refuse or fail to give information, sign a record, or produce a book on the grounds of self-incrimination. However, if an examinee, before making an oral statement or signing a record, claims the privilege against self-incrimination, then the statement is not admissible in evidence against them in criminal proceedings or in proceedings for the imposition of a penalty (subclause 295(3)).

The explanatory memorandum explains (at pages 215-216) this provision in the context of the need for ASIC to exercise its powers and functions to properly inquire into questionable behaviour. Since the bill gives effect to a national scheme and, in any case, the exercise of ASIC’s powers are scrutinised on a continuing basis by the Parliamentary Joint Committee on Corporations and Financial Services, the Committee considers that no further comment is required.

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

Standing appropriation Schedule 1, subclause 115(2)

Subclause 115(2) of Schedule 1 (which contains the National Credit Code) provides for a standing appropriation. Subclause 115(1) enables an order to pay a debtor or guarantor a civil penalty to be set off against the amount due to the credit provider under the credit contract. Subclause 115(2) provides that the Consolidated Revenue Fund is appropriated to pay a set-off or debt due in relation to a penalty ordered under subclause (1).

In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see some limitation placed on the amount of funds that may be appropriated or a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to the Parliament. The Committee notes in this case that the National Credit Code is part of a national scheme, and that the reasons for the appropriation are clear.

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

Wide discretion Schedule 1, subclause 171(4)

Part 11 of the National Credit Code (in Schedule 1) regulates consumer leases. Division 1 of Part 11 contains interpretation and application provisions, including provisions which describe the leases regulated. Subclause 171(4) provides that ‘ASIC may exclude, from the application of all or any provisions of this Part, a consumer lease specified by ASIC’. The Committee notes that this gives ASIC a broad discretion, is not a legislative instrument, and will not be subject to scrutiny. The explanatory memorandum does not explain why such a wide discretion is necessary. The Committee **seeks the Treasurer’s advice** on the reasons for providing such broad discretion to ASIC in these circumstances.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it 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.

Incorporating material as in force from time to time Schedule 1, clause 215

Clause 215 of the National Credit Code provides that a statutory instrument made under the Code may apply, adopt or incorporate (with or without modification) the provisions of an Act, statutory instrument or other document 'as in force at a particular time or as in force from time to time'.

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed in such a manner without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise 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. In this case, the reason for incorporation by reference is not explained in the explanatory memorandum. Therefore, the Committee **seeks the Treasurer's advice** on the need and justification for including this incorporation by reference in the regulation-making power.

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

National Consumer Credit Protection (Fees) Bill 2009

Introduced into the House of Representatives on 25 June 2009

Portfolio: Treasury

Background

Part of a package of three bills to implement a new national consumer credit regime, this bill allows for the imposition of fees, as taxes, for things done under the National Consumer Credit Protection Bill 2009 and the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (such as the lodgement of documents or the inclusion of a document in, or inspection of, a register maintained by the Australian Securities and Investments Commission (ASIC)).

Imposing a tax by regulation

Clause 5

Clause 5 provides for regulations to prescribe fees for ‘chargeable matters’ (which are defined in subclause 4(1)). Subclause 5(2) provides that such fees are imposed as taxes. The explanatory memorandum states (at paragraph 1.9) that such fees will be imposed as a tax to ensure compliance with constitutional requirements. However, there is no explanation relating to the imposition of a tax by way of regulation (although the Committee notes that clause 6 limits the amount that may be charged in a fee). The Committee **seeks the Treasurer’s advice** on the justification for using a regulation-making power to impose a tax.

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

National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

Introduced into the House of Representatives on 25 June 2009

Portfolio: Treasury

Background

Part of a package of three bills to implement a new national consumer credit regime, this bill sets out the transitional and consequential arrangements to support the transfer of the regulation of credit from the states and territories to the Commonwealth.

Schedule 1 deals with the transition from the regime provided in the old Credit Code to the new consumer credit regime provided for in both the National Consumer Credit Protection Bill 2009 and Schedule 2 to this bill, including:

- the application of the existing legislation or the proposed legislation to legal proceedings that arose before the change;
- the rights or liabilities a person may have under the existing legislation; and
- the extent to which the existing legislation may continue to have effect under the National Consumer Credit Protection Bill.

Schedule 2 sets out the requirement for persons currently engaging in credit activities to become registered with the Australian Securities and Investments Commission (ASIC), prior to applying for an Australian credit licence.

Schedule 3 includes consequential amendments to the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*.

‘Henry VIII’ clauses Subclauses 6(2), (3) and (6)

There are several ‘Henry VIII’ clauses in the bill which enable regulations to change responsibilities and entitlements conferred by the principal legislation. Some relate to activities undertaken pursuant to the old Credit Code and the Committee accepts the explanation that they are necessary to ensure a smooth transition to the new Code. Discussed below are those clauses which are not accompanied by any explanation in the explanatory memorandum.

Subclause 6(2) provides that regulations may prescribe matters of a transitional nature and that the regulations have effect ‘despite anything else in this Act’. There is no explanation of this provision in the explanatory memorandum. Subclause 6(3) provides that: ‘(t)he regulations may provide that certain provisions of this Act are taken to be modified as set out in the regulations. Those provisions then have effect as if they were so modified’. Similarly, there is no explanation for this ‘Henry VIII’ clause in the explanatory memorandum. Subclause 6(6) provides that ‘(t)he provisions of this Act that provide for regulations to deal with matters do not limit each other’. Again, the explanatory memorandum provides no explanation for the existence of this provision.

Since all these provisions purport to authorise a regulation to amend the Act, or purport to authorise a regulation that is beyond the scope of the Act, the Committee **seeks the Treasurer’s advice** on why such a broad use of the regulation-making power is considered necessary in the circumstances.

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

‘Henry VIII’ clause Schedule 1, subitem 15(4)

Subitem 15(1) of Schedule 1 provides that references in the new Credit Code generally include references to events, circumstances or things that happened

or arose before commencement, unless a contrary intention is expressed. However, subitem 15(4) enables regulations to provide that this does not apply to a particular reference or class of references in the new Credit Code. The explanatory memorandum does not explain the reason for this provision and the Committee **seeks the Treasurer's advice** on the need for this particular regulation-making power in these circumstances.

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

Delayed commencement Schedule 1, subitem 19(1)

Subitem 19(1) provides that Chapter 3 of the proposed National Consumer Credit Protection Bill 2009 (which deals with responsible lending conduct) applies in relation to conduct engaged in on and after 1 January 2011. The Committee will generally not comment where the delayed commencement is six months or less. However, where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with paragraph 19 of Drafting Direction No. 1.3. The explanatory memorandum explains (at paragraph 2.51) that the timing of the commencement of the responsible lending conduct provisions in Chapter 3 of the main bill 'is set in order to give industry participants sufficient time to change their business systems and processes to be able to comply with their new obligations'.

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

Strict liability
Schedule 2, items 17 and 18

Item 17 of Schedule 2 provides that ASIC may require a registered person to obtain an audit report, and failure to comply with a notice to provide such a report is an offence of strict liability (subitem 17(9)). Item 18 of Schedule 2 provides that the regulations may require a registered person, or each registered person in a class of registered persons, to give ASIC specified information about the credit activities engaged in by the registered person or its representatives. Failure to comply is an offence of strict liability (subitem 18(5)).

The explanatory memorandum explains (at page 45) that strict liability is imposed in these offences because ‘it is crucial that ASIC is able to obtain information about the conduct of a registered person in a timely way, that allows it to effectively perform its regulatory function’. While the explanatory memorandum does not refer to the *Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers*, the Committee considers that the explanation is clear.

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

National Health Security Amendment Bill 2009

Introduced into the House of Representatives on 24 June 2009

Portfolio: Health and Ageing

Background

This bill amends the *National Health Security Act 2007* to enhance Australia's controls for the security of certain biological agents that could be used as weapons. Such an agent is known as a security sensitive biological agent (SSBA).

In particular, the bill:

- enables the Minister for Health and Ageing, following advice from relevant experts, to suspend certain existing regulatory requirements and specify new conditions to ensure that adequate controls are maintained in the event of an SSBA-related disease outbreak;
- establishes new controls relating to the handling of biological agents suspected of being SSBAs;
- provides for additional search and seizure powers to bring the powers in line with those exercised by other regulatory bodies such as the Gene Technology Regulator; and
- makes a number of minor amendments (for example, to include new reporting requirements to local police forces for certain SSBA-related events, to clarify the reporting obligations of registered entities, and to amend the definition of 'biological agents').

Insufficient parliamentary scrutiny

Schedule 1, item 1, new sections 60A and 60B

Item 1 of Schedule 1 inserts a new Division 5A into the National Health Security Act to provide for suspension of Division 5 to deal with threats. Proposed new subsections 60A(4), (5) and (6), also to be inserted by item 1 of

Schedule 1, provide that legislative instruments created to suspend the usual regulatory obligations for specified periods in emergency situations have effect despite section 12 of the *Legislative Instruments Act 2003*, and according to their own terms. This would allow instruments to take effect before they are registered on the Federal Register of Legislative Instruments.

The explanatory memorandum explains (at page 7) that this allows instruments to take effect without delay in order to deal with particular emergency disease situations: for example, if there is a need to put measures in place immediately to deal with the extreme threat posed by the spread of an SSBA-related disease outbreak.

Similarly, proposed subsections 60B(4) and (5), also inserted by item 1 of Schedule 1, provide for the issue of a new legislative instrument to vary or revoke an instrument made pursuant to new subsection 60A(1). Such new legislative instruments would also take effect despite section 12 of the *Legislative Instruments Act*. The explanatory memorandum explains (at page 8) that this is necessary because there may be cases where there is a need to vary or revoke the legislative instrument immediately to deal with an increased threat posed by a disease outbreak.

While the Committee is cognisant of the need to deal with emergency disease situations expediently, these provisions would allow legislative instruments to cover important matters without having the benefit of scrutiny by the Parliament. Accordingly, the Committee **seeks the Minister's advice** as to how scrutiny of any emergency arrangements is intended to be provided.

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.

Review of decisions

Schedule 1, item 53, new subsection 55A(5)

Proposed new section 55A, to be inserted by item 53 of Schedule 1, provides for total cancellation or facility cancellation in relation to an entity's registration on the National Register, upon application by the entity for cancellation. Proposed new subsection 55A(4) contains the notification of cancellation procedures that must be followed by the Secretary if he or she decides to cancel the registration; namely, that the entity must be informed in writing of the decision. However, proposed new subsection 55A(5) provides that failure to follow these notification procedures does not affect the validity of the decision.

This has the effect that the obligations of an entity may be altered without notice or without an opportunity for review of the decision. The explanatory memorandum does not provide an explanation for the inclusion of this provision. Therefore, the Committee **seeks the Minister's advice** on the reasons for inclusion of new subsection 55A(5) in the bill.

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

National Security Legislation Monitor Bill 2009

Introduced into the Senate on 25 June 2009

Portfolio: Cabinet Secretary

Background

This bill establishes the position of the National Security Legislation Monitor (Monitor). The standing function of the Monitor will be to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis to ensure that the laws operate in an effective and accountable manner, are consistent with international human rights law and maintain public confidence. The establishment of an independent reviewer of terrorism laws is consistent with the recommendations of a number of recent reviews and reports.

Specifically, the bill:

- provides for the appointment of the Monitor;
- prescribes the functions and powers of the Monitor;
- requires the Monitor to report his or her comments, findings and recommendations to the Prime Minister, and in turn the Parliament, on an annual basis;
- requires the Monitor to consider whether Australia's counter-terrorism and national security legislation contains appropriate safeguards for protecting individuals' rights, and whether it remains necessary;
- requires the Monitor to have regard to Australia's international obligations and the agreed national counter-terrorism arrangements between the Commonwealth and the states and territories;
- allows the Monitor to initiate his or her own investigations; and
- enables the Prime Minister to refer a matter to the Monitor for review within a specified timeframe.

Determination of important matters by regulation

Clause 4, definition of ‘law enforcement or security agency’

Clause 4 of the bill contains definitions. In addition to specified law enforcement and security agencies, the definition of the term ‘law enforcement or security agency’ includes ‘any other agency prescribed by regulations’ (paragraph (1)). The explanatory memorandum does not provide any explanation for the need to expand or modify the scope of the definition by means of regulations, and does not give any indication of the circumstances where such expansion or modification may be required. The Committee **seeks the Cabinet Secretary’s advice** on the need and justification for the use of the regulation-making power to expand a definition in the principal Act.

Pending the Cabinet Secretary’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.

Insufficient parliamentary scrutiny

Various clauses

Subclause 29(1) provides that the Monitor must prepare and give to the Prime Minister an annual report relating to the performance of the Monitor’s functions as set out in paragraphs 6(1)(a) and (b) of the bill. The Prime Minister must present the annual report to the Parliament (subclause 29(5)). The Committee notes that the annual report does not relate to references given to the Monitor by the Prime Minister pursuant to paragraph 6(1)(c). There is provision for the excision of sensitive information from the annual report (subclause 29(3)) which must be provided to the Prime Minister in a supplementary report (subclause 29(7)).

If the Prime Minister refers a matter to the Monitor (which he or she may do under clause 7, either at the Monitor’s suggestion or on his or her own initiative), then the Monitor must report on that reference to the Prime Minister (subclause 30(1)). The Monitor may give the Prime Minister an

interim report (subclause 30(2)), and must give an interim report to the Prime Minister if the Prime Minister so directs (subclause 30(3)).

However, there is no provision requiring the Prime Minister to present to the Parliament the report, an abridged version of the report or a statement announcing the reference or completion of the report. The Committee **seeks the Cabinet Secretary's advice** on whether greater parliamentary scrutiny could be provided in relation to the Monitor's third function in paragraph 6(1)(c) of reporting on a reference given by the Prime Minister.

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

Personal Property Securities Bill 2009

Introduced into the House of Representatives on 24 June 2009

Portfolio: Attorney-General

Background

This bill establishes a single national law governing security interests in personal property (which includes motor vehicles, contractual rights and uncertificated shares), supported by a public Register of Personal Property Securities (Register) to be maintained by a Registrar of Personal Property Securities (Registrar).

In particular, the bill:

- specifies the circumstances when personal property would be able to be acquired free of a security interest;
- includes default rules for determining priority between competing security interests in the same property;
- includes special priority rules for specific transactions, including ‘purchase money security interests’, accounts, authorised deposit-taking institution (ADI) accounts, crops, livestock, accessions and commingled goods;
- provides rules for determining priority between security interests and other interests, such as repairers’ liens and the interests of an execution creditor;
- provides a process for enforcing security agreements following default by debtors; and
- establishes the Register which will contain, among other things, details of registered security interests in personal property (financing statements), details of the grantor and the secured party, and an address for service of notice on the secured party.

‘Henry VIII’ clause

General commentary

There are several ‘Henry VIII’ clauses in the bill which enable regulations to change responsibilities and entitlements conferred by the principal Act. The Committee reiterates the general concerns it expressed earlier in this *Alert Digest*, in relation to the National Consumer Credit Protection Bill 2009, about the increasing occurrence of such clauses in legislation. The Committee **leaves to the Senate as a whole** any consideration of this matter.

‘Henry VIII’ clause

Subclause 8(3)

Particular interests are to be included on the Register and subclauses 8(1) and (2) provide for interests which are not proposed to be covered. Under subclause 8(3), ‘(t)he regulations may provide that, despite subsection (1), th[e] Act applies in relation to a kind of interest prescribed by the regulations’. This means that regulations can provide for an interest to be excluded from the bill’s coverage. The explanatory memorandum does not explain why this provision is needed. The Committee **seeks the Attorney-General’s advice** in relation to why such a regulation-making power is considered necessary in these circumstances.

Pending the Attorney-General’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.

‘Henry VIII’ clause

Subclause 118(5)

Clause 118 provides for the enforcement of security interests in accordance with land law decisions. Subclause 118(4) provides that the law, in the same terms as that of the land law, applies under the bill for the purposes of the enforcement of the security interest. However, subclause 118(5) provides that regulations may modify the law that applies by virtue of subclause 118(4) in

order to facilitate its application to the enforcement of security interests in personal property. The explanatory memorandum does not provide any explanation for the provision. The Committee considers that this may create uncertainty in the enforcement of security interests and **seeks the Attorney-General's advice** in relation to the justification for this use of the regulation-making power.

Pending the Attorney-General'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.

Wide discretion

Wide delegation of powers

Clauses 147 and 197

The Register is to be established and maintained by the Registrar (subclause 147(1)) who may keep the register 'in any form that he or she considers appropriate' (subclause 147(3)), subject to ensuring certain data requirements are contained in the register (clause 148). The explanatory memorandum states (at paragraph 5.9) that the intention is 'to implement a fully electronic register'.

Under clause 197, the Registrar may delegate 'all or any of his or her functions or powers' to any public servant or another person determined by the Registrar (that is, a non-public servant). The explanatory memorandum states (at paragraph 5.145) that the ability to delegate to non-public servants is necessary in the event that functions under the bill are outsourced by the Registrar (such as to those engaged in a contact centre).

However, the explanatory memorandum does not include an explanation as to why such a wide power of delegation to public servants is considered necessary. Generally, the Committee prefers to see a limit set on the sorts of powers that might be delegated, or on the categories of people to whom these 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.

The Committee **seeks the Attorney-General's advice** as to the justification for such a wide discretion, and whether the discretion might be limited in some way to particular categories of persons. The Committee also **seeks the Attorney-General's advice** in relation to why the Registrar has been given such a broad power to keep the Register in any form that he or she considers appropriate, and whether more specific guidance on this matter might be included in the bill.

Pending the Attorney-General'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.

'Henry VIII' clause

Clause 255

Clause 255 provides that the regulations may resolve inconsistencies where there is concurrent operation of the bill and, for example, another Commonwealth law or the law of a state or territory. Among other things, the regulations may specify a person, body or circumstances to which the bill does not apply (paragraph 255(2)(a)). While the explanatory memorandum assists in explaining the effect of the provision to resolve inconsistencies (at page 111), it does not explain why the provision itself is required. Therefore, the Committee **seeks the Attorney-General's advice** in relation to the need for such a broad use of the regulation-making power in these circumstances.

Pending the Attorney-General'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.

‘Henry VIII’ clause
Subclause 258(4)

Clause 258 provides for the relationship between the bill and other laws, including state and territory laws, and sets out when other laws prevail. Subclause 258(1) limits the effect of the bill where there is inconsistency but subclause 258(4) provides that subclause 258(1) does not apply to an effect of a law to the extent (if any) prescribed by the regulations. That is, the regulations may change or extend the scope of the bill. The explanatory memorandum provides no explanation for this provision. Therefore, the Committee **seeks the Attorney-General’s advice** as to the need and justification for this use of the regulation-making power.

Pending the Attorney-General’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.

‘Henry VIII’ clause
Subclause 259(3)

Clause 259 provides that the bill does not apply when a state or territory law declares a matter to be an excluded matter (subclause 259(1)); and the relevant state or territory can specify the extent to which the matter is excluded (subclause 259(2)). However, subclause 259(3) provides that subclause 259(2) does not apply to the declaration to the extent (if any) prescribed by the regulations. The explanatory memorandum states (at paragraph 7.60) that ‘(r)egulations made under the Bill could override any such declaration’ and that ‘(t)hese provisions are in accordance with the terms of the PPS inter-governmental agreement between the Commonwealth and the States and Territories’. In light of this explanation, the Committee accepts the use of the regulation-making power in this instance.

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

Shifting onus of proof

Subclause 299(2)

Clause 299 provides for actual or constructive knowledge in relation to certain property transfers, unless there is proof to the contrary beyond a reasonable doubt (the criminal standard). Subclause 299(2) provides that, where personal property is transferred between members of the same household, related companies, or a company and a company director or officer of that company, there is a presumption, unless the contrary is shown beyond reasonable doubt, that the transferee had actual or constructive knowledge: of the security interest in the collateral; that the transaction was a breach of the security agreement; and that value was not given by the transferee for the interest acquired.

The explanatory memorandum states (at page 120) that this provision is based on similar provisions in NSW and Victorian legislation and ‘is intended to address the risk of fraud in property transfers between related entities’. Further: ‘(t)he civil standard of proof would not afford sufficient protection or deterrent in these circumstances. Imposing the criminal standard of proof would better protect financiers holding security interests in personal property and deter fraudulent transactions which are a clear risk where related entities trade with one other’.

The Committee notes the explanation provided in the explanatory memorandum and is mindful that the bill provides for a national scheme. Nevertheless, the Committee considers that this is an unusual provision in Commonwealth legislation. The Committee **seeks the Attorney-General’s advice** as to whether further background information might be provided relating to the need and justification for the use of such a provision in the bill.

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

Quarantine Proclamation Amendment Bill 2009

Introduced into the House of Representatives on 22 June 2009

By Mr Katter

Background

This bill amends the *Quarantine Proclamation 1998* to ensure that certain social, economic and environmental impacts are taken into account in the consideration of permits to import fruit and vegetables into Australia.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Member's bill, was introduced without an explanatory memorandum or second reading speech. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by explanatory memoranda. The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of such documents. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and explanatory material, *Preparing Private Senator's Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may assist Senators and Members in preparing explanatory memoranda.

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

Road Transport Reform (Dangerous Goods) Repeal Bill 2009

Introduced into the House of Representatives on 22 June 2009

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill repeals the *Road Transport Reform (Dangerous Goods) Act 1995* to allow the ACT Government to implement the updated Australian Dangerous Goods Code, and the associated model dangerous goods transport legislation, in accordance with the Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport entered into between the Commonwealth and the states and territories.

The Committee has no comment on this bill.

Statute Stocktake (Regulatory and Other Laws) Bill 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Finance and Deregulation

Background

This bill will amend or repeal 28 Acts to remove provisions which no longer have any function or purpose, following a comprehensive stocktake of Commonwealth regulation which was completed in 2008. The bill amends 17 Acts to remove redundant provisions, repeals eight redundant Acts in their entirety, and makes amendments to three other Acts consequential on repeals.

Retrospective application Schedule 1, items 99 and 102

Item 99 of Schedule 1 relates to the repeal and substitution of subsections 20J(1), (2) and (3) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* by item 86 to all claim periods starting on 1 July 2009 in relation to a digital data service provider (and to all later claim periods). Item 102 provides that, despite the repeal of paragraph 22A(1)(b) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* made by item 94, section 22A continues to apply to a person who was a digital data service provider for a claim period ending before 1 July 2009, as if that person were an eligible person for the purposes of that section. Both provisions have retrospective effect.

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 these instances of retrospectivity, the explanatory memorandum states (at pages 10-11) that they provide for transitional measures in respect of levy credit determinations and requests for certain information relating to claims periods made under the repealed subsections, and are designed to provide certainty.

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

**Retrospective application
Schedule 2, item 14**

Item 4 of Schedule 2 repeals the *Income Tax (Franking Deficit) Act 1987*. Part 2 of Schedule 2 contains amendments consequential upon this repeal including, in item 14, the application of item 4 to all acts or states of affairs existing after 14 September 2006. The explanatory memorandum states (at page 14) that this is the date of repeal of section 160AQ of the *Income Tax Assessment Act 1936*. The Committee considers that this instance of retrospectivity is sufficiently explained by the clear link between the two relevant repeals.

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

Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009

Introduced into the House of Representatives on 24 June 2009

Portfolio: Treasury

Background

This bill makes consequential and transitional amendments to a number of Acts to facilitate the smooth transition from the current law regarding the registration of tax agents to the new regulatory regime provided for in the *Tax Agent Services Act 2009* (which received Royal Assent on 26 March 2009).

Among other things, the bill:

- repeals certain provisions that will no longer have any effect due to the commencement of the Tax Agent Services Act (such as Part VIIA of the *Income Tax Assessment Act 1936* relating to the registration of tax agents);
- amends, repeals or inserts relevant definitions and reference in other Acts to ensure consistency with the Tax Agent Services Act;
- amends certain provisions in the *Taxation Administration Act 1953* to reflect the enhanced independence of the Tax Practitioners Board from the Commissioner of Taxation, as provided for in the Tax Agent Services Act;
- expands the definition of ‘taxation law’ to include the Tax Agent Services Act, and associated regulations; and
- amends the Tax Agent Services Act to correct typographical errors and to expand the circumstances in which the Tax Practitioners Board can disclose information to the Commissioner of Taxation.

Inappropriate delegation of legislative power
Insufficient parliamentary scrutiny
Schedule 2, items 15 and 16

Items 15 and 16 of Schedule 2 contain transitional provisions providing for references to, and things done by, or in relation to, a Tax Agents' Board. Subitem 15(1) provides for a thing done by a Tax Agents' Board under the old law to be taken to have been done by the new Tax Practitioners Board for the purposes of the operation of any law after commencement.

The explanatory memorandum gives the example (at page 53) that if a state Board had cancelled a tax agent's registration and the decision had been overturned by the Administrative Appeals Tribunal (AAT), then the Board could appeal the AAT's decision to the Federal Court. Subitem 15(2) states that the Minister may, by writing, determine that subitem (1) does not apply in relation to a specified thing done by, or in relation to, a Tax Agents' Board. Such a determination is not a legislative instrument (subitem 15(4)). The explanatory memorandum explains that this 'provides flexibility for the Minister to ensure that the appropriate outcome is achieved in all circumstances'.

Similarly, subitem 16(1) provides that a reference to a Tax Agents' Board in an instrument in force immediately before commencement has effect after commencement, as if the reference were to the Tax Agents' Board. Under subitem 16(2), the Minister may, by writing, determine that subitem (1) does not apply in relation to a specified reference; under subitem 16(3), this is not a legislative instrument.

The Committee considers that, in each case, the Minister is given a very broad discretion. In the example provided in the explanatory memorandum, it appears that the Minister, or his or her delegate, could substitute a less favourable decision without this being subject to scrutiny. Accordingly, the Committee **seeks the Treasurer's advice** in relation to how it is anticipated that the transitional provisions in items 15 and 16 will be accompanied by sufficient scrutiny.

Pending the Treasurer's advice, The Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv)

of the Committee's terms of reference; and 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.

Tax Laws Amendment (2009 Measures No. 4) Bill 2009

Introduced into the House of Representatives on 25 June 2009

Portfolio: Treasury

Background

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

Schedule 1 amends the *Income Tax Assessment Act 1936* to increase the research and development (R&D) expenditure cap for eligibility to the R&D Tax Offset from \$1 million to \$2 million.

Schedule 2 amends the *A New Tax System (Australian Business Number) Act 1999*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* in relation to prescribed private funds (PPFs) to, among other things, rename PPFs as private ancillary funds and move the full administration of those funds under the authority of the Commissioner of Taxation.

Schedule 3 amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, and the *Income Tax (Transitional Provisions) Act 1997* to provide relief from capital gains tax (CGT) to members and insured entities of friendly societies that have a life insurance business and/or a private health insurance business, and the friendly society demutualises to a for-profit entity.

Schedule 4 amends the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to ensure that losses transferred to the head company of a consolidated group, or a multiple entry consolidated group, by a joining entity that is insolvent at the joining time, can be used by the head company in certain circumstances.

Schedule 5 makes technical corrections and other minor amendments to a number of Acts relating to taxation laws.

Retrospective application

Various items

Several provisions in the bill relating to a variety of measures have retrospective application: Schedule 3, item 4; Schedule 3, item 23; Schedule 3, item 24; Schedule 4, item 5; Schedule 5, item 282; Schedule 5, item 305; Schedule 5, item 316; and Schedule 5, item 338.

As a matter of practice, the Committee draws attention to provisions that seek to have retrospective impact and will comment adversely where such provisions have a detrimental effect on people. In each case of retrospectivity in this bill, the explanatory memorandum explains either that the respective measures were announced prior to the date on which they are to apply or will have no detrimental effect on any individual.

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

Strict liability

Schedule 2, item 22, new section 426-165

Proposed new section 426-165, to be inserted into the *Taxation Administration Act 1953* by item 22 of Schedule 2, contains various strict liability offences relating to certain obligations of former trustees to, for example, provide information (all books within the meaning of the Corporations Act) to the acting trustee about a private ancillary fund's affairs (subsection 426-165(1)); and respond to certain notices within a specified time (subparagraph 426-165(4)).

The explanatory memorandum states (at paragraph 2.74) that the imposition of strict liability has been established to compel former trustees which have already been removed on the grounds of misconduct to deal fairly with the trust's property during the handover period. While noting that the explanatory memorandum does not refer to the *Guide to Framing Commonwealth Offences, Civil Offences and Enforcement Powers*, the Committee considers that the explanation for the strict liability offences is sufficiently clear.

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

Insufficient parliamentary scrutiny Schedule 2, subitem 26(2)

Item 26 of Schedule 2 provides for transitional arrangements relating to prescribed private fund declarations. Specifically, subitem 26(1) provides for the Minister, by legislative instrument, to declare a trust to be a prescribed private fund; and subitem 26(2) provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, the declaration has effect during the period starting at the time stated in the declaration (which must be before the commencement date) and ending just before the commencement time.

The explanatory memorandum states (at paragraph 2.92) that ‘(f)or reasons of simplicity and certainty’, the Treasurer may make a declaration after 1 October 2009 which lists those funds that have been approved but not yet prescribed. The declaration will have the effect of ‘deeming those listed funds to have been prescribed from the date set out in the declaration’.

While the Committee has always accepted that transitional arrangements are needed to ensure a smooth transition to new legislative schemes, the process of deeming funds to have been prescribed creates rights and obligations. The Committee **seeks the Treasurer’s advice** on how parliamentary scrutiny will be achieved for the transitional arrangements contained in subitem 26(2) of Schedule 2.

Pending the Treasurer’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.

Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009

Introduced into the Senate on 25 June 2009

Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Telecommunications Act 1997* to allow for network information to be provided to the Commonwealth by telecommunications carriers and other utilities, for purposes related to the planning and rollout of the National Broadband Network.

In particular, the bill:

- amends the provisions in Part 27A that impose the requirement to provide information so that the requirement may apply to utilities as well as to telecommunications carriers;
- amends the provisions in Part 27A that set out the purposes for which information is permitted to be disclosed and used; and
- amends the sunset periods applying to certain provisions in Part 27A (as amended) so that information can be disclosed and used during the period of the roll-out of the National Broadband Network.

Delegation of legislative power

Schedule 1, item 32, new subparagraph 531G(3A)(b)(iii)

Proposed new section 531F, to be inserted by item 25 of Schedule 1, requires carriers and utilities to give information to an authorised information officer. Proposed new subsection 531G(3A), to be inserted by item 32 of Schedule 1, provides that an entrusted public official may use protected network information for the purposes of the Implementation Study for the National Broadband Network (paragraph 531G(3A)(a)). It also provides that the

information may be used for purposes specified in the regulations, so long as the purpose relates to: the creation or development of a broadband telecommunications network (subparagraph 531G(3A)(b)(i)); or to the supply of a carriage service using a broadband telecommunications network (subparagraph 531G(3A)(b)(ii)); or to ‘a matter incidental or ancillary to’ these matters (subparagraph 531G(3A)(b)(iii)).

The explanatory memorandum states (at page 32) that this is to allow for use of protected network information after the Implementation Study is completed. An example of such use might be to allow officials to use the information for the purposes of the Minister or Cabinet in relation to matters covered in the Implementation Study report. The power may also be limited by conditions that may be imposed by a determination made by the Minister pursuant to proposed new subsection 531G(3AA), to be inserted by item 35 of Schedule 1, although the exercise of this power is discretionary.

While the breadth of the regulation-making power in subparagraph 531G(3A)(b)(iii) is limited to some extent by the preceding subparagraphs, the Committee notes that there is no time limit on the period during which the information may be used. The Committee **seeks the Minister’s advice** in relation to the need and justification for this broad regulation-making power, and whether it might be appropriate to include in the bill some further specificity or limitation on the use of such a power.

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.

Delegation of legislative power

Schedule 1, item 39, new paragraph 531H(1)(e)

Proposed new subsection 531H(1), to be inserted by item 39 of Schedule 1, allows an authorised information officer to disclose protected network information to entrusted company officers of certain companies for specified purposes. Proposed new paragraph 531H(1)(e) includes, among those purposes, ‘a matter incidental or ancillary’ to the purposes specified in

paragraphs 531H(1)(c) or (d) (so long as the disclosure complies with any applicable restricted recipients rules and, if a Ministerial determination setting out relevant conditions is in force, the conditions satisfied in the determination are met).

The explanatory memorandum states (at page 34) that '(t)his is intended to clarify that protected network information must only be disclosed to a company for purposes relating to that company's involvement in the roll-out of the National Broadband Network, or relating to the company's eventual supply of carriage services'. The Committee considers that, in this case, the breadth of the power contained in proposed new paragraph 531H(1)(e) is limited in effect by reference to the preceding paragraphs, including the possibility of conditions specified in a determination under subsection 531H(1)(g).

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

Denial of natural justice

Schedule 1, item 39, new subsection 531H(2)

Proposed new subsection 531H(2), to be inserted by item 39 of Schedule 1, provides that an authorised information officer is not required to give a carrier or utility an opportunity to be heard in relation to a decision to disclose protected network information to an entrusted company officer under subsection 531H(1).

The explanatory memorandum explains (at page 35) that this is to 'facilitate the development of the National Broadband Network' and to ensure that it 'is not undermined by delays created by the potential need for an authorised information officer to consult with a carrier or utility every time the authorised information officer wishes to disclose information under section 531H. This is intended to displace any common law obligation to consult a carrier or utility'.

The Committee notes that natural justice principles require that those whose interests are affected should be given an opportunity to be heard. The Committee **seeks the Minister's advice** on whether alternatives were

considered, apart from the proposed legislative override of the principles of natural justice in proposed new subsection 531H(2).

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

Delegation of legislative power

Schedule 1, item 41, new subparagraph 531K(2)(a)(iii)

Proposed new paragraph 531K(2)(a), to be inserted by item 41 of Schedule 1, allows an entrusted company officer of a company who receives protected network information to disclose that information to another entrusted company officer, so long as certain conditions are met. The purposes for which information may be disclosed are specified and include matters 'incidental or ancillary' to those listed (subparagraph 531K(2)(a)(iii)). The power is also limited by the fact that conditions may be imposed by a determination made by the Minister pursuant to proposed new subsection 531K(2AA), to be inserted by item 44 of Schedule 1, although the exercise of this power is discretionary.

The explanatory memorandum states (at page 36) that this is intended to clarify that protected network information may only be disclosed by entrusted company officers to other entrusted company officers of the same company for purposes relating to that company's involvement in the roll-out of the National Broadband Network, or relating to the company's eventual supply of carriage services. There is also the possibility of conditions specified in a determination under subsection (2AA). Therefore, in this instance, the broad power contained in subparagraph (iii) is limited by reference to the preceding subparagraphs.

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

Delegation of legislative power

Schedule 1, item 45, new subparagraph 531K(2A)(a)(iii)

Similarly, proposed new paragraph 531K(2A)(a), to be inserted by item 45 of Schedule 1, enables an entrusted company officer who receives protected network information to use that information for certain purposes, subject to certain conditions being met. The purposes for which information may be used include ‘a matter incidental or ancillary’ to those listed (subparagraph 531K(2A)(a)(iii)).

The explanatory memorandum states (at page 37) that this is intended to clarify that protected network information may only be used by entrusted company officers for purposes relating to that company’s involvement in the roll-out of the National Broadband Network, or relating to the company’s eventual supply of carriage services. The power is also limited by the fact that conditions may be imposed by a determination made by the Minister pursuant to proposed new subsection 531K(2B), to be inserted by item 48 of Schedule 1, although the exercise of this power is discretionary. As the broad power contained in subparagraph (iii) is limited by reference to the preceding subparagraphs, and the possibility of conditions specified in a determination under subsection (2B), the Committee also accepts the use of the regulation-making power in this instance.

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

Therapeutic Goods Amendment (2009 Measures No. 2) Bill 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Health and Ageing

Background

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

- introduce new arrangements for the separate scheduling of medicines and poisons;
- enable the Secretary to declare purposes for which certain kinds of medical devices cannot be included in the Australian Register of Therapeutic Goods (Register);
- extends the circumstances in which consultation can occur with, and where advice can be requested from, the Gene Technology Regulator regarding applications for the listing or registration in the Register of therapeutic goods that are, or that contain, genetically modified organisms;
- amend the advertising offence provisions to provide that it is an offence for any person to advertise a therapeutic good inappropriately;
- amends delegation provisions to enable the regulations to specify a relevant person for the purposes of exercising delegations under section 19A of the Therapeutic Goods Act; and
- introduce provisions that would allow the Minister, by legislative instrument, to specify advisory statements that are required to be included on the labels of specified medicines.

**Delayed commencement
Clause 2**

Clause 2(1) contains the table of commencement information and item 2 of the table provides that the amendments commence on 1 July 2010, resulting in delayed commencement. The explanatory memorandum explains (at page 3) that the fixed date provides certainty to pharmaceutical and chemical industries, and interested parties, about the new arrangements for scheduling of medicines and chemicals. The explanatory memorandum also notes that this will allow time for subordinate legislation to be completed which will support the bill. The Committee is satisfied that the reasons for the delayed commencement are thoroughly explained.

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

**Incorporating matter as in force from time to time
Schedule 1, item 11, new subsection 52D(4B)**

Proposed new subsection 52D(4B), to be inserted by item 11 of Schedule 1, provides that an instrument made under the section may apply, adopt or incorporate ‘any matter contained in an instrument or other writing as in force or existing from time to time’. The explanatory memorandum explains (at pages 7-8) that this provision ensures that the current Poisons Standard can reflect the broader international and national legislative and regulatory environments in which it operates; and that it will also ensure consistency and a reduced regulatory compliance burden for those affected (no lag time between revision and recognition in the Poisons Standard). The Committee is satisfied that this incorporation by reference is thoroughly explained.

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

Trade Practices Amendment (Australian Consumer Law) Bill 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Treasury

Background

This bill amends the *Trade Practices Act 1974* to establish and apply a single, national consumer law framework – the Australian Consumer Law (ACL) – as agreed by the Council of Australian Governments on 2 October 2008.

Specifically, the bill:

- amends the Trade Practices Act to establish the ACL as a schedule to that Act;
- makes provision for the application and amendment of the ACL;
- includes provisions to address unfair contract terms in the ACL;
- introduces into the Trade Practices Act new penalties, enforcement powers and consumer redress options which will later be the basis of consistent national provisions in the ACL; and
- amends the *Australian Securities and Investments Commission Act 2001* to introduce corresponding provisions that will apply in respect of financial services, in relation to unfair contract terms, penalties, enforcement powers and consumer redress options.

The bill also makes minor consequential amendments to the *Corporations Act 2001*, as well as minor changes to the *Administrative Decisions (Judicial Review) Act 1997*, the *Telecommunications (Interception and Access) Act 1979* and the *Trade Practices Act 1974*.

The Committee has no comment on this bill.

Trade Practices Amendment Bill 2009

Introduced into the House of Representatives on 22 June 2009

By Mr Katter

Background

This bill amends the *Trade Practices Act 1974* to provide protection to unions and their members from being sued if they stop the export of Pacific Brands manufacturing machinery or the importation of goods to replace Pacific Brands products.

Such protection is provided for secondary boycotts for the purpose of causing substantial loss or damage, secondary boycotts for the purpose of causing substantial lessening of competition, and boycotts affecting trade or commerce. The exception is restricted to circumstances where a government is negotiating with a company to protect jobs and would only allow for unions to be entitled to ban such imports for two years.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Member's bill, was accompanied only by a statement made on presentation of the bill and was introduced without an explanatory memorandum or second reading speech. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanatory memorandum. The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of such documents. In this instance, the Committee notes that the accompanying statement contains some explanation of the background to, and intent of, the proposed amendments.

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

Drafting note

Proposed new subsection 45DD(2C), to be inserted by item 1 of Schedule 1, provides that ‘for the purposes of subsections (2A) and (2B) the term *Pacific Brands* and has the meaning given in the regulations’. As a drafting matter, the word ‘and’ after *Pacific Brands* is unnecessary and causes confusion. The Committee **draws to the Senator’s attention** this drafting matter.

Trade Practices Amendment (Guaranteed Lowest Prices—Blacktown Amendment) Bill 2009

Introduced into the Senate on 24 June 2009
By Senators Xenophon and Joyce

Background

This bill amends the *Trade Practices Act 1974* to ensure that major retailers charge the same price for the same product in the same geographic region (that is, within a 35 kilometre radius of adjacent retail outlets operated under the same trading name by a corporation or related entity).

Explanatory memorandum

The Committee notes that this bill, introduced as a private Senators' bill, was accompanied only by second reading speeches and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanation of the intent and operation of the proposed amendments, preferably in the form of an explanatory memorandum. In this case, the Committee notes that the second reading speeches provide some explanation of the background and intent of the proposed amendments.

While the Committee recognises the limited resources available to Senators to assist with the preparation of private Senators' Bills and explanatory material, the Department of the Senate has developed a set of guidelines to assist: *Preparing Private Senator's Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may assist Senators and Members in preparing explanatory memoranda.

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

COMMENTARY ON AMENDMENTS TO BILLS

Coordinator-General for Remote Indigenous Services Bill 2009

On 18 June 2009, the House of Representatives agreed to five government amendments to the bill, none of which fall within the Committee's terms of reference. On 25 June 2009, the Senate passed the bill as amended.

Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

On 25 June 2009, the Senate agreed to one government amendment to the bill which does not fall within the Committee's terms of reference. On 25 June 2009, the House of Representatives also agreed to this amendment. The bill received Royal Assent on 8 July 2009.

Health Workforce Australia Bill 2009

On 24 June 2009, the Senate agreed to one amendment to the bill which does not fall within the Committee's terms of reference. On 24 June 2009, the House of Representatives also agreed to this amendment. The bill received Royal Assent on 22 July 2009.

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
Australian Wine and Brandy Corporation Amendment Bill 2009	Schedule 3, item 8, proposed subsection 39ZH(2)	Failure to provide information to public authority	30 penalty units
Automotive Transformation Scheme Bill 2009	Subclause 24(1)	Failure to provide information to a public authority	Imprisonment for six months

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009	Schedule 3, item 10, new section 15HU	Failure to provide information to a public authority	Imprisonment for six months
Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009	Subclause 66(2)	Failure to provide information to a public authority	30 penalty units
Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009	Subclause 84(2)	Failure to provide information to a public authority	30 penalty units
National Consumer Credit Protection Bill 2009	Subclause 49(7)	Failure to provide information to a public authority	25 penalty units or six months imprisonment, or both
National Consumer Credit Protection Bill 2009	Subclause 49(8)	Failure to provide information to a public authority	10 penalty units
National Consumer Credit Protection Bill 2009	Subclause 50(3)	Failure to provide information to a public authority	25 penalty units or six months imprisonment, or both

National Consumer Credit Protection Bill 2009	Subclause 51(3)	Failure to provide information to a public authority	25 penalty units or six months imprisonment, or both
National Consumer Credit Protection Bill 2009	Subclause 51(3)	Failure to provide information to a public authority	25 penalty units or six months imprisonment, or both
National Consumer Credit Protection Bill 2009	Subclause 52(3)	Failure to provide information to a public authority	10 penalty units
National Consumer Credit Protection Bill 2009	Subclause 53(5)	Failure to provide information to a public authority	60 penalty units
National Consumer Credit Protection Bill 2009	Subclause 71(6)	Failure to provide information to a public authority	25 penalty units or six months imprisonment, or both
National Consumer Credit Protection Bill 2009	Subclause 100(5)	Failure to provide information to a public authority	200 penalty units or five months imprisonment, or both
National Consumer Credit Protection Bill 2009	Subclause 220(4)	Failure to provide information to a public authority	50 penalty units or one year imprisonment, or both

National Consumer Credit Protection Bill 2009	Subclause 290(2)	Includes failure to provide information to a public authority	10 penalty units or three months imprisonment, or both
National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009	Schedule 2, subitem 17(7)	Failure to provide information to a public authority	25 penalty units or six months imprisonment, or both
National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009	Schedule 2, subitem 17(8)	Failure to provide information to a public authority	10 penalty units
National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009	Schedule 2, subitem 18(3)	Failure to provide information to a public authority	25 penalty units or six months imprisonment, or both
National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009	Schedule 2, subitem 18(4)	Failure to provide information to a public authority	10 penalty units
National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009	Schedule 2, subitem 19(3)	Failure to provide information to a public authority	25 penalty units or six months imprisonment, or both
National Health Security Amendment Bill 2009	Schedule 1, item 12, new subsection 38G(1)	Failure to provide information to a public authority	500 penalty units

National Health Security Amendment Bill 2009	Schedule 1, item 12, new subsection 38J(1)	Failure to provide information to a public authority	500 penalty units
National Health Security Amendment Bill 2009	Schedule 1, item 12, new subsection 38L(1)	Failure to provide information to a public authority	500 penalty units
National Health Security Amendment Bill 2009	Schedule 1, item 12, new subsection 38N(1)	Failure to provide information to a public authority	500 penalty units
National Health Security Amendment Bill 2009	Schedule 1, item 32, new subsection 70D(3)	Failure to provide information to a public authority	30 penalty units
National Health Security Amendment Bill 2009	Schedule 1, item 43, new subsection 48B(1)	Failure to provide information to a public authority	500 penalty units
National Security Legislation Monitor Bill 2009	Subclauses 25(3) and (4)	Failure to provide information to a public authority	Imprisonment for six months or 30 penalty units, or both
Tax Laws Amendment (2009 Measures No. 4) Bill 2009	Schedule 2, item 22, new subsection 426-165(1)	Failure to provide information to a public authority (if Commissioner is acting trustee)	50 penalty units

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

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

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

Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009

This bill amends the *Corporations Act 2001* to strengthen the regulatory framework relating to the payment of termination benefits to company directors and executives. In his second reading speech, the Minister for Financial Services, Superannuation and Corporate Law stated that the Ministerial Council for Corporations was consulted in relation to the amendments to the laws in the national corporate regulation scheme, and approved them as required under the Corporations Agreement.

Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009

This bill amends the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* to provide for the national regulation of margin lending and trustee corporations, as agreed by the Council of Australian Governments (COAG) on 26 March 2008. In his second reading speech, the Minister for Financial Services, Superannuation and Corporate Law explained that the Ministerial Council for Corporations was consulted in relation to bill.

The Minister also noted that the amendments relating to the regulation of trustee corporations were the subject of consultations with representatives from the states and territories, and that this consultation included consideration of the draft amendments by the Ministerial Council for Corporations. The Minister advised that, during that process, some state and territory Ministers raised certain issues which will be considered further by the Commonwealth. However, the Ministerial Council approved the amendments in the bill for introduction, as required under the Corporations Agreement.

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

In April 2009, the Standing Committee of Attorneys-General (SCAG) agreed to a set of resolutions for a comprehensive national response to organised crime. This bill implements the Commonwealth's commitment, as part of the SCAG agreement, to enhance its legislation to combat organised crime.

Schedule 3 of the bill implements model laws for controlled operations, assumed identities and witness identity protection which were developed following the 2002 Leaders Summit on Multi-jurisdictional Crime by the Joint Working Group of SCAG and the then Australasian Police Ministers' Council. The Joint Working Group's Report, *Cross-border investigative powers for law enforcement*, was released in 2003, and the model laws endorsed for implementation by SCAG in 2004.

National Consumer Credit Protection Bill 2009

This bill establishes a new national consumer credit regime. The new regime gives effect to COAG's agreements of 25 March 2008 and 3 July 2008 to transfer responsibility for regulation of consumer credit, and a related cluster of additional financial services, to the Commonwealth; and implements the first phase of a two-phase Implementation Plan to transfer credit regulation to the Commonwealth, as agreed by COAG on 2 October 2008.

Personal Property Securities Bill 2009

This bill establishes a single national law governing security interests in personal property. The Attorney-General's second reading speech noted that, in April 2007, COAG endorsed the need for a national system to deal with the creation and enforcement of security interests in personal property. COAG signed an inter-governmental agreement in October 2008 and, since then, personal property securities reform has been included as part of the *National Partnership Agreement to Deliver a Seamless National Economy* reached between the Commonwealth and the states and territories. SCAG also played a role in the development of the bill.

Road Transport Reform (Dangerous Goods) Repeal Bill 2009

This bill meets the Federal Government's obligation, under the Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport, to repeal any road transport legislation that has been enacted by the Commonwealth on behalf of the Australian Capital Territory. This coincides with the passage of legislation by the ACT Government, allowing it to implement its own arrangements in the same manner as other states and territories.

The Inter-Governmental Agreement sets out principles and processes for cooperation between the Commonwealth and the states and territories to progress regulatory and operational reform for road, rail and intermodal transport, in order to deliver and sustain nationally consistent transport outcomes.

Trade Practices Amendment (Australian Consumer Law) Bill 2009

On 2 October 2008, COAG agreed to a new consumer policy framework comprising a single national consumer law, having agreed to develop a national consumer law on 3 July 2008. COAG based this decision on the proposals of the Ministerial Council on Consumer Affairs (MCCA) which were announced on 15 August 2008.

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
	Automotive Transformation Scheme Bill 2009 — clause 10
*	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)
	Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009 — subclause 43(2), clause 70 and subclause 78(2)
*	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>)
	National Consumer Credit Protection Bill 2009 — Schedule 1, subclause 115(2)
*	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)
Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009	8(24.6.09)	17.6.09		Education, Employment and Workplace Relations	25.6.09	10.8.09	8(12.8.09)
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)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
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	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	29.6.09	8(12.8.09)
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	5.8.09	8(12.8.09)
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	24.6.09	8(12.8.09)
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)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Infrastructure Australia Amendment (National Broadband Network and Other Projects) Bill 2009	8(24.6.09)		15.6.09	Senator Minchin	25.6.09	10.8.09	8(12.8.09)
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)
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)
Renewable Energy (Electricity) Amendment Bill 2009	8(24.6.09)	17.6.09		Climate Change and Water	25.6.09		
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	6.7.09	8(12.8.09)
Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Bill 2009	8(24.6.09)	15.6.09	17.6.09	Families, Housing, Community Services and Indigenous Affairs	25.6.09	5.8.09	8(12.8.09)
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)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
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)