

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

Alert Digest

No. 5 of 2009

13 May 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

Defence Legislation Amendment Bill (No. 1) 2009	5
Evidence Amendment (Journalists' Privilege) Bill 2009	7
• Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009	8
Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Bill 2009	12
• Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009	13
• Food Safety (Trans Fats) Bill 2009	16
• Fuel Quality Standards Amendment Bill 2009	18
• Higher Education Support Amendment (VET FEE-HELP and Providers) Bill 2009	21
International Monetary Agreements Amendment Bill 2009	23
International Tax Agreements Amendment Bill (No. 1) 2009	24
Law and Justice (Cross Border and Other Amendments) Bill 2009	25
Migration Amendment (Abolishing Detention Debt) Bill 2009	26
• National Greenhouse and Energy Reporting Amendment Bill 2009	28
• Native Title Amendment Bill 2009	32

- **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.

• Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Bill 2009	36
• Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Amendment Bill 2009	39
Social Security Legislation Amendment (Improved Support for Carers) Bill 2009	41
• Tax Laws Amendment (2009 Measures No. 2) Bill 2009	43
Tax Laws Amendment (Small Business and General Business Tax Break) Bill 2009	48
• Therapeutic Goods Amendment (2009 Measures No. 1) Bill 2009	49
Commentary on amendments to bills	56
Provisions of bills which impose criminal sanctions for a failure to provide information	59
Scrutiny of standing appropriations	60

- **The Committee has commented on these bills**

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Defence Legislation Amendment Bill (No. 1) 2009

Introduced into the House of Representatives on 18 March 2009

Portfolio: Defence Science and Personnel

Background

This bill amends the *Defence Act 1903* to introduce a discretionary Tactical Payment Scheme (TPS) to provide a new mechanism for making expeditious no-liability payments to persons affected by Australian Defence Force (ADF) operations outside of Australia. The TPS will not preclude Defence from having recourse to the Act of Grace provisions in the *Financial Management and Accountability Act 1997* but will operate independently from those provisions.

The bill also amends the *Defence Home Ownership Assistance Scheme Act 2008* to address a number of unintentional anomalies since the scheme came into effect on 1 July 2008 by:

- removing the windfall gain in the eligibility and entitlement of members who rejoined the ADF after a break in service prior to 1 July 2008 so that those members are provided with the same eligibility and entitlement as members who rejoined after that date;
- providing greater reliability of the subsidy certificate as evidence to a home loan provider that subsidy is payable to a member by making the issue of a subsidy certificate conditional on a member having a service credit in the scheme;
- ensuring that only serving members who are buying a home for the first time have access to the subsidy lump sum payment option;
- requiring that for lump sum subsidy to become payable in respect of an interest in land, the property must have been purchased subsequent to the giving of the subsidy certificate that is the basis for the lump sum requested;
- clarifying that subsidy may be payable either as a monthly payment or as a lump sum payment and monthly payment, and ensuring that members

who access the subsidy lump sum payment option retain sufficient service credit in the scheme to support ongoing monthly subsidy payments;

- ensuring that the entitlement of subsidised borrowers who enter into a joint mortgage with a person who is not defined as a partner in the Act, is proportional to the subsidised borrowers' liability;
- clarifying entitlements of subsidised borrowers who are partners and who are both parties in respect of the same loan to provide a consistent framework for shared liability; and
- delegating to the Scheme Administrator the Secretary's function to provide written statements of reason for a decision that may be reviewable, including information about the affected person's rights.

The bill also contains application and transitional provisions.

The Committee has no comment on this bill.

Evidence Amendment (Journalists' Privilege) Bill 2009

Introduced into the House of Representatives on 19 March 2009
Portfolio: Attorney-General

Background

This bill amends the *Evidence Act 1995* to enhance the existing professional confidential relationship privilege provisions which provide for a privilege at the trial and pre-trial stage of civil and criminal proceedings for communications made in-confidence to journalists in certain circumstances.

In particular, the bill:

- ensures that a court has relevant public interest factors in mind when exercising its discretion to direct that evidence of a protected confidence or protected identity information not be given in a proceeding;
- requires a court to consider any potential harm to a journalist if the evidence were to be given, including damage to the journalist's professional reputation and to the journalist's ability to access sources of fact in the future;
- repeals provisions for automatic loss of privilege in cases of misconduct and makes the issue of whether a communication between a journalist and his or her source was made for an improper purpose only one of the several matters that a court must take into account when exercising its discretion to direct that a journalist breach a source's confidence; and
- provides greater flexibility for a court in balancing the relevant factors to which it must have regard when exercising its discretion, by removing the existing requirement for the court to give the greatest weight to any risk of prejudice to national security.

The Committee has no comment on this bill.

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Introduced into the House of Representatives on 19 March 2009

Portfolio: Education, Employment and Workplace Relations

Background

This bill is the first of two bills which make transitional and consequential provisions in relation to the new federal workplace relations system set out in the *Fair Work Act 2009* (Fair Work Act). A second bill will deal with consequential amendments to other Commonwealth legislation and amendments consequential on state referrals of power.

In particular, the bill:

- repeals the *Workplace Relations Act 1996* (Workplace Relations Act) (other than Schedules 1 and 10) and renames it the *Fair Work (Registered Organisations) Act 2009* to reflect its remaining content;
- makes transitional provisions to move employers, employees and organisations from the old Workplace Relations Act system to the new system; and
- makes consequential amendments to Commonwealth legislation considered essential to the operation of the Fair Work Act (being the creation of the Fair Work Divisions of the Federal Court of Australia and the Federal Magistrates Court of Australia).

The transitional provisions in the bill cover such issues as:

- preservation of existing workplace instruments and setting out how these instruments interact with the new system, including the new National Employment Standards and modern awards;
- arrangements to enable bargaining under the new system to commence in an orderly manner; and

- arrangements for the transfer of assets, functions and proceedings from Workplace Relations Act institutions to Fair Work Australia and the Fair Work Ombudsman.

Insufficient parliamentary scrutiny

Schedule 2, subitem 10(2)

Schedule 2 is an overarching schedule about transitional matters related to the Fair Work Act. Subitem 10(2) of Schedule 2 provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations may be expressed to take effect before the regulations are registered under that Act. The Committee notes that the explanatory memorandum (at paragraph 17) states that the regulations can ‘modify the transitional provisions in this Bill’. Since this would allow regulations to cover important matters without having the benefit of parliamentary scrutiny, the Committee **seeks the Minister’s advice** as to the reasons for the use of regulations for these purposes.

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 2, items 7 and 8

Item 7 of Schedule 2 contains a general power for regulations to deal with transitional matters and item 8 of Schedule 2 allows regulations to modify provisions of the transitional Schedules. These are ‘Henry VIII’ clauses as they enable delegated legislation to override an earlier Act.

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.

In this case, the Committee notes that the effect of the provisions is ameliorated by item 9 in Schedule 2 which places a limitation on the power to make regulations. As the explanatory memorandum explains (at paragraph 18) ‘regulations made under items 7 and 8 cannot change the right of entry regime set out in the [Fair Work Act] and this Bill or give inspectors additional compliance powers’.

The Committee also notes that any regulations will be subject to scrutiny by the Senate Regulations and Ordinances Committee.

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

‘Henry VIII’ clause Schedule 3, item 8

Item 8 of Schedule 3 provides for transitional instruments to displace Commonwealth laws. Regulations may prescribe Commonwealth laws containing conditions of employment and this will have the effect of displacing them. Commonwealth law is defined in subitem 8(2) as ‘as Act or any regulations or other instrument made under an Act’. This is also a ‘Henry VIII’ clause and, as outlined in the commentary above, such provisions are a concern to the Committee. The Committee **seeks the Minister’s comments** as to the reasons for the use of regulations for these purposes.

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.

Wide delegation of power Schedule 6, item 10

Schedule 6 of the bill covers modern enterprise awards. Enterprise instruments are to be modernised and subitem 10(1) of Schedule 6 requires that, at least six months prior to the expiration of an enterprise instrument, Fair Work Australia (FWA) must notify a person covered by such an instrument that the instrument is about to end. Subitem 10(2) gives FWA a discretion to give that advice in 'any way it considers appropriate'. Subitem 10(3) incorporates the delegation power of the FWA President in section 625 of the Fair Work Act which means that the notification power could be exercised by the General Manager, a Senior Executive Service employee or a staff member of FWA in a class prescribed by regulations.

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

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. The Committee notes that there is no such explanation of the broad delegation power in this case. The Committee **seeks the Minister's advice** regarding the potential delegation of a discretion about the notification of rights to a junior officer of FWA.

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.

Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Bill 2009

Introduced into the House of Representatives on 18 March 2009

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill introduces one measure from the 2008 Budget on family tax benefit and two further non-Budget measures.

The bill amends the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999* to streamline the administration of family tax benefit (FTB) by removing the Australian Taxation Office from delivery of FTB from 1 July 2009. Individuals will continue to claim FTB by instalment or for a past period through Centrelink or Medicare.

The bill amends the *Social Security (Administration) Act 1999* to ensure people subject to the Northern Territory income management regime have access to the Social Security Appeals Tribunal and Administrative Appeals Tribunal in relation to their income support and family payments.

The bill also amends the *Social Security Act 1991* to implement part of the Federal Government's announced reforms to the Community Development Employment Projects (CDEP) program to:

- provide new CDEP participants (commencing on or after 1 July 2009) with access to the CDEP program while receiving income support payments, instead of CDEP wages from CDEP providers; and
- provide for continuing CDEP participants to continue receiving CDEP wages from CDEP providers and, in certain circumstances, the CDEP Scheme Participant Supplement.

The bill also contains application and saving provisions.

The Committee has no comment on this bill.

Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009

Introduced into the House of Representatives on 19 March 2009

Portfolio: Treasury

Background

This bill amends the *Life Insurance Act 1995* (Life Insurance Act) and makes consequential amendments to a number of other Acts to establish a prudential regulation regime administered by the Australian Prudential Regulation Authority (APRA) – modelled on the existing prudential regulation regime for authorised deposit-taking institutions and general insurers – in relation to the non-operating holding companies (NOHCs) of life insurance companies.

The bill also amends the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995* and the *Superannuation Industry (Supervision) Act 1993* to harmonise court injunction powers across prudential legislation so that APRA can seek injunctions for conduct relating to the financial health of an entity. The amendments to the *Superannuation Industry (Supervision) Act 1993* will apply to the conduct of superannuation trustees that offer First Home Saver Accounts under the *First Home Saver Accounts Act 2008*.

The bill also contains application provisions.

Denial of natural justice

Schedule 1, item 21, new section 28C

Schedule 1 provides for NOHCs of life insurance companies to be registered under the Life Insurance Act and to come under the supervision of APRA. Item 21 of Schedule 1 inserts a new Division 2 which provides for registration of NOHCs of life companies. Proposed new section 28C requires APRA to give written notice of advice to a registered NOHC if APRA is considering revocation of its registration. Under proposed new paragraph 28C(2)(b), APRA must give the relevant NOHC at least 90 days after the notice is given to make submissions about the revocation but APRA must also ‘consider any submissions made by the registered NOHC by that date’. The Committee

notes that this has the effect of limiting the actual time available to particular NOHCs to make a submission that can be duly considered and **seeks the Treasurer's advice** as to whether this has the effect of limiting the provision of natural justice to NOHCs.

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

Retrospective commencement Schedule 1, items 81-88, section 132A

Existing section 132A of the Life Insurance Act requires life insurance companies to notify APRA of certain matters. Items 81 to 87 of Schedule 1 amend section 132A. Item 88 is an application provision which states that '(t)he amendments...made by this Part [Part 7] apply in relation to matters of which a body corporate becomes aware on or after commencement of the amendments (whether the matter arose before, on or after that commencement)'. The explanatory memorandum (at paragraph 1.51) misleadingly states that the amendments 'apply to matters or breaches that a registered NOHC becomes aware of on or after their commencement'.

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 **seeks the Treasurer's advice** as to whether further explanation might be provided of the new section 132A notification requirements in relation to matters that arose before commencement of the bill but come to the attention of the NOHC on or after commencement.

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.

Entry and search powers
Schedule 1, items 91-116

Items 91 to 116 of Schedule 1 extend the existing investigation powers of APRA (including entry and search without warrant powers) to registered NOHCs and associated companies. The explanatory memorandum does not refer to the Committee's report on *Entry, Search and Seizure Provisions in Commonwealth Legislation (Twelfth Report of 2006)*. However, the Committee notes that the bill and explanatory memorandum contain the necessary elements of investigation procedures, including the giving of notice, the provision of an identity card, request for production of documents, request for assistance and obtaining a warrant in appropriate circumstances.

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

Food Safety (Trans Fats) Bill 2009

Introduced into the Senate on 16 March 2009

By Senator Siewert

Background

This bill prohibits, within the bounds of Commonwealth constitutional competence, the addition of synthetic trans fatty acids to food. Specifically, the bill prohibits constitutional corporations and individuals in particular circumstances from manufacturing, distributing, offering for sale, selling or otherwise trading in food containing synthetic trans fatty acids.

The bill would replace the current regulatory regime, while providing scope for the states and territories to adopt their own regulatory response in recognition of their responsibility for food standards.

Delayed commencement

Clause 2

Clause 2 of the bill states that it will commence on 1 January 2010. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of 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 this instance, the Committee notes that the explanatory memorandum explains that the delay in commencement is to allow industry sufficient time to find suitable substitutes for synthetic trans fatty acids.

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

National schemes of legislation – insufficient parliamentary scrutiny
Clause 6

Clause 6 of the bill provides that state and territory legislation regulating the content of synthetic fatty acids may prevail over the bill to the extent of any inconsistency. The Committee notes that the explanatory memorandum explains this reversal of the usual Constitutional rule (section 109) by reference to the right of states and territories to enact complementary or alternative regulatory regimes. The Committee has in the past been concerned to ensure that there is sufficient parliamentary scrutiny of national schemes of legislation but, in this case, leaves **to the Senate as a whole** any consideration of the matter.

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

Fuel Quality Standards Amendment Bill 2009

Introduced into the House of Representatives on 18 March 2009

Portfolio: Environment, Heritage and the Arts

Background

This bill amends the *Fuel Quality Standards Act 2000* (Fuel Quality Standards Act) to implement recommendations from the first statutory review of the Act conducted in 2004-05.

In particular, the bill aims to:

- improve the process for granting approvals to vary fuel standards by providing for a wider range of conditions that the Minister can apply to approvals and to simplify the procedures when an approval is required urgently to avoid a fuel supply shortfall;
- provide for more effective and efficient monitoring and enforcement powers, including the introduction of a civil penalty regime and the establishment of an infringement notice system; and
- address a number of issues that have arisen from the practical application of the Fuel Quality Standards Act and its subordinate legislation.

The bill also contains application and saving provisions.

Delegation of legislative power

Schedule 1, item 15, new section 24C

The Fuel Quality Standards Act establishes a consultative scheme for the regulation of fuel standards through the Fuel Standards Consultative Committee (FSCC) (section 24) which includes representatives from all states. Part 1 of Schedule 1 of the bill amends the approvals process in the Fuel Quality Standards Act through two new processes: emergency approvals and variations on approvals.

Proposed new section 24C, to be inserted by item 15 of Schedule 1, authorises the Minister to notify the FSCC of these processes, rather than receiving the FSCC's prior authorisation for the processes. The FSCC must be notified of a variation to an approval that is of a minor nature (proposed new subsection 24C(2)) and a variation to add one or more regulated persons (proposed new subsection 24C(3)). The term 'minor nature' is not defined in the Fuel Quality Standards Act. The explanatory memorandum states (at paragraph 35) that '(t)he types of variations that would be considered to be of a minor nature include the correction of an error in the approval instrument, or technical amendments, for example, to update a test method'.

The Committee notes that, under section 68 of the Fuel Quality Standards Act, the Minister can delegate his or her powers to the Secretary or a Senior Executive Service officer and give directions about the exercise of those powers. However, the Committee considers that the power of delegation is sufficiently limited to senior officers, and is satisfied that the Minister's power to vary approvals is adequately explained in the explanatory memorandum.

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

Non-availability of merits review

Schedule 1, item 11, new subsection 17E(4)

Item 11 of Schedule 1 inserts four new sections into the Fuel Quality Standards Act in relation to 'variation of approvals'. Proposed new subsection 17E enables a person to apply to the Minister for an approval to be varied so that one or more regulated persons are added to the approval.

Subsection 17E(4) provides that if the Minister does not vary the approval, he or she must notify the applicant of the refusal. Section 70 of the Fuel Quality Standards Act authorises review of decisions, including review of decisions to 'refuse to grant an approval' and to 'vary or revoke an approval', but not review of a decision to 'refuse to vary an approval'. The Committee **seeks the Minister's advice** as to whether merits review of a decision under new section 17E(4) to refuse to vary an approval might be included 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.

Reversal of the onus of proof

Schedule 1, item 34, new section 12AA

Proposed new subsection 12AA(1), to be inserted by item 34 of Schedule 1, includes a civil penalty if a person supplies fuel in Australia that does not comply with relevant fuel standards (including fuel standards as varied). Proposed new subsection 12AA(2) provides a defence for contravention of the civil penalty provision if a person believes, on reasonable grounds, that the fuel supplied will be further processed for the purpose of bringing it into compliance with the standard, or the standard as varied.

This imposes an evidential burden on the person seeking to rely on the defence which is a reversal of the normal onus of proof. The explanatory memorandum indicates (at paragraph 56) that this is considered appropriate as the matters relied upon 'are issues wholly or primarily within the knowledge of the person seeking to rely on the defence'. Under its terms of reference, the Committee is required to inquire whether a provision trespasses unduly on personal rights and liberties and a reversal of the onus of proof gives rise to such inquiry. The Committee notes, however, that the explanatory memorandum clearly explains the intention underlying the provision and the reasons why the person relying on the defence should bear the burden of proof.

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

Higher Education Support Amendment (VET FEE-HELP and Providers) Bill 2009

Introduced into the House of Representatives on 18 March 2009

Portfolio: Education

Background

This bill amends the *Higher Education Support Act 2003* (Higher Education Support Act) to make minor technical amendments in relation to the operation of the FEE-HELP and VET FEE-HELP Assistance Schemes.

In particular, the bill:

- clarifies that a student cannot access VET FEE-HELP assistance to undertake a VET unit of study, unless that VET unit of study is required to be undertaken in order for the student to receive the award associated with that course of study;
- ensures that the Minister can revoke the approval as a VET provider of a body corporate if the body corporate does not maintain certain standards set by the Higher Education Support Act, and provides protections for the Minister and the Commonwealth in relation to revocation of such approval;
- allows higher education and VET provider notices of approval to take effect on the day immediately following the day the relevant notice is registered on the Federal Register of Legislative Instruments, and provides for the repeal of provisions governing the date of effect for such notices; and
- ensures that higher education VET providers will be able to offer FEE-HELP or VET FEE-HELP assistance to students immediately following the registration of the relevant notice of higher education or VET provider approval.

The bill also contains application and transitional provisions.

Rights and non-reviewable decisions

Schedule 1, item 5, new clause 32A of Schedule 1A

Proposed new clause 32A of Schedule 1A of the Higher Education Support Act, to be inserted by item 5 of Schedule 1, would enable the Minister to revoke approval of a body as a VET provider if the body no longer offers any VET courses of study and the Minister complies with the requirements of clause 34 of Schedule 1A. The explanatory memorandum explains that compliance with clause 34 includes giving notice to the body before revocation and inviting the body to make written submissions. However, the Committee notes that the explanatory memorandum does not explain whether the Minister's decision is reviewable, nor whether such a decision is non-delegable. The Committee **seeks the Minister's advice** about the availability of review rights in relation to decisions by the Minister under new clause 32A of Schedule 1A.

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.

International Monetary Agreements Amendment Bill 2009

Introduced into the House of Representatives on 19 March 2009

Portfolio: Treasury

Background

This bill amends the *International Monetary Agreements Act 1947* to alter the definition of the International Monetary Fund Articles of Agreement ('Fund Agreement') and the definition of World Bank Articles of Agreement ('Bank Agreement') to include any amendments of the relevant Articles of Agreement that enter into force for Australia without the need for further legislative changes when these amendments are made.

The bill aims to simplify the process for Australia to accept agreed amendments to the Fund Agreement and the Bank Agreement that have recently been agreed by members of the International Monetary Fund (IMF) and World Bank, as well as any future amendments, while retaining policy and parliamentary scrutiny.

The bill also contains an application provision.

The Committee has no comment on this bill.

International Tax Agreements Amendment Bill (No. 1) 2009

Introduced into the House of Representatives on 19 March 2009

Portfolio: Treasury

Background

This bill amends the *International Tax Agreements Act 1953* to give the force of law to the following tax agreements:

- the *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals*, which was signed in London on 27 October 2008; and
- the *Agreement between the Government of Australia and the Government of the Isle of Man for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments*, which was signed in London on 29 January 2009.

These agreements provide for the allocation of taxing rights between Australia and the British Virgin Islands, and Australia and the Isle of Man, over certain income of individuals who are residents of Australia or the British Virgin Islands, or the Isle of Man, in order to help prevent double taxation. The agreements are consistent with corresponding provisions contained in Australia's bilateral tax treaties.

The Committee has no comment on this bill.

Law and Justice (Cross Border and Other Amendments) Bill 2009

Introduced into the House of Representatives on 19 March 2009
Portfolio: Attorney-General

Background

This bill contains a range of measures relating to the Commonwealth's legal framework for resolving disputes that have a connection to more than one jurisdiction.

Schedule 1 of the bill amends the *Service and Execution of Process Act 1992* (SEPA Act) to facilitate the operation of a Cross Border Justice Scheme – which is to be established by Western Australia, South Australia and the Northern Territory – so that the SEPA Act will not apply where the Cross Border Justice Scheme, or another scheme established under legislation prescribed by regulations under the SEPA Act, would otherwise operate.

Schedule 2 of the bill amends the SEPA Act to enable persons in prison to give evidence by audio or video link with the approval of the court, when subpoenaed to give evidence before an interstate court, tribunal or person.

Schedule 3 of the bill amends the *Evidence and Procedure (New Zealand) Act 1994* to extend the cooperative scheme for the service of subpoenas between Australia and New Zealand to certain family proceedings.

The bill also contains an application provision.

The Committee has no comment on this bill.

Migration Amendment (Abolishing Detention Debt) Bill 2009

Introduced into the Senate on 18 March 2009

Portfolio: Immigration and Citizenship

Background

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

In particular, the bill:

- removes the requirement in Division 10 of Part 2 of the Migration Act for non-citizens who are detained in immigration detention, including liable third parties, to pay the Commonwealth the costs of their transport between where the non-citizen is detained and another place within Australia, and the daily maintenance amount for each day of the non-citizen's detention;
- extinguishes all outstanding detention debt for non-citizens who are in immigration detention, or persons who have been in immigration detention, and liable third parties at the time of the commencement of the legislation;
- ensures that any immigration detention costs for which a person or third party will be liable under Division 14 of Part 2 of the Migration Act are clearly specified in section 262 by enabling the Minister to make a legislative instrument determining the daily amount for keeping and maintaining a person in immigration detention at a specified place in a specified period;
- clarifies that the cost of keeping certain non-citizens in Australia in Subdivision B and C of Division 4 of Part 2 of the Migration Act does not include the cost of immigration detention;

- ensures that the regulations can no longer prescribe sponsorship undertakings or obligations that include paying the Commonwealth an amount relating to the cost of a person's immigration detention; and
- ensures that the element of undertakings or obligations made by a sponsor prior to commencement of the bill, that relate to paying the Commonwealth the costs of detaining a visa holder sponsored by the sponsor, will cease to have effect.

The bill also contains transitional provisions.

The Committee has no comment on this bill.

National Greenhouse and Energy Reporting Amendment Bill 2009

Introduced into the House of Representatives on 18 March 2009

Portfolio: Climate Change and Water

Background

This bill makes minor amendments to the *National Greenhouse and Energy Reporting Act 2007* to better reflect the original policy intent of that Act, and to better facilitate its administration.

In particular, the bill:

- clarifies the definitions of a number of terms relating to greenhouse and energy audits to be conducted under the Act;
- requires results of greenhouse and energy audits to be included on the register established under section 16 of the Act;
- extends the secrecy requirements to also cover audit information;
- allows the Administrative Appeals Tribunal to review decisions by the Greenhouse and Energy Data Officer (GEDO) not to register an auditor under the Act;
- gives the GEDO authority to audit entities who report under section 20 of the Act;
- expands the scope of the legislative instrument to be determined under section 75 of the Act to include requirements for the preparation, conduct and reporting of audits, and allow for these requirements to be determined by the Minister rather than the GEDO;
- requires potential auditors under the Act to apply to the GEDO for registration and allow for detailed requirements on auditor registration to be provided in regulations and in a legislative instrument determined by the GEDO;

- makes a number of administrative amendments consequential to the substantive amendments set out above; and
- repeals the requirement for the GEDO to publish corporate level energy production information.

Determination of important matters by regulation Schedule 1, item 15, new paragraph 56(j)

Proposed new paragraph 56(j), to be inserted by item 15 of Schedule 1, provides for merits review of a decision by the GEDO to refuse to register an individual in the register of greenhouse and energy auditors kept under section 75A (see further discussion below). The explanatory memorandum states (at paragraph 20) that ‘(i)t is intended that other decisions relating to the registration of auditors will also be reviewable but will be included in regulations to be developed under this section’. This means that important matters will be covered by regulations. The Committee **seeks the Minister’s advice** in relation to the rationale for the proposed use of delegated legislation to determine review rights.

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.

Insufficient parliamentary scrutiny Schedule 1, item 36, new section 75A

Proposed new section 74A, to be inserted by item 34 of Schedule 1, provides for the appointment of audit team leaders to audit compliance with requirements to report on greenhouse gas emissions, and energy production and consumption. Proposed new section 75A, to be inserted by item 36 of Schedule 1, requires the GEDO to establish a register of qualified auditors. Proposed new subsection 75A(2) requires that, to be on the register, an auditor must meet the requirements set out in regulations *or* in a legislative instrument. Proposed new subsection 75A(4) provides that regulations made

for the purpose of subsection 75A(2) *may* authorise the GEDO to make a legislative instrument.

The explanatory memorandum states (at paragraph 48) that the GEDO is required to register an applicant who meets the requirements for qualifications, knowledge, expertise, competence and independence specified in the regulations *and* determined by the GEDO in a legislative instrument created under subsection 75A(4). The explanatory memorandum also explains that it is intended that ‘this will include robust requirements for independence similar to the requirements for auditors operating under the *Corporations Act 2001*’. The Committee **seeks the Minister’s advice** as to how parliamentary scrutiny of the requirements for suitable auditors will be achieved.

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.

Wide delegation of power

Schedule 1, item 36, subsection 75A(7)

Proposed new subsection 75A(7), to be inserted by item 36 of Schedule 1, allows the GEDO power to delegate, by signed instrument, any of his or her powers or functions under that section or regulations made under that section. The delegation can be made to ‘another person (whether or not an SES employee or acting SES employee)’. The explanatory memorandum provides no explanation for the broad delegation. It states that the subsection ‘allows the GEDO to delegate part or all of the administration of the auditor registration process and decision making to a third party’.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The

Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the Committee notes that the delegation in proposed new subsection 75A(7) is limited to a considerable degree by proposed new subsection 75A(8) which provides that the GEDO's power to delegate the making of a legislative instrument under proposed new subsection 75A(4) is limited to SES employees or acting SES employees. However, the explanatory memorandum does not explain the level of the officers who will be applying the remainder of the new powers. The Committee **seeks the Minister's advice** on the level of officers who will have the delegation to exercise these powers.

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.

Native Title Amendment Bill 2009

Introduced into the House of Representatives on 19 March 2009

Portfolio: Attorney-General

Background

This bill amends the *Native Title Act 1993* (Native Title Act) to improve the operation of the native title system and achieve better outcomes for participants by encouraging more negotiated settlements and providing the Federal Court of Australia with a central role in managing native title claims.

Schedule 1 contains amendments which largely implement the proposed ‘institutional change’ to the native title system by giving the court the role of managing all native title claims, including determining whether claims should be mediated by the court or referred to the National Native Title Tribunal (NNTT) or another individual or body. Consequential amendments accompanying this change govern the manner in which mediations are conducted and generally expand the scope of existing provisions in relation to the conduct of mediation undertaken by the NNTT to apply to all native title claim-related mediation.

Schedule 2 amends the powers of the court to enable it to:

- rely on a statement of facts agreed between the parties; and
- make consent orders that cover matters beyond native title so that parties can resolve a range of native title and related issues at the same time.

Schedule 3 allows amended evidence rules made by the *Evidence Amendment Act 2008* that concern evidence given by Aboriginal and Torres Strait Islander people to apply to native title claims in certain circumstances.

Schedule 4 expands the current assistance provisions in the Native Title Act to allow assistance in relation to all mediations.

Schedule 5 streamlines the operation of the representative body provisions in the Native Title Act.

Schedule 6 contains a range of other minor and technical amendments to improve or clarify the operation of existing provisions in relation to determinations, bank guarantees, trust regimes and penalty provisions.

The bill also contains application, saving and transitional provisions.

Denial of natural justice

Schedule 1, item 35, new section 94P

Item 35 of Schedule 1 inserts several new provisions into the Native Title Act to allow a mediator to conduct mediations referred from the Federal Court. Proposed new section 94P gives the mediator the power to report that a party ‘did not act or is not acting in good faith in relation to the conduct of the mediation’. This report can be made to a range of people and organisations, including legal professional bodies and/or the Federal Court.

The Committee notes that there is no requirement that the mediator issue a warning to a party that he or she is forming this view, nor a requirement that the party be given an opportunity to be heard before the mediator’s decision is then communicated to another party. However, the Committee is mindful that the purpose of the amendment is to streamline the mediation process and is satisfied that, in the circumstances, the amendment will not amount to a denial of procedural fairness.

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

Wide delegation of power

Schedule 4, item 2, new paragraph 213A(8)(b)

Proposed new paragraph 213A(8)(b), to be inserted by item 2 of Schedule 4, would allow the Attorney-General to delegate any or all of his or her powers to authorise assistance in relation to mediations to a person occupying a ‘specified position’ in the Department.

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

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the explanatory memorandum does not contain an explanation of the potential delegation of power below the level of a senior officer. The Committee therefore **seeks the Attorney-General's advice** as to what the term 'specified position' will mean in practice and the levels at which it is anticipated that the delegations will apply.

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.

No entitlement to be heard

Schedule 5, item 24, new subsection 203AD(3C)

Schedule 5 contains amendments to Part 11 of the Native Title Act which deals with representative Aboriginal and Torres Strait Islander (ATSI) bodies that assist ATSI people to undertake action in relation to native title. Items 13-39 of Schedule 5 relate to recognition of representative bodies. Bodies may be recognised in an instrument of recognition for between one and six years (proposed new subsection 203AD(3A), inserted by item 24 of Schedule 1).

Proposed new subsection 203AD(3C), also to be inserted by item 24 of Schedule 1, allows the Minister, in deciding the period of recognition for a representative body, to 'consider any information in the possession of the Minister or the Department that is relevant to that decision'. The Committee notes that there is no provision for an applicant to be given an opportunity to

respond to information that may cause the period of recognition to be limited. The Committee **seeks the Attorney-General's** advice as to whether an applicant will have the opportunity to be heard on the length of the relevant recognition period.

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

Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Bill 2009

Introduced into the House of Representatives on 19 March 2009
Portfolio: Resources and Energy

Background

This bill contains three main elements to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Offshore Petroleum and Greenhouse Gas Storage Act).

First, the bill addresses minor policy and technical issues identified during consultative processes reviewing the operation of the Offshore Petroleum and Greenhouse Gas Storage Act over the past two years by:

- providing an ‘expedited’ consultation process for the granting of an access authority to titles in adjoining offshore areas where the title holders have consented to the access;
- changing the decision-maker who can declare a petroleum location and grant a scientific investigation consent from the Designated Authority (DA) to the Joint Authority (JA);
- requiring notification of discovery of petroleum in a production license area, as is required for other titles, and extending the period of notification of discovery of petroleum from immediately to within 30 days from completion of the well that led to the discovery;
- empowering the DA to issue instruments to allow relabelling of, for example, title areas and blocks using coordinates corresponding to the current datum rather than providing this power through regulations as occurs currently;
- providing in unequivocal terms that the fault element for duty of care offences is negligence and not intent;
- removing the consent to operate a pipeline;

- removing requirements for Data Management Plans; and
- clarifying titleholder's responsibility for matters within their control in relation to drilling safety cases.

Second, the bill corrects omissions in and makes clarifications to the greenhouse gas provisions in the Offshore Petroleum and Greenhouse Gas Storage Act, which came into effect in November 2008.

Third, the bill makes a number of technical corrections, including references to the Offshore Petroleum and Greenhouse Gas Storage Act in other legislation.

Insufficiently defined administrative power Schedule 1, items 29 and 30, new sections 471A and 523A

Item 28 of Schedule 1 amends sections 44 and 45 of the Offshore Petroleum and Greenhouse Gas Storage Act to allow the DA to issue an instrument to vary petroleum titles and instruments, greenhouse gas titles and instruments, applications for petroleum titles and applications for greenhouse gas titles by relabelling them using coordinates based on the current datum. However, item 29 of Schedule 1 adds a new section 471A, giving the DA the power to make a notation in the Register about the applicable datum for a petroleum title, petroleum special prospecting authority, notice or instrument. The explanatory memorandum states that '(w)hen a new Datum is gazetted there can be considerable work in relabelling titles with new coordinates. This item allows the DA to make a notation in the Register rather than necessarily issuing an instrument as set out in Sections 44-45 for every change'.

Similarly, item 30 of Schedule 1 adds a new section 523A allowing the Minister to make a notation in the Register about the applicable datum for a greenhouse gas title, greenhouse gas search authority, notice or instrument.

The Committee **seeks the Minister's advice** as to whether greater certainty might be included in the bill in relation to the particular circumstances in which Register notations under proposed new sections 471A and 523A will be deemed appropriate.

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, and 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, items 32-37

Items 32-37 of Schedule 1 contain amendments relating to the pipeline safety management plan levy and consent to operate a pipeline. They will commence on 1 January 2010 which will mean a delay in commencement. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of 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 this instance, the explanatory memorandum observes that the safety levies are calculated annually at the start of each calendar year and this commencement time will allow an easier transition for safety levy arrangements and the new arrangements for consent to operate a pipeline.

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

Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Amendment Bill 2009

Introduced into the House of Representatives on 19 March 2009

Portfolio: Resources and Energy

Background

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Act 2003* to remove references to the current ‘pipeline safety management plan levy’.

Future amendments to the *Offshore Petroleum (Safety Levies) Regulations 2004* will provide for a ‘safety case levy’ instead of the current ‘pipeline safety management plan levy’ which will be, in effect, a name change for the levy. The new arrangements will take effect from 1 January 2010.

The changes will facilitate pipelines being covered under safety regulations rather than under separate pipeline regulations as they are currently.

The bill also contains application and transitional provisions.

Delayed commencement Schedule 1, Parts 1 and 2

Parts 1 and 2 of Schedule 1 which amend the safety case levy and pipeline safety management plan levy, will commence on 1 January 2010. This will mean a delay in commencement. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of 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 this instance, the explanatory memorandum observes that, since safety levies are calculated annually at the start of each calendar year, it is desirable

for the new arrangements to start then to avoid unnecessary administrative burdens on industry in adjusting on a pro-rata basis.

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

Social Security Legislation Amendment (Improved Support for Carers) Bill 2009

Introduced into the House of Representatives on 18 March 2009

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *Social Security Act 1991* to provide part of the Federal Government's response to the report of the Carer Payment (child) Review Taskforce, and gives effect to a number of measures aimed at improving assistance to carers from 1 July 2009.

The bill aims to provide a fairer and more equitable process in assessing carer payment for care provided to children with disability or severe medical condition, based on the level of care required rather than the more rigid medical criteria used currently.

Schedule 1 of the bill:

- introduces a new test – the Disability Care Load Assessment (Child) Determination – that assesses the level of care a child requires because of their disability or medical condition;
- allows a person who qualifies for a carer payment under the bill to automatically qualify for carer allowance;
- allows a person to qualify or remain qualified for carer payment while a care receiver who is a child is in hospital for an unlimited number of days per calendar year; and
- allows, for the first time, access to carer payment paid in respect of a child on a short term or episodic basis to cover care required for recurring conditions where the care recipient is aged under 16 years and each episode is expected to last at least three months and less than six months.

Schedule 2 of the bill amends the *Social Security (Administration) Act 1999* in relation to the administrative structure necessary for the carer allowance amendments made by Schedule 1.

The bill also contains application, saving and transitional provisions.

The Committee has no comment on this bill.

Tax Laws Amendment (2009 Measures No. 2) Bill 2009

Introduced into the House of Representatives on 19 March 2009

Portfolio: Treasury

Background

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

Schedule 1 amends the *Banking Act 1959*, the *First Home Saver Accounts Act 2008*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997*, the *Insurance Act 1973* and the *Taxation Administration Act 1953* to ensure that there are no adverse tax implications arising from payments made by the Australian Prudential Regulation Authority (APRA), or by a liquidator, under the financial claims scheme in relation to capital gains tax, farm management deposits, retirement savings accounts, first home saver accounts, and various reporting and withholding obligations.

Schedule 2 amends the *Income Tax Assessment Act 1997*, the *Income Tax Assessment Act 1936* and the *Tax Laws Amendment (2008 Measures No. 6) Act 2009* to increase access to the small business capital gains tax (CGT) concessions for taxpayers owning passively held CGT assets; and clarifies and refines elements of the existing small business CGT concession provisions.

Schedule 3 amends the *Income Tax Assessment Act 1997* to provide a general exemption from CGT for capital gains arising from a right or entitlement to a tax offset, deduction or similar benefit.

Schedule 4 amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Taxation (Interest on Overpayments and Early Payments) Act 1983* to provide a refundable tax offset in relation to eligible projects approved under the National Urban Water and Desalination Plan.

Schedule 5 amends the *Income Tax Assessment Act 1997* to update the list of the deductible gift recipients to include four new entities and to extend the time limit of three organisations currently listed.

Schedule 6 amends the *A New Tax System (Australian Business Number) Act 1999* to allow the Registrar of the Australian Business Register (ABR) to act as the Multi-agency Registration Authority, to enable representatives of businesses to be identified for the purpose of communicating electronically with multiple government agencies on behalf of businesses; and to improve the integrity and efficiency of the ABR and help position the Registrar to take on the role of the Multi-agency Registration Authority.

Schedule 7 amends the *Fuel Tax Act 2006* and the *Fuel Tax (Consequential and Transitional Provisions) Act 2006* to remove the restriction that businesses may not claim more than \$3 million of fuel tax credits in a financial year unless they are a member of the Greenhouse Challenge Plus Programme.

Schedule 8 amends the *Income Tax Assessment Act 1997* to provide an exemption from tax for the Clean-up and Restoration Grants paid to small businesses and primary producers affected by the Victorian bushfires.

The bill also contains application, consequential and transitional provisions.

Retrospective commencement

Clause 2

Clause 2 of the bill contains a table of commencement information. Item 3 of the table in clause 2 shows that item 1 of Schedule 2 commenced on 21 June 2007. The explanatory memorandum states (at page 4) that the relevant amendments relate to CGT events in the 2007-08 income year but does not explain the need for retrospective application.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee, therefore, **seeks the Treasurer's advice** on the reasons for the retrospective commencement of item 1 of Schedule 2.

Pending the Treasurer'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.

Commencement more than six months after assent

Clause 2

In the table of commencement information contained in clause 2 of the bill, item 14 shows that Part 2 of Schedule 6 (Multi-agency Registration Authority amendments) will commence on a single day to be fixed by Proclamation. However, the date is limited to a day not later than 12 months after Royal Assent. The explanatory memorandum explains (at pages 95-97) that the amendments are dependent upon the development and successful delivery of a number of different information technology programs.

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

Insufficiently defined administrative powers

Schedule 1, item 9, new subsection 128A(5)

Proposed new section 128A, to be inserted by item 9 of Schedule 1, comprises special provisions applying if financial claims scheme entitlements arise in relation to first home saver accounts (FHSAs). If a failed authorised deposit taking institution (ADI) holds a person's FHSA then it will need to be transferred to a new FHSA. However, the person's circumstances may have changed making them no longer eligible for an FHSA.

Proposed new subsection 128A(5) requires a person to give notice that they do not satisfy the FHSA eligibility requirements within 30 days after notice is sent to them that a new FHSA has been opened in their name with a new FHSA provider. The explanatory memorandum states (at paragraph 1.40) that '(t)his will ensure that the tax and penalty consequences of ineligibility will be

as similar as possible to what they would have been if the old FHSA provider had not become a declared ADI’.

However, the Committee considers that the provision is indeterminate in nature. It does not specify that APRA must send the notice about the new FHSA, nor state whom the person must notify about failure to satisfy eligibility requirements. The Committee **seeks the Treasurer’s advice** as to whether there will be any liability to penalty or sanction under proposed new subsection 128A(5) and, if so, whether such penalty or sanction might be specified.

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.

Impact on a particular class of persons **Schedule 2, item 14, new section 152-47**

Schedule 2 of the bill amends the *Income Tax Assessment Act 1997* in relation to capital gains tax CGT concessions for small business. Existing subsection 152-40(1A) is repealed and proposed new section 152-47, to be inserted by item 14 of Schedule 2, is introduced to allow spouses or children to be an affiliate for the purpose of calculating certain passively held CGT assets.

The explanatory memorandum states (at pages 69-70) that ‘some taxpayers may be disadvantaged under these amendments’. The Committee notes that those taxpayers may include single or childless taxpayers. The Committee considers that, as this provision balances competing interests, the matter should be **left for consideration by the Senate as whole**.

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

Merits review

Clarification of statement in explanatory memorandum

Schedule 4, item 10, new subsection 402-765(5) and new section 402-775

Proposed new section 402-775, to be inserted by item 10 of Schedule 4, grants a company the right to seek merits review of decisions made by the Water Minister in relation to: the refusal to issue a certificate to the company; the amount of urban water offset specified in such a certificate; or the revocation of such a certificate.

The Committee considers that the explanatory memorandum (at paragraph 4.22) is misleading in stating that ‘review rights apply only to the process surrounding the issuance and revoking of certificates’. In fact, both proposed new section 402-775 and proposed new subsection 402-765(5) (also to be inserted by item 10 of Schedule 4) grant the right to seek review of a decision specifying the amount of the offset set out in a certificate. The Committee **brings this matter to the Treasurer’s attention** and **seeks his advice** as to whether consideration could be given to amending the explanatory memorandum to accurately inform companies of their review rights.

Tax Laws Amendment (Small Business and General Business Tax Break) Bill 2009

Introduced into the House of Representatives on 19 March 2009
Portfolio: Treasury

Background

As part of the Federal Government's Nation Building and Jobs Plan, this bill amends the *Income Tax Assessment Act 1997* to provide a temporary bonus income tax deduction for certain business investment – the Small Business and General Business Tax Break – for new, tangible depreciating assets and new expenditure on existing assets undertaken between 13 December 2008 and 31 December 2009.

The Committee has no comment on this bill.

Therapeutic Goods Amendment (2009 Measures No. 1) Bill 2009

Introduced into the House of Representatives on 19 March 2009

Portfolio: Health and Ageing

Background

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

- allow the Secretary to suspend the registration or listing on the Australian Register of Therapeutic Goods of a medicine if there are concerns about its safety;
- amend the manufacturing licence provisions for the issuing of single site licences and enable the transfer of licences between owners and variations to licence authorisations;
- extend the powers of authorised officers who can enter manufacturing premises to monitor for safety and quality to allow such officers to take samples of therapeutic goods and any thing (such as ingredients) that relates to those goods, and enable the taking of any still or moving image or any recording to assist in providing a record of the observations made;
- provide a framework for the improved regulation of homoeopathic and anthroposophic medicines, as recommended by the Expert Committee on Complementary Medicines in the Health System in 2003;
- allow the Minister to list, by legislative instrument, various permitted and prohibited ingredients in listed medicines which are currently covered as a class in the regulations but are not individually identified;
- amend references to legislative instruments in the Therapeutic Goods Act to reflect the *Legislative Instruments Act 2003*, and current terminology;
- clarify arrangements for the setting of conditions imposed on registered and listed therapeutic goods;

- strengthen scrutiny of overseas manufacturing of listed medicines;
- clarify that decisions may be made using computer software under the Therapeutic Goods Act, such as for the listing of medicines;
- clarify the definition of accessory to a medical device; and
- clarify arrangements for the Minister to make a code relating to the advertising of therapeutic goods.

The bill also contains application, saving and transitional provisions.

Exclusion of rights

Schedule 1, item 2, new paragraph 29D(1)(b)

Schedule 1 of the bill inserts new provisions in the Therapeutic Goods Act to enable the suspension of registered or listed therapeutic goods from the Register. (This power already exists in relation to medical devices). Proposed new paragraph 29D(1)(b), to be inserted by item 2 of Schedule 1, gives the Secretary power to suspend goods if he or she is satisfied that there are grounds for cancelling the registration or listing of goods under section 30 of the Therapeutic Goods Act.

One of the existing grounds for cancellation under the Therapeutic Goods Act is a request from a person for cancellation (paragraph 30(1)(c)). The Committee notes that the right of a person to request a suspension is not included in the grounds available to the Secretary for granting a suspension under proposed new paragraph 29D(1)(b). The Committee **seeks the Minister's advice** as to the justification for this exclusion of the exercise of a right that exists elsewhere in the Therapeutic Goods Act.

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.

Excluding merits review**Schedule 1, item 2, new sections 29D, 29E and 29F**

Item 2 of Schedule 1 inserts new sections into Part 3-2 of the Therapeutic Goods Act to allow the Secretary to suspend the registration and listing of therapeutic goods (proposed new sections 29D and 29E), extend the suspension (proposed new subsection 29E(3)) and revoke the suspension (proposed new section 29F).

Section 60 of the Therapeutic Goods Act provides for review of decisions which include decisions made ‘under Part 3-2 (registration and listing of therapeutic goods)’ (paragraph 60(1)(c)) and decisions made ‘under Part 4-6 (suspension and cancellation from the Register)’ (paragraph 60(1)(g)). Since Part 3-2 of the Therapeutic Goods Act currently includes decisions on the suspension from the Register, the Committee considers that the proposed new sections could be reflected in section 60 to remove doubt about the availability of internal review and merits review for decisions on suspension under that Part.

This need is underscored by the statement in the explanatory memorandum (at page 7) on the operation of item 7 of Schedule 1 which sets out the application of the amendments made by item 2 of Schedule 1: ‘Once the registration or listing of the goods is officially cancelled under section 30, the *only* option for the sponsor of those goods would be to re-apply for registration or listing’ (emphasis added).

Since other options for the sponsor would include seeking merits and/or judicial review of the decision, item 7 of Schedule 1 (the Application provision) could not purport to remove these rights. The Committee **seeks the Minister’s advice** as to the availability of merits review of the new decisions inserted by Schedule 1 of 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.

Wide delegation of power

Schedule 2, item 19, new sections 40A and 40B

Schedule 2 of the bill inserts new provisions amending Part 3-3 of the Therapeutic Goods Act in relation to manufacturing licences held by people who manufacture therapeutic goods. New provisions in item 19 of Schedule 2 give the Secretary a range of new powers such as the power to vary a site authorisation (proposed new section 40A), vary a licence (proposed new subsection 40B(3)), determine a reasonable time for compliance with a notice (proposed new subsection 40B(10)), and approve forms (proposed new subsection 40B(11)).

The Secretary's powers could potentially be exercised by junior officers because section 57 of the current Therapeutic Goods Act enables the Secretary to delegate 'all or any of his or her powers and functions' under the Act to '(b) an officer of an authority of the Commonwealth that has functions in relation to therapeutic goods' and '(ba) an APS employee in an Agency (within the meaning of the *Public Service Act 1999*) that has functions in relation to therapeutic goods'.

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

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the Committee notes that the explanatory memorandum does not explain the level of the officers who will be applying the new powers. The Committee **seeks the Minister's advice** on the level of officers who will have the delegation to exercise these powers.

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.

Schedule 2, item 25

Retrospective application

Item 25 of Schedule 2 provides for transitional arrangements for applications for licences. The explanatory memorandum (at page 15) provides a comprehensive explanation of the operation of the provisions. It explains how the legislation applies to licence applications which were made before the legislation commenced but have not been decided at the time of commencement. This is managed through the device of splitting multi-site licences.

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

Schedule 3, item 16

Retrospective application

Item 16 of Schedule 3 explains the application of amendments relating to: conditions of registration or listing of goods (section 28); conditions of medical device conformity assessment certificates (section 41EJ) and medical devices included in the Register (section 41FN). The amendments are stated to apply 'before, on or after the commencement' of those provisions. The explanatory memorandum does not explain why there is a need for retrospective application of the legislation. The Committee therefore **seeks the Minister's advice** on the need for retrospective application of the relevant provisions.

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.

Delayed commencement

Schedule 4, items 1-13

Schedule 4 of the bill contains amendments to the Therapeutic Goods Act to regulate the provision of homoeopathic and anthroposophic medicines. These provisions will commence in July 2011 which means a delay in commencement. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of 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 this instance, the explanatory memorandum states (at page 3) that the fixed date for commencement will provide certainty to sponsors of homoeopathic and anthroposophic medicines about the requirements these products will have to meet by that date, and allows time for them to comply with the new standards. It will also enable finalisation of consultation and the making of subordinate legislation to support the new homoeopathic and anthroposophic framework.

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

Delegation of legislative power

Schedule 4, item 1, subsection 3(1)

Item 1 of Schedule 4 inserts a definition of ‘anthroposophic pharmacopoeia’ into subsection 3(1) of the Therapeutic Goods Act. The definition includes a pharmacopoeia publication as ‘in force from time to time’. The explanatory memorandum explains (at page 20) that anthroposophic pharmacopoeia is a publication or a part of a publication specified by the Minister, by legislative instrument, under proposed new paragraphs 3AB(3)(a) or (b), respectively. The legislative instrument applies, adopts or incorporates, with or without modification, any matter contained in the publication or part of the publication specified in the instrument as in force from time to time.

The Minister's second reading speech refers to homeopathic and anthroposophic medicines and explains that the amendments in Schedule 4 put 'in place a framework allowing standards for these medicines to be set by reference to various pharmacopaeias from July 2011'.

This means the legislative power to make standards for therapeutic goods has the potential to be delegated, to some extent, to overseas pharmacopaeias. However, the Committee **leaves to the Senate as a whole** the question of whether this is an appropriate delegation of legislative power in the circumstances.

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

COMMENTARY ON AMENDMENTS TO BILLS

Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008

On 20 March 2009, the Senate agreed to one amendment to the bill. On 20 March 2009, the House of Representatives also agreed to this amendment. The amendment does not fall within the Committee's terms of reference.

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

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

On 16 March 2009, the Senate agreed to 18 requests for amendments to the Customs Tariff Amendment Bill and two requests for amendments to the Excise Tariff Amendment Bill, none of which fall within the Committee's terms of reference. On 17 March 2009, the Senate passed both bills with the requested amendments. On 18 March 2009, the House of Representatives disagreed with all the Senate's requested amendments. On 18 March 2009, the Senate agreed not to press its requests for the amendments not made by the House of Representatives and negatived both bills at the third reading.

Fair Work Bill 2008

On 19 and 20 March 2009 (am), the Senate agreed to 231 amendments to the bill. On 20 March 2009, the House of Representatives agreed to amendments Nos. 1-30, 35-93, 95-135 and 137-231 and disagreed to amendments Nos. 31-34, 94 and 136. Amendment Nos. 16 and 30 fall within the Committee's terms of reference.

‘Henry VIII’ clause**Amendment No. 16 – new section 35A**

New section 35A (amendment No. 16) provides for regulations to exclude ‘the application of the whole of this Act in relation to all or part of an area referred to in section 32 or subsection 33(4) or 34(4)’. This is a ‘Henry VIII’ clause as it enables delegated legislation to override an earlier Act.

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.

While the Committee recognises that this amendment has already been agreed to by the Senate and the bill has received Royal Assent, it nevertheless **draws to the attention of Senators** the existence of the provision.

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.

Commencement more than six months after assent**Amendment No. 30 – new subsection 2(1)**

New subsection 2(1) contains a table of commencement provisions. Item 2 in Column 1 of the table relates to sections 3-40 which are to commence on a day to be fixed by Proclamation or within 12 months after Royal Assent. Items 4 (sections 573-718) and item 6 (Schedule 1) of Column 1 commence at the same time as the provisions covered by item 2. Item 3 (sections 41-572) and item 5 (sections 719-800) have similar commencement provisions to item 2.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee has previously drawn attention to provisions that enable legislation to commence on a date ‘to be proclaimed’ rather than on a determinable date and, if a specified period is chosen, prefers that it be not longer than six months. Where a six-month period is impracticable, the Committee has previously accepted a period of 12 months if the explanatory memorandum contains sufficient justification.

In this case, the supplementary explanatory memorandum explains that commencement by way of Proclamation is intended to allow various new institutions, such as Fair Work Australia and the Fair Work Ombudsman, as well as arrangements under Schedule 1 (transitional provisions about early commencement) to be established before the rest of the bill. The substantive functions of the institutions, and inspectors’ powers, cannot commence before the Fair Work (Transitional Provisions and Consequential Amendments) Bill receives Royal Assent. The Committee accepts this justification, particularly in light of the fact that the amendment has already been agreed to by the Senate and the bill has received Royal Assent.

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

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
Fuel Quality Standards Amendment Bill 2009	Schedule 1, item 106, proposed subsection 65D(5)	Failure to provide information to a public authority	30 penalty units

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
*	COAG Reform Fund Bill 2008 — clause 5 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Commonwealth Securities and Investment Legislation Amendment Bill 2008 — Schedule 1, item 10, subsection 5BA(7)
*	Defence Home Ownership Assistance Scheme Bill 2008 — Clause 84
*	Dental Benefits Bill 2008 — Clause 65
*	Education Legislation Amendment Bill 2008 — Schedule 1, item 6, section 14B
*	Fair Work Bill 2008 — Subclause 559(4)
*	Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008 — Schedule 1, item 29
*	Federal Financial Relations Bill 2009 — clause 22

*	Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009 — Schedule 4, subitem 2(3)
*	Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008 — Schedule 1, item 49, section 54A, and Schedule 2, item 23, section 70E (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008 — Schedule 1, item 79, section 94B (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 — Schedule 5, item 141, section 65A
*	Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008 — clause 5
*	Nation-building Funds Bill 2008 — clauses 13, 61, 68, 75, 82, 132, 181, 188, 215 and 255 — (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Protection of the Sea Legislation Amendment Bill 2008 — Schedule 1, item 20, section 46N
*	Safe Work Australia Bill 2008 — clause 64 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Schools Assistance Bill 2008 — clause 167
	Uranium Royalty (Northern Territory) Bill 2008 – clause 18
*	Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008 — Schedule 1, item 1
*	Wheat Export Marketing Bill 2008 — clause 58 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)

Other relevant appropriation clauses

*Indicates passed by Senate	Bills and Clauses
*	Household Stimulus Package Bill 2009 — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year).
*	Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008 — Schedule 4, item 4: special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year).

*	Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008 — Schedule 2, items 1 and 2, and Schedule 4, item 1: special appropriation clauses – for a finite period of time (ie. for circumstances arising in a particular financial year).
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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)
Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008	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 HOUSE	SENATE	MINISTER	RESPONSE SOUGHT	RECEIVED	REPORT NUMBER
Bills dealt with in 2009							
Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008	1(4.2.09)	3.12.08	12.2.09	Infrastructure, Transport, Regional Development and Local Government	5.2.09	10.3.09	2(11.3.09)
<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)
Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008	1(4.2.09)	3.12.08	10.3.09	Home Affairs	5.2.09	23.2.09	2(11.3.09)
Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008	1(4.2.09)	3.12.08	12.2.09	Attorney-General	5.2.09	27.2.09	2(11.3.09)
Employment and Workplace Relations Amendment Bill 2008	1(4.2.09)	3.12.08	12.2.09	Employment and Workplace Relations	5.2.09	16.3.09	3(18.3.09)
Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008	1(4.2.09)	4.12.08	12.2.09	Treasury	5.2.09	11.3.09	3(18.3.09)
Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008	1(4.2.09)	3.12.08	3.12.08	Health and Ageing	5.2.09	12.2.09	2(11.3.09)
Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008	1(4.2.09)	3.12.08	12.2.09	Treasury	5.2.09	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)