

Senate Standing Committee
for the
Scrutiny of Bills

Alert Digest No. 3 of 2011

23 March 2011

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator G Marshall

Senator L Pratt

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

Abolition of Age Limit on Payment of the Superannuation Guarantee Charge Bill 2011	1
• Auditor-General Amendment Bill 2011	2
Customs Amendment (Anti-Dumping) Bill 2011	4
Customs Amendment (Anti-dumping Measures) Bill 2011	5
Electoral and Referendum Amendment (Provisional Voting) Bill 2011	6
• Environment Protection and Biodiversity Conservation (Abolition of Alpine Grazing) Bill 2011	7
Environment Protection and Biodiversity Conservation Amendment (Bioregional Plans) Bill 2011	8
• Midwife Professional Indemnity Legislation Amendment Bill 2011	9
• National Health Reform Amendment (National Health Performance Authority) Bill 2011	11
• Trans-Tasman Proceedings Amendment and Other Measures Bill 2011	15
Commentary on Amendments to Bills	16
Bills giving effect to National Schemes of Legislation	17
Scrutiny of standing appropriations	18

Abolition of Age Limit on Payment of the Superannuation Guarantee Charge Bill 2011

Introduced into the House of Representatives on 28 February 2011

By: The Hon B Bishop

Background

This bill amends the *Superannuation Guarantee (Administration) Act 1992* to abolish the current age limit of 70 years for the payment of the superannuation guarantee.

The Committee has no comment on this bill.

Auditor-General Amendment Bill 2011

Introduced into the House of Representatives on 28 February 2011

By: Mr Oakeshott

Background

This bill amends the *Auditor-General Act 1997* to:

- require the Auditor-General to audit a sample of agency performance indicators annually;
- enable the Auditor-General to undertake assurance reviews other than audits of agencies, authorities, companies and their subsidiaries; and
- provide that claims of legal professional privilege do not override the Auditor-General's information-gathering powers.

No explanatory memorandum

This bill, introduced as a private Member's bill, was introduced without an explanatory memorandum. The Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents assist in the interpretation of bills, and ultimately, Acts. If the bill proceeds to further stages of debate the Committee **requests that the Private Member** provide an explanatory memorandum.

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

Abrogation of legal professional privilege Schedule 1, item 13

Item 13 of Schedule 1 seeks to insert a new section 32 into the *Auditor-General Act 1997*. Proposed subsection 32A(1) provides that the Auditor-General's exercise of powers to obtain information is not limited by a claim that the information or document is the subject of legal professional privilege. The Committee has accepted that the privilege against self-incrimination is

not absolute, but has indicated that the public benefit from its negation should decisively outweigh the resultant harm to individual rights.

To assist in determining whether the public interest in abrogating the privilege decisively outweighs that in the preservation of an important individual right, if the bill proceeds to further stages of debate the Committee **requests that the Private Member provides advice** of the rationale for the proposed approach. In particular, clarification is sought as to the nature and seriousness of harm which may be suffered and the extent to which information gained can reasonably be expected to serve this public interest.

Pending the Private Member'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.

Customs Amendment (Anti-Dumping) Bill 2011

Introduced into the Senate on 2 March 2011

By: Senator Xenophon

Background

This bill amends Part XVB of the *Customs Act 1901* to:

- provide that the importer of goods which are subject to anti-dumping applications bears the onus of proving that the imported goods have not been dumped or subsidised for export into Australia;
- provide a presumption of dumping, where material injury has been proven and dumping has been proven, the material injury is the result of the dumping;
- allow for new or updated information that reasonably could not have been provided earlier to be submitted during the application, investigation and review process;
- allow applicants to provide evidence as recently as 90 days prior to the application being submitted;
- allow preliminary affirmative decision to be applied once an investigation has been initiated;
- increase consultation with industry experts as part of an investigation or review process; and
- enable decisions to be referred to the Administrative Appeals Tribunal

The Committee has no comment on this bill.

Customs Amendment (Anti-dumping Measures) Bill 2011

Introduced into the House of Representatives on 2 March 2011

Portfolio: Home Affairs

Background

This bill amends Division 5 of Part XVB of the *Customs Act 1901* to:

- introduce procedural requirements in order for the Chief Executive Officer of Customs (the CEO) to recommend, and for the Minister to declare, that anti-dumping measures be revoked at the conclusion of a review; and
- insert a legislative test outlining when the CEO may recommend that the Minister revoke anti-dumping measures.

The Committee has no comment on this bill.

Electoral and Referendum Amendment (Provisional Voting) Bill 2011

Introduced into the House of Representatives on 2 March 2011

Portfolio: Special Minister of State

Background

This bill amends the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to repeal the requirement for provisional voters to provide evidence of identity before their votes are admitted to preliminary scrutiny.

The Committee has no comment on this bill.

Environment Protection and Biodiversity Conservation (Abolition of Alpine Grazing) Bill 2011

Introduced into the House of Representatives on 28 February 2011

By: Mr Bandt

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to deem that the minister has: received from the Victorian government a referral of its proposal to trial cattle grazing in the Alpine National Park; and decided that the trial of alpine grazing is unacceptable.

No explanatory memorandum

This bill, introduced as a Private Member's bill, was introduced without an explanatory memorandum. The Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents assist in the interpretation of bills, and ultimately, Acts. If the bill proceeds to further stages of debate the Committee **requests that the Private Member** provide an explanatory memorandum.

Pending the Private Member's reply, the Committee draws Senators' attention to this circumstance, 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.

Environment Protection and Biodiversity Conservation Amendment (Bioregional Plans) Bill 2011

Introduced into the Senate on 2 March 2011

By: Senator Colbeck

Background

This bill seeks to make bioregional plans disallowable instruments, as per the provisions in the *Legislative Instruments Act 2003*.

The Committee has no comment on this bill.

Midwife Professional Indemnity Legislation Amendment Bill 2011

Introduced into the House of Representatives on 3 March 2011

Portfolio: Health and Ageing

Background

This bill amends the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* to ensure that self-employed midwives can access the Scheme and amends the *Midwife Professional Indemnity (Run-Off Cover Support Payment) Act 2010* to ensure that the tax on insurers of eligible midwives is correctly calculated.

Retrospective effect

Schedule 1, items 1 and 2

The *Midwives Professional Indemnity (Commonwealth Contribution) Act 2010* enables a Commonwealth contribution to be paid to insurers for the cost of eligible claims made against eligible midwives. The policy intention of the government was not to exclude self-employed midwives. Nevertheless, the legislation had this effect. Rules were therefore enacted to correct this oversight. The Rules were made pursuant to a general power to make rules which were ‘necessary and convenient’ for the administration of the Act. The purpose of this bill is to give Parliament the opportunity to explicitly approve the power to make these Rules.

Item 1 of Schedule 1 would insert a new subsection 11(3B) into the Act. This subsection provides that under the Rule-making power inserted by subsection 11(3A), the Rules may take effect retrospectively, that is ‘from a date before the Rules are registered under the *Legislative Instruments Act 2003*’. However, the explanatory memorandum gives the assurance that ‘rules will be made so that no person would be disadvantaged, apart from the Commonwealth’. The same issue arises in relation to Schedule 1, item 2, proposed subsection 31(7).

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

Retrospective effect
Schedule 1, items 3 and 4

Item 3 of Schedule 1 fixes a typographical error in the *Midwife Professional Indemnity (Run-off Cover Support Payment) Act 2010*. The effect of the error was to inadvertently impose a much higher tax on premium income of insurers of eligible midwives than had been intended (see the explanatory memorandum at page 5). Item 3 corrects this error and item 4 backdates the correction. Although item 4 has retrospective effect it is clearly to the benefit of the relevant taxpayers and therefore the Committee has no further comment.

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

National Health Reform Amendment (National Health Performance Authority) Bill 2011

Introduced into the House of Representatives on 3 March 2011

Portfolio: Health and Ageing

Background

This bill establishes the National Health Performance Authority as agreed to at the Council of Australian Governments (COAG) meeting in April 2010 and reconfirmed in the Heads of Agreement – National Health Reform of 13 February 2011. Clause 68 of the Heads of Agreement – National Health Reform provides that the Heads of Agreement will lapse after all parties sign the National Health Reform Agreement.

Reversal of onus

Schedule 1, items 127 and 130

Item 127 of Part 1 of Schedule 1 inserts a new subsection 54A(1). This provision would establish an offence for an official of the Australian Commission on Safety and Quality in Health Care to disclose or use ‘protected’ information that has been obtained in the course of their work. Proposed subsection 54A(2) provides for a number of exceptions to the offence, and imposes an evidentiary burden of proof on a defendant who wishes to rely upon them.

This reverse onus applies in relation to the question of whether the action of disclosing protected information was ‘authorised by this Part’ or was in compliance with a law of the Commonwealth or a prescribed law of a State or Territory. Item 127 of the bill also sets out the exceptions whereby ‘disclosure or use is authorised by this Part’. These are listed at page 7 of the explanatory memorandum.

As stated at page 29 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, the ‘mere fact that it is difficult for the prosecution to prove an element of an offence has not traditionally been considered in itself, a sound justification for reversing the onus of proof’. The *Guide* also indicates that criteria such as (1) whether a matter is peculiarly within the defendant’s knowledge, (2) the centrality of the question to the issue of culpability for the offence, (3) the severity of the penalty, and (4)

whether the conduct proscribed by the offence poses grave dangers to public health or safety, are relevant to the issue of whether the reversal of the onus of proof is legitimate.

The explanatory memorandum at page 6 justifies the provision by noting that it 'would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing information should reasonably be aware of the basis for their disclosure'. While this seems to imply that relevant information could be peculiarly within the knowledge of the defendant the Committee's consideration of the appropriateness of this provision would be assisted by a more detailed elaboration of the justification for the proposed approach. The Committee therefore **seeks the Minister's advice** in relation to the reasons for this approach. This issue also arises in relation to the secrecy provisions set out in Part 3.12, inserted by item 130 of Schedule 1 and the Committee also **seeks the Minister's advice** in relation to the reasons for this approach in this item.

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.

Trespass on personal rights and liberties
Schedule 1, item 127, subsection 54A(2) and item 130

The exceptions set out in subsection 54A(2) to the offence for disclosing protected information relating to the disclosure of protected information potentially compromise an individual's privacy as they authorise the disclosure of personal information. There is no direct conflict with the Information Privacy Principles as Principle 11 allows for disclosure if 'the disclosure required or authorised by law'. Nevertheless, the explanatory memorandum merely restates the effect of the exemptions, without attempting to justify them. So as to better determine whether there is any undue encroachment of an individual's privacy the Committee seeks the **Minister's further advice** as to why disclosure of information should be authorised by these exemptions. This issue also arises in relation to the secrecy provisions set out in Part 3.12, inserted by item 130 of Schedule 1 and the Committee also **seeks the Minister's advice** in relation to this item.

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.

Legislative Instruments Act - exemption Schedule 1, clause 130

Item 130 of Schedule 1 of the bill inserts a new Chapter 3 into the legislation, which establishes the National Health Performance Authority. The proposed paragraph 60(1)(f) enables the Minister to specify in an instrument additional functions which are to be performed by the Authority. Subsection 60(5) states that such an instrument is not a legislative instrument. This appears to be a substantive exemption from the *Legislative Instruments Act*. The reasons given for this exemption in the explanatory memorandum at page 9 are as follows: (1) the obligations which are imposed only apply to the Authority and are not general statements of law and (2) the Minister 'will usually be making these instruments at the request of the Australian Health Ministers' Conference or to give effect to COAG agreements.' In the Committee's view these reasons may be considered as justifying the exclusion of the disallowance provisions of the *Legislative Instruments Act*. However, the Committee **seeks the Minister's advice** as to whether consideration has been given to alternative means for enabling public scrutiny of these instruments, such as a requirement that they be published on the Authority's website.

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.

Wide discretion Schedule 1, item 130, section 81

Item 130 of Schedule 1 of the bill would insert a new section 81 into the legislation. This provision enables the Minister to 'at any time' terminate the appointment of a member of the Performance Authority. This power confers a very broad discretionary power on the Minister. Given that the appointment of some members is based on the need to secure the agreement of other political actors (eg, Premiers of the States) and that members may be appointed based

on their experience, knowledge and standing in particular areas (see the proposed new section 72) it is disappointing that explanatory memorandum at page 10 merely repeats the effect of this provision. The Committee **seeks the Minister's advice** as to the justification for the approach and whether it would be possible to confine or structure this discretionary power to dismiss a member of the Authority to include relevant grounds and a process for dismissal.

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

Trans-Tasman Proceedings Amendment and Other Measures Bill 2011

Introduced into the House of Representatives on 2 March 2011

Portfolio: Attorney-General

Background

This bill amends the *Trans-Tasman Proceedings Act 2010* (the Proceeding Act) and the *Trans-Tasman Proceedings (Transitional and Consequential Amendments) Act 2010* (the Transitional Act). The bill makes minor amendments to harmonise the language and structure of the Proceedings Act and the Transitional Act with the New Zealand Act. The bill also makes minor technical amendments to enhance the internal consistency of the Australian legislation.

Retrospective effect

Schedule 3

As described in the *General Outline* to the explanatory memorandum for the Bill:

Schedule 3 of the Bill contains technical measures to retrospectively validate fees charged for de facto financial proceedings under the Family Law Act 1975 for the period 1 March 2009 to 25 November 2010.

A technical error in the amending legislation resulted in an anomaly in the application of the fee provisions of the Family Law Regulations 1984 to de facto financial proceedings...

The technical measures in Schedule 3 of this Bill ensure that the fees applying to de facto financial proceedings in the Family Court of Australia (and relevant State and Territory Courts) in the relevant period were the same as those applying to parenting matters and matrimonial financial proceedings in those courts, and de facto financial proceedings in the Federal Magistrates Court

The Committee has been advised that these amendments will ensure that the legislation reflects the situation originally intended (and which is currently being used) for the application of the relevant fee provisions.

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

COMMENTARY ON AMENDMENTS TO BILLS

Evidence Amendment (Journalists' Privilege) Bill 2010

[Digest 8/10 no comment]

On 3 March 2011 the Senate agreed to two Australian Greens amendments and passed the bill. None of the amendments fall within the committee's terms of reference.

National Broadband Network Companies Bill 2010

[Digest 1/11 response required]

On 2 March 2011 a revised explanatory memorandum was tabled in the Senate.

National Health and Hospitals Network Bill 2010

[Digest 8/10 and response in 1/11 Report]

On 3 March 2011 the Senate agreed to eight Australian Greens amendments and passed the bill. None of the amendments fall within the committee's terms of reference.

Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010

[Digest 8/10 and response in 9/10 Report]

On 2 March 2011 a replacement explanatory memorandum was tabled, a government amendment was agreed to and the bill was passed in the Senate. On 3 March 2011 the House of Representatives agreed to the Senate amendment. None of the amendments fall within the committee's terms of reference.

Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011

[Digest 1/11 response required]

On 1 March 2011 the House of Representatives agreed to two Australian Greens amendments and passed the bill. On 2 March 2011 a revised explanatory memorandum was tabled in the Senate. None of the amendments fall within the committee's terms of reference.

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.

National Health Reform Amendment (National Health Performance Authority) Bill 2011

This bill establishes the National Health Performance Authority as agreed to at the Council of Australian Governments (COAG) meeting in April 2010 and reconfirmed in the Heads of Agreement – National Health Reform of 13 February 2011. Clause 68 of the Heads of Agreement – National Health Reform provides that the Heads of Agreement will lapse after all parties sign the National Health Reform Agreement.

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 in the 43rd Parliament from the previous *Alert Digest*

Nil

Other relevant appropriation clauses in bills in the 43rd Parliament from the previous *Alert Digest*

Nil