

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



Alert Digest

No. 13 of 2005

9 November 2005

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ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator A McEwen
Senator A Murray

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

• Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005	5
Anti-Terrorism Bill 2005	7
• Anti-Terrorism Bill (No. 2) 2005	8
• Census Information Legislation Amendment Bill 2005	17
Charter of Budget Honesty Amendment Bill 2005	18
• Commonwealth Radioactive Waste Management Bill 2005	19
• Commonwealth Radioactive Waste Management (Related Amendment) Bill 2005	21
Defence Legislation Amendment Bill (No. 2) 2005	22
European Bank for Reconstruction and Development Amendment Bill 2005	23
Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005	24
Telemarketing (Protection of Privacy Rights of Residential Telephone Subscribers) Bill 2005	25
• Workplace Relations Amendment (Work Choices) Bill 2005	26
Provisions of bills which impose criminal sanctions for a failure to provide information	29

- **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.

Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005

Introduced into the Senate on 12 October 2005

Portfolio: Environment and Heritage

Background

This bill amends the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to:

- ensure that declarations made under the Act cannot act to prevent the return of objects imported temporarily to Australia with a certificate of exemption under the *Protection of Movable Cultural Heritage Act 1986*;
- to repeal provisions in the Act that apply only to places in Victoria, enabling the Victorian Government to administer Aboriginal heritage protection through its own legislation; and
- bring the Act into line with the *Legislative Instruments Act 2003*.

The bill also contains consequential amendments to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*.

Commencement on Proclamation Schedule 2

Item 3 in the table to subclause 2(1) of this bill provides that the amendments in Schedule 2 would commence on Proclamation. The item goes on to provide that if the commencement is not fixed by a Proclamation made within 12 months of Assent, the amendments in that Schedule are repealed.

The Committee generally looks for an explanation for any delay in commencement of more than 6 months. In this case, the explanatory memorandum observes that the amendments provide for the repeal of Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* that apply only to places in Victoria. It is intended that the Victorian Government administer Aboriginal heritage protection for sites in Victoria. The commencement provision is included to guard against the possibility that

Victorian legislation is not enacted within 12 months of this bill being assented to. If that were to happen, no Proclamation will be made, and Part IIA will continue in force.

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

Anti-Terrorism Bill 2005

Introduced into the House of Representatives on 2 November 2005 and passed by the Senate on 3 November 2005

Portfolio: Attorney-General

Background

This bill amends the *Criminal Code Act 1995* to expand the scope of existing federal offences and powers relating to terrorist activity. The amendments specify that, in a prosecution for relevant offences, it is not necessary to identify a particular terrorist act.

The Committee has no comment on this bill.

Anti-Terrorism Bill (No. 2) 2005

Introduced into the House of Representatives on 3 November 2005

Portfolio: Attorney-General

Background

This bill amends a number of Acts to expand the federal regime of offences and powers relating to terrorist acts and terrorist organisations.

The bill extends the definition of a terrorist organisation to encompass organisations that advocate terrorism (Schedule 1); updates existing sedition offences to cover those who urge the use of force or violence, or assist an enemy at war (Schedule 7); extends offences for the financing of terrorist activity (Schedule 3) and amends financial transaction reporting requirements to implement certain recommendations relating to terrorist financing (Schedule 9).

The bill also introduces a number of new and expanded powers relating to terrorist activity, including:

- control orders and preventative detention orders (Schedule 4);
- a new regime of ‘stop, question, search and seize’ powers, exercisable at airports and other Commonwealth places (Schedule 5); and
- a ‘notice to produce’ regime to ensure the AFP can enforce compliance with requests for information in relation to relevant offences (Schedule 6).

The bill also establishes a statutory basis for video surveillance at airports and on aircraft (Schedule 8).

Finally, Schedule 10 of the bill extends ASIO’s powers in a number of relevant areas. These include:

- extending ASIO’s special powers warrant regime;
- providing greater access to aircraft and vessel information; and
- strengthening the offence for providing false or misleading information under an ASIO questioning warrant.

The bill also contains technical amendments.

Commencement on Proclamation Schedule 9, items 1, 2, 6, 8, 9, 14, 15 and 18 to 24

Items 8, 11, 13, 17 and 19 in the table to subclause 2(1) in this bill provide that the amendments proposed in various items of Schedule 9 (all of which amend the *Financial Transactions Reports Act 1988*) would commence on Proclamation, but may not commence for up to 12 months after Assent. The Committee generally looks for an explanation for any delay in commencement of more than 6 months. In this case, the explanatory memorandum states that this delay is to ‘allow for a public education campaign to raise awareness about the implications of the amendments and to enable the Australian Customs Service and the Australian Transaction Reports and Analysis Centre (AUSTRAC) to put in place appropriate training and system upgrades.’

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

Retrospective operation Schedule 1, item 22

Proposed new section 106.3 of the *Criminal Code*, to be inserted by item 22 of Schedule 1 to this bill, would provide that the amendments made by Schedule 1 to the *Anti-Terrorism Act 2005* ‘apply to offences committed:

- (a) before the commencement of this section (but not before the commencement of the particular section of the Code being amended); and
- (b) after the commencement of this section.’

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact. As noted in the Committee’s *Tenth Report of 2005*, which outlines the Committee’s practice on retrospectivity:

The Committee *will* comment adversely... where such a bill has a detrimental effect on people. Under this principle, the Committee

has consistently criticised bills which sought to impose criminal liability retrospectively and has been critical of measures which retrospectively increase penalties, or apply new penalties...

The Committee also considers it essential that those proposing retrospective provisions should seek to justify them, including by setting out the reasons for that retrospectivity in the explanatory memorandum to the bill.

In this case, the explanatory memorandum seeks to justify the retrospective operation which this proposed section would give to provisions creating criminal offences on the basis that ‘the provision merely clarifies what was originally intended.’ The memorandum goes on to assert that the retrospective operation is ‘necessary because [a failure to include this proposed new section 106.3] will ... create an incorrect implication.’

The retrospective operation of the offences amended by the Anti-Terrorism Bill 2005, passed by the Senate on 3 November 2005, would clearly trespass on personal rights and liberties. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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.

Non-reviewable decisions — Initial preventative detention orders Schedule 4, item 24

By virtue of proposed new section 105.8 of the *Criminal Code*, to be inserted by item 24 of Schedule 4 to this bill, the Commissioner of the Australian Federal Police, a Deputy Commissioner, or a member of that police force above the rank of Superintendent may, on application by a member of the Australian Federal Police, make an ‘initial preventative detention order’, under which a person aged 16 or more may be taken into custody for a maximum period of 24 hours, if either the police officer applying for the order, or the police officer making the order, has reasonable grounds to

suspect, in relation to the subject of the order, the various matters specified in proposed new subsection 105.4(4) or (6).

The power to issue such a preventative detention order might appear to make rights or liberties dependent on non-reviewable decisions. However, proposed new section 105.51 allows the subject of such a detention order to apply to the Administrative Appeals Tribunal for a review of the decision, but only after the order has ceased to be in force. The Administrative Appeals Tribunal is authorised, by new paragraph 105.51(7)(b), in appropriate circumstances, to determine that the Commonwealth should compensate the subject of such an order. It is suggested that new section 105.51 takes new section 105.8 outside the terms of reference of the Committee, and that there is consequently no need to bring section 105.8 to the attention of the Senate.

The Committee does have concerns on the related question of ‘prohibited contact orders’. These are set out on page 12, below.

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

Non-reviewable decisions — Continued preventative detention orders

Schedule 4, item 24

By virtue of proposed new section 105.12 of the *Criminal Code*, to be inserted by item 24 of Schedule 4 to this bill, a Judge, Federal Magistrate, member of the Administrative Appeals Tribunal or a retired Judge may, on application by a member of the Australian Federal Police, make a ‘continued preventative detention order’ under which a person aged 16 or more may be taken into custody for a maximum period of 48 hours, if the judicial officer making the order has reasonable grounds to suspect, in relation to the subject of the order, the various matters specified in proposed new subsection 105.4(4) or (6).

Although the power to issue such a preventative detention order is conferred on persons who hold or have held judicial office, it is conferred on them in a personal capacity, and not as a member of a court. That power therefore

makes the rights or liberties of the subject of the order dependent upon non-reviewable decisions.

However, proposed new section 105.51 allows the subject of such a detention order to apply to the Administrative Appeals Tribunal for a review of the decision, but only after the order has ceased to be in force. The Administrative Appeals Tribunal is authorised, by new paragraph 105.51(7)(b), in appropriate circumstances, to determine that the Commonwealth should compensate the subject of such an order. It is suggested that new section 105.51 takes new section 105.12 outside the terms of reference of the Committee, and that there is consequently no need to bring new section 105.12 to the attention of the Senate.

The Committee does have concerns on the related question of ‘prohibited contact orders’. These are set out below.

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

Non-reviewable decisions — Prohibited contact orders Schedule 4, item 24

By virtue of proposed new sections 105.15 and 105.16 of the *Criminal Code*, to be inserted by item 24 of Schedule 4 to this bill, the officer who issues a detention order (whether an ‘initial detention order’ under new section 105.8 or a ‘continued detention order’ under new section 105.12) may *also*, on application by a member of the Australian Federal Police, make a prohibited contact order in relation to the same person. Such an order prohibits the subject from making contact with a specified person for so long as the subject is held in custody. The power to issue such a prohibited contact order makes rights or liberties dependent upon non-reviewable decisions. The Committee **leaves for the Senate as a whole** the question of whether it does so *unduly*.

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.

Personal rights and liberties

Schedule 4, item 24

By virtue of proposed new section 105.22 of the *Criminal Code*, to be inserted by item 24 of Schedule 4 to this bill, a member of the Australian Federal Police who believes on reasonable grounds that the subject of a preventative detention order is on any premises may enter those premises, using such force as is necessary and, subject to the restrictions in proposed new subsection 105.22(2), may exercise that power in relation to any premises where people ordinarily retire for the night. The exercise of this power may be regarded as trespassing on personal rights and liberties. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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.

Exclusion of judicial review

Schedule 4, item 25

Item 25 of Schedule 4 to this bill would amend the *Administrative Decisions (Judicial Review) Act 1977* so as to remove from the purview of that Act decisions of the Attorney-General, under proposed new section 104.1 of the *Criminal Code* (to consent to a police officer requesting a court to issue a control order) and decisions under proposed new Division 105 of that *Code* (to issue preventative detention orders and prohibited contact orders). The explanatory memorandum seeks to justify these provisions on the ground that it is 'appropriate to exclude these decisions from such review due to their security nature.' In the light of proposed new section 105.51 of the *Criminal Code*, referred to above, the Committee is prepared to accept this justification.

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

Legislative Instruments Act — Exemption Schedule 5, item 10

Proposed new section 3UJ of the *Crimes Act 1914*, to be inserted by item 10 of Schedule 5 to this bill, would allow the Attorney-General to declare a Commonwealth place to be a prescribed security zone, thereby giving police officers greater powers to stop, search and seize things found on persons who are in such a zone.

New subsection 3UJ(7) provides that such a declaration is not a legislative instrument. It appears that the declarations in question may be legislative in character. If so, the effect of the subsection is to exempt them from the operation of the *Legislative Instruments Act 2003* (LIA). This contrasts with identically-worded provisions in other legislation which merely declare that the instrument is not one which would ordinarily fall within the definition in the LIA: see the Committee's *Second Report of 2005, Legislative Instruments Act – Declarations*. As noted in that report, the Committee expects that the explanatory memorandum to a bill will set out the policy justification for any proposed exemption from the provisions of the LIA.

In this case, the explanatory memorandum appears to acknowledge that such a declaration would normally be regarded as legislative rather than administrative in character. The memorandum seeks to justify exclusion from the scrutiny process and from possible disallowance under the *Legislative Instruments Act 2003* by observing that 'given the security nature of this declaration, it is not appropriate for its operation to be uncertain due to the possibility of disallowance.' The Committee is prepared to accept this justification.

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

Abrogation of the privilege against self-incrimination Schedule 6, item 1

Proposed new subsection 3ZQR of the *Crimes Act 1914*, to be inserted by item 1 of Schedule 6 to this bill, would abrogate the privilege against self-

incrimination and the protection of legal professional privilege for a person required to produce a document under proposed new sections 3ZQN and 3ZQO of the same Act.

At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law entitlement trespasses on personal rights and liberties. The Committee does not see this privilege as absolute, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures.

In this case, subsection 3ZQR(2) limits the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. The Committee accepts that it strikes a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

Abrogation of legal professional privilege Schedule 6, item 1

Proposed new subsection 3ZQR of the *Crimes Act 1914*, to be inserted by item 1 of Schedule 6 to this bill, would also abrogate the protection of legal professional privilege for a person required to produce a document under proposed new sections 3ZQN and 3ZQO.

As recognised by the High Court, legal professional privilege is not merely a rule of substantive law but an important common law right, which may be abrogated only by an express provision in legislation. Any abrogation of legal professional privilege trespasses on the rights of those affected and the Committee will always draw such provisions to the attention of the Senate (see *Seventh Report of 2005* at pp. 151–4).

Again, the Committee does not consider the privilege to be absolute and considers that there may be circumstances which justify the abrogation of the privilege. In this regard, the Committee notes the protection to residual claims of legal professional privilege afforded by subsection 3ZQR(4). The Committee considers that, while the clause clearly trespasses on the rights of those affected. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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.

Search without warrant Schedule 9, item 18

By virtue of proposed new subsection 33AA(6) of the *Financial Transactions Reports Act 1988*, to be inserted by item 18 of Schedule 9 to this bill, a police or customs officer may, without a warrant, search a person who is about to leave, or has arrived in, Australia, if the officer has reasonable grounds to believe that the person has a bearer negotiable instrument about his or her person in respect of which the person has made a false declaration.

The Committee notes, however, that the provision merely implements a new 'disclosure when asked' regime in relation to these instruments, similar to the regime which exists in relation to numerous other customs declarations. The exercise of this power may, however, be regarded as trespassing on personal rights and liberties. The Committee, according to its usual practice, **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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.

Census Information Legislation Amendment Bill 2005

Introduced into the House of Representatives on 3 November 2005

Portfolio: Treasury

Background

This bill provides for the National Archives of Australia to store and preserve name-identified information collected in the 2006 Census and all subsequent censuses. The information will be collected from households which give explicit consent and can be released for genealogical and other research after a closed access period of 99 years.

Strict liability

Schedule 2, item 3

Proposed new subsection 14(2) of the *Census and Statistics Act 1905*, to be inserted by item 3 of Schedule 2 to this bill, renders the offence created by proposed new subsection 14(1) one of strict liability. The Committee will generally draw to Senators' attention provisions which create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this case, the explanatory memorandum observes that, prior to the commencement of the *Criminal Code*, the offence had been understood to be one of strict liability, and that the 'intent of this amendment is to restore strict liability to the offence and bring it into line with general principles of criminal responsibility in Chapter 2 of the *Criminal Code*.' In accordance with the approach it took during the 'criminal code harmonisation' process, the Committee is prepared to accept that the provision is not intended to create a new strict liability offence, but simply to identify an existing offence of a strict liability character.

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

Charter of Budget Honesty Amendment Bill 2005

Introduced into the House of Representatives on 31 October 2005

By Mr Tanner

Background

This bill amends the *Charter of Budget Honesty Act 1998* to enable the Government or the Opposition to seek from the departments of the Treasury and Finance a costing of any of its policies during the period beginning 12 months prior to the last day for issue of the writs for a general election through to the end of the 'caretaker' period, and to publicly release the costings.

The Prime Minister may give directions to the secretaries about the level of resources to be allocated to the costing of Opposition policies.

The Committee has no comment on this bill.

Commonwealth Radioactive Waste Management Bill 2005

Introduced into the House of Representatives on 13 October 2005
Portfolio: Education, Science and Training

Background

This bill ensures the Commonwealth's power (notwithstanding any state or territory legislation) to select specified Commonwealth land as a site for the management of radioactive waste. The bill provides for the establishment and operation of a radioactive waste management facility together with an access route.

The bill effects the acquisition or extinguishment of all interests in the selected site and any access route, and provides compensation for affected parties.

The bill ensures that, after the selection of a site, Commonwealth regulatory processes under the *Environment Protection and Biodiversity Conservation Act 1999*, *Australian Radiation Protection and Nuclear Safety Act 1998* and the *Nuclear Non-Proliferation (Safeguards) Act 1987* must be complied with.

Trespass on personal rights and liberties Clauses 5, 10 and 13

It is one of the clear purposes of clauses 5, 10 and 13 of this bill that the terms of this bill will override any contrary provisions contained in legislation of any of the states or of the Northern Territory, and will override any possible future contrary legislation of the States and the Northern Territory. It appears, therefore, that these clauses trespass on any individual rights and liberties contained (or to be contained) in the relevant state or territory legislation. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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.

Absolute ministerial discretion

Abrogation of procedural fairness

Clauses 7 and 8

Clause 7 would give the Minister an absolute discretion to declare that a site – or part of a site – is selected as the site for a radioactive waste management facility, and that all or specified rights or interests in land in the Northern Territory are required for providing all-weather access to such a site, while clause 8 provides that no person ‘is entitled to procedural fairness in relation to the Minister’s making of’ either of those declarations. The explanatory memorandum, unhelpfully, fails to set out any justification for these measures, instead merely repeating the text of the provisions of the bill.

These clauses clearly make rights, liberties or obligations dependent upon non-reviewable discretions. The Committee **seeks the Minister’s advice** as to the justification for the inclusion of this absolute ministerial discretion and for the abrogation of procedural fairness. The Committee also **seeks the Minister’s advice** as to whether such declarations ought be contained in legislative instruments and subject to the usual tabling and disallowance regime in the *Legislative Instruments Act 2003*.

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.

Commonwealth Radioactive Waste Management (Related Amendment) Bill 2005

Introduced into the House of Representatives on 12 October 2005
Portfolio: Education, Science and Training

Background

This bill amends the *Administrative Decisions (Judicial Review) Act 1977* to include a reference to a decision to select a site for a Commonwealth radioactive waste management facility made by the Minister under section 7 of the *Commonwealth Radioactive Waste Management Act 2005*.

The bill adds the *Commonwealth Radioactive Waste Management Act 2005* to the classes of decisions that are decisions to which the *Administrative Decisions (Judicial Review) Act 1977* does not apply.

Non-reviewable discretions

Section 7

The only purpose of this bill is to amend the *Administrative Decisions (Judicial Review) Act 1977* to remove from the purview of that Act ‘a decision under section 7 of the *Commonwealth Radioactive Waste Management Act 2005*’ – see Schedule 1, item 1. It is clear that this item makes rights, liberties or obligations dependent upon non-reviewable discretions. However, whether it does so *unduly* is a matter best left for **decision by the Senate as a whole**.

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.

Defence Legislation Amendment Bill (No. 2) 2005

Introduced into the Senate on 12 October 2005

Portfolio: Defence

Background

This bill amends the *Defence Force Discipline Act 1982* and the *Defence Act 1903* to ensure the effectiveness of Australia's military justice system.

The bill:

- creates the statutory appointment of the Director of Military Prosecutions, the Registrar of Military Justice and the Inspector General of the Australian Defence Force (ADF);
- removes the roles and functions currently given to 'Convening Authorities' in favour of the Director of Military Prosecutions, Registrar of Military Justice and superior authorities; and
- enables the Inspector General ADF to appoint inquiry officers, inquiry assistants or Assistant Inspectors General of the ADF and to delegate power to an officer not below the rank of naval captain, colonel or group captain.

The bill also contains transitional provisions.

The Committee has no comment on this bill.

European Bank for Reconstruction and Development Amendment Bill 2005

Introduced into the House of Representatives on 3 November 2005
Portfolio: Treasury

Background

This bill amends Article 1 of the Agreement Establishing the European Bank for Reconstruction and Development (EBRD) to specifically provide for Mongolia to be a country of operations of the EBRD.

The commencement provisions in clause 2 of the bill provide that the provisions – which commence at the latest on the day the relevant international agreement comes into force – will nevertheless *not* commence should that Agreement not come into force within two years. The explanatory memorandum records that this ‘is to avoid an open-ended proclamation provision and to ensure that the Parliament remains responsible for determining when the provisions come into force.’ This meets a longstanding concern of the Committee – see, for example, *First Report of 2005*, at pp. 5-6.

The Committee has no comment on this bill.

Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005

Introduced into the House of Representatives on 12 October 2005

Portfolio: Treasury

Background

This bill makes amendments to the *Income Tax Assessment Act 1936* consequential upon the government's election commitment to allow a member of an eligible fund to split both personal and employer superannuation contributions with the member's spouse for income tax purposes. Details of the measures will be specified in regulations.

The Committee has no comment on this bill.

Telemarketing (Protection of Privacy Rights of Residential Telephone Subscribers) Bill 2005

Introduced into the House of Representatives on 31 October 2005

By Ms Burke

Background

The purpose of this bill is to protect residential telephone subscribers' rights to avoid receiving telephone solicitations to which they object.

The bill requires the Australian Competition and Consumer Commission to:

- establish and maintain a list of telephone numbers of residential subscribers who request not to receive telephone solicitations;
- provide notice to subscribers of the establishment of the list;
- make the list and parts thereof available for purchase by persons desiring to make telephone solicitations; and
- protect the privacy rights of persons whose telephone numbers are included in the list.

The bill prohibits telephone solicitations to any person at any time on a Sunday or public holiday, between midnight and 9.00am or between 8.00pm and midnight on any other day.

The Committee has no comment on this bill.

Workplace Relations Amendment (Work Choices) Bill 2005

Introduced into the House of Representatives on 2 November 2005
Portfolio: Employment and Workplace Relations

Background

This bill amends the *Workplace Relations Act 1996* (the WR Act) to create a national workplace relations system based on the corporations power.

This bill establishes the Australian Fair Pay Commission and introduces the Australian Fair Pay and Conditions Standard to set out certain minimum conditions of employment. The bill makes changes to the operation of the awards system and to agreement-making processes, introduces a range of options for settling disputes and puts into place a range of transitional arrangements.

Personal rights and liberties Schedule 1, item 71

Proposed new section 96D of the *Workplace Relations Act 1996*, to be inserted by item 71 of Schedule 1 to the bill (see page 163), would permit an entity which proposes to establish a business to make what is called an 'agreement' relating to the employment conditions of persons whom the entity might in the future employ. However, in derogation of one of the fundamental principles of contract law, the bill makes no provision for a second party to this 'agreement'. It appears that the proposed new section permits a putative employer to decide unilaterally the terms under which it will enter into any future employment contracts. The Committee considers that this provision trespasses on personal rights and liberties. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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.

Henry VIII clauses Schedule 1, item 71

A Henry VIII clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated 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.

A number of provisions to be inserted by item 71 of Schedule 1 to the bill are 'Henry VIII' clauses, in that they would permit the terms of the *Workplace Relations Act 1996* to be amended, amplified or given more precise meaning by regulation rather than by subsequent primary legislation. The provisions are proposed new subsection 97(2), sections 100C and 101D, paragraph 116B(1)(m), and sections 117D and 117E.

The respective provisions clearly delegate legislative powers to the Executive. The Committee notes, however, that any regulation made under these provisions would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny by the Regulations and Ordinances Committee. It is often the case that this level of scrutiny meets the concerns of the Committee and the Parliament.

In accordance with its usual practice, the Committee **leaves for the Senate as a whole** the question of whether these delegations of legislative power are *inappropriate*.

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.

Non-reviewable decisions

Schedule 1, item 71

Proposed new section 112 of the *Workplace Relations Act 1996*, to be inserted by item 71 of Schedule 1 to the bill, would permit the Minister, by written declaration, to terminate a specified bargaining period, on being satisfied as to the various matters specified in paragraphs (a) to (c) of that proposed subsection. There is no indication in the explanatory memorandum whether the exercise of this discretion is subject to merits review by the Administrative Appeals Tribunal. The Committee **seeks the Minister's advice** as to whether the exercise of the discretion *is* subject to such review.

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.

Personal rights and liberties

Schedule 1, item 113

Proposed new subsection 170CE(5E) of the *Workplace Relations Act 1996*, to be inserted by item 113 of Schedule 1 to the bill, would prevent an employee whose employment has been terminated in a harsh, unjust or unreasonable manner from applying to the Australian Industrial Relations Commission for relief on the arbitrary ground that, at the time of the dismissal, the employer employed fewer than 100 employees. The Committee considers that this provision may trespass on the personal rights and liberties of employees. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

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.

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.

TABLE

Bill/Act	Section/Subsection	Offence	Penalty
Anti-Terrorism Bill (No. 2) 2005	Schedule 6, item 1	Fail to provide information	60 penalty units
	Schedule 6, item 1	Fail to provide information	30 penalty units
	Schedule 9, item 11	Fail to provide information	Imprisonment for 2 years
	Schedule 10, item 2	Fail to provide information	60 penalty units

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2005

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills dealt with in 2004							
Australian Communications and Media Authority Bill 2004	12(8.12.04)	2.12.04	7.3.05	Communications, Information Technology and the Arts	9.12.04	14.3.05	3(16.3.05)
<i>Copyright Legislation Amendment Act 2004</i>	12(8.12.04)	9.12.04	30.11.04	Attorney-General	9.12.04	2.2.05	1(9.2.05)
<i>James Hardie (Investigations and Proceedings) Act 2004</i>	12(8.12.04)	2.12.04	8.12.04	Treasury	9.12.04	1.7.05	7(10.8.05)
Water Efficiency Labelling and Standards Bill 2004	9(4.8.04) 12(8.12.04)	24.6.04	12.8.04	Environment and Heritage Reintroduced – no response required	5.8.04	24.12.04	1(9.2.05)
Bills dealt with in 2005							
Aged Care Amendment (Transition Care and Assets Testing) Bill 2005	2(9.3.05)	10.2.05	7.3.05	Ageing	10.3.05	15.3.05	3(16.3.05)
Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005	2(9.3.05)	17.2.05	9.3.05	Agriculture, Fisheries and Forestry	10.3.05	11.3.05	3(16.3.05)
Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005	5(1.6.05)	25.5.05	14.6.05	Employment and Workplace Relations	1.6.05	14.6.05	5(15.6.05)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
AusLink (National Land Transport) Bill 2004	1(9.2.05)	9.12.04	10.2.05	Transport and Regional Services	10.2.05	28.4.05	4(11.5.05)
Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005	2(9.3.05)	17.2.05	11.5.05	Fisheries, Forestry and Conservation	10.3.05	4.5.05	4(11.5.05)
Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand) Bill 2005	8(10.8.05)		23.6.05	Transport and Regional Services	11.8.05	8.9.05	10(14.9.05)
Corporations (Aboriginal and Torres Strait Islander) Bill 2005	8(10.8.05) 9(17.8.05)	23.6.05		Immigration and Multicultural and Indigenous Affairs	11.8.05		
<i>Defence Amendment Act 2005</i>	2(9.3.05)	10.2.05	7.3.05	Defence	10.3.05	22.6.05	7(10.8.05)
Energy Efficiency Opportunities Bill 2005	12(5.10.05)	14.9.05	7.11.05	Industry, Tourism and Resources	6.10.05	11.10.05	12(12.10.05)
Family and Community Services Legislation Amendment (Family Assistance and Related Measures) Bill 2005	5(1.6.05)	26.5.05	15.6.05	Family and Community Services	1.6.05	20.6.05	6(22.6.05)
Film Licensed Investment Company Bill 2005	5(1.6.05)	26.5.05	16.6.05	Communications, Information Technology and the Arts	1.6.05	21.6.05	6(22.6.05)
Fuel Quality Standards (Renewable Content of Motor Vehicle Fuel) Amendment Bill 2005	11(14.9.05)	5.9.05		Mr Katter	15.9.05		
Higher Education Legislation Amendment (Workplace Relations Requirements) Bill 2005	8(10.8.05)	23.6.05	12.10.05	Education, Science and Training	11.8.05	29.9.05	11(5.10.05)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005	5(1.6.05)	18.8.05	26.5.05	Justice and Customs	1.6.05	26.7.05	7(10.8.05)
Maritime Transport Security Amendment Bill 2005	5(1.6.05)	25.5.05	14.6.05	Transport and Regional Services	1.6.05	21.6.05	6(22.6.05)
<i>Medical Indemnity Legislation Amendment Act 2005</i>	2(9.3.05)	17.2.05	9.3.05	Health and Ageing	10.3.05	28.4.05	4(11.5.05)
New International Tax Arrangements (Foreign-owned Branches and Other Measures) Bill 2005	4(11.5.05)	17.3.05	20.6.05	Treasurer	12.5.05	31.5.05	5(15.6.05)
Offshore Petroleum Bill 2005	8(10.8.05)	23.6.05	18.8.05	Industry, Tourism and Resources	11.8.05	19.8.05	9(7.9.05)
Offshore Petroleum (Annual Fees) Bill 2005	8(10.8.05)	23.6.05	18.8.05	Industry, Tourism and Resources	11.8.05	19.8.05	9(7.9.05)
Offshore Petroleum (Registration Fees) Bill 2005	8(10.8.05)	23.6.05	18.8.05	Industry, Tourism and Resources	11.8.05	19.8.05	9(7.9.05)
Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill 2005	11(14.9.05)	5.9.05		Mr Kerr	15.9.05		
Payment Systems (Regulation) Amendment Bill 2005	3(16.3.05)	10.3.05	14.6.05	Treasury	17.3.05	10.6.05	5(15.6.05)
Superannuation Bill 2005	5(1.6.05)	12.5.05	14.6.05	Finance and Administration	1.6.05	14.6.05	5(15.6.05)
Tax Laws Amendment (2005 Measures (No. 4) Bill 2005	8(10.8.05)	23.6.05	11.8.05	Treasury	11.8.05	16.8.05	8(17.8.05)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Bill 2005	8(10.8.05)	23.6.05	11.8.05	Communications, Information Technology and the Arts	11.8.05	7.9.05	10(14.9.05)
Telstra (Transition to Full Private Ownership) Bill 2005	11(14.9.05)	15.9.05	8.9.05	Communications, Information Technology and the Arts	15.9.05	10.10.05	12(12.10.05)
Therapeutic Goods Amendment Bill 2005	10(7.9.05)	17.8.05		Health and Ageing	8.9.05	10.10.05	12(12.10.05)
Trade Practices Legislation Amendment Bill (No. 1) 2005 – Supplementary comments	10(7.9.05)	10.2.05	10.3.05	Treasury	8.9.05	19.9.05	11(5.10.05)
Trade Practices Amendment (National Access Regime) Bill 2005	6(15.6.05)	2.6.05		Treasury	15.6.05	10.8.05	8(17.8.05)
Workplace Relations Amendment (Better Bargaining) Bill 2005 Amendments	11(14.9.05)	9.3.05	12.9.05	Employment and Workplace Relations	15.9.05		

