

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

Alert Digest No. 6 of 2011

22 June 2011

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator G Marshall

Senator L Pratt

Senator R Siewert

Senator the Hon J Troeth

Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

TABLE OF CONTENTS

Commentary on bills

• Competition and Consumer Legislation Amendment Bill 2011	1
• Commonwealth Electoral Amendment (Tobacco Industry Donations) Bill 2011	3
• Customs Amendment (New Zealand Rules of Origin) Bill 2011	4
Live Animal Export (Slaughter) Prohibition Bill 2011	6
Migration Amendment (Declared Countries) Bill 2011	7
Commentary on Amendments To Bills	8
Scrutiny of standing appropriations	10

Competition and Consumer Legislation Amendment Bill 2011

Introduced into the House of Representatives on 27 May 2010 and reintroduced on 15 June 2011

Portfolio: Treasury

This bill is substantially similar to a bill introduced in the previous Parliament.

Background

This bill amends the *Competition and Consumer Act 2010* to clarify the operation of the provision relating to mergers and acquisitions.

The bill also amends the unconscionable conduct provisions of the Australian Consumer Law and the *Australian Securities and Investments Commission Act 2001*.

The bill also corrects minor drafting errors made in the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010*.

Retrospective effect

Schedule 2, items 1 and 4

Schedule 2 of the bill proposes to introduce changes to the unconscionable conduct provisions of the *Australian Consumer Law* and the *Australian Securities and Investments Commissions Act*. The main amendment is to include a list of interpretative principles to assist the courts in applying the prohibition of statutory unconscionable conduct, and to assist stakeholders in their understanding of the meaning and scope of the provisions.

Item 1 of Schedule 2 introduces a new section 12CB, replacing the existing sections 12CB and 12CC of the *Australian Securities and Investments Commissions Act*. Item 4 of Schedule 2 introduces a new section 21, replacing the existing sections 21 and 22 of the *Competition and Consumer Act*. In both cases paragraph (3)(b) of the new section indicates that for the purpose of determining whether a person has engaged in unconscionable conduct (under subsection (1)), ‘the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section’.

This means that these amendments have retrospective effect. The explanatory memorandum justifies this result as follows (at page 21):

The unconscionable conduct provisions of the CC Act have been in place since 1986...and 1988...[The proposed amendments] whilst providing for retrospective effect of the ACL provisions, ensures that a gap does not occur whereby conduct that would have been unconscionable under the CC Act escapes consideration upon the commencement of the ACL provisions’.

It should also be noted that the new interpretive principles which are included to guide the courts in the application of the provisions are ‘drawn from existing case law’ and that the intention is to clarify, not alter, the effect of the statutory prohibition of unconscionable conduct (see explanatory memorandum, also at page 21). **In these circumstances the Committee leaves consideration of whether these provisions are appropriate to the Senate as a whole.**

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

Retrospective commencement Schedule 3

Schedule 3 of the bill corrects drafting errors in the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*. These corrections are to apply with retrospective effect from 1 January 2011, the date on which the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* commenced. The justification for the proposed approach is that the amendments correct only ‘typographical drafting errors’ and ‘to ensure that the amendments in that Act have always applied as intended’ (see the explanatory memorandum at page 25). **The Committee notes this information and the implication that these are minor amendments of a machinery nature, but seeks the Treasurer’s confirmation that the amendments do not have potential to cause any detriment.**

Pending the Treasurer’s reply, 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.

Commonwealth Electoral Amendment (Tobacco Industry Donations) Bill 2011

Introduced into the Senate on 15 June 2011

By: Senator Bob Brown

Background

This bill amends the *Commonwealth Electoral Act 1918* in relation to political donations by the tobacco industry to:

- make unlawful the receipt of a gift from manufacturers or wholesalers of tobacco products by political parties; and
- introduce new offences related to this measure.

Possible trespass on personal rights and liberties Various

This bill contains provisions which would make it unlawful to receive a gift from manufacturers or wholesalers of tobacco products by political parties. The bill also would make it unlawful for a candidate or member of a group to accept a gift from manufacturers or wholesalers of tobacco products. There are also offences related to these measures which would be introduced. The freedom which owners of property enjoy to dispose of their property as they see fit is always subject to the law. **In the circumstances the Committee leaves the question of whether this law may be considered to unduly encroach on any personal right or liberty to the Senate as a whole.**

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

Customs Amendment (New Zealand Rules of Origin) Bill 2011

Introduced into the House of Representatives on 16 June 2011

Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* to implement amendments to the rules of origin requirements in Article 3 of the Australia-New Zealand Closer Economic Relations Trade Agreement.

Possible delayed commencement

Clause 2, table item 2

The bill provides that the timing of the commencement of the provisions in Schedule 1 is linked to:

...the day on which the amendments of Article 3 of the Australia New Zealand Closer Economic Relations Trade Agreement, that were agreed to by Australian and New Zealand in 2010, enter into force.

The explanatory memorandum states at page 3 that:

The amendments would enter into force on the date when the governments of Australia and New Zealand notify each other by an exchange of notes that they have completed their respective domestic processes to bring the amendments into force. Australia will complete its domestic processes when this Bill receives the Royal Assent.

The Committee also notes that the commencement clause also requires that:

The Minister administering the *Customs Act 1901* must announce by notice in the Gazette the day on which those amendment enter into force.

Where there is a delay, or a possible delay, in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of *Drafting Direction No 1.3*.

In this instance it seems commencement could be delayed if the New Zealand process takes longer than 6 months, but it is clear that any delay would arise because the provisions of the relevant international agreement had not yet entered into force.

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

Live Animal Export (Slaughter) Prohibition Bill 2011

Introduced into the Senate on 15 June 2011

By: Senator Siewert

Background

This bill amends the *Export Control Act 1982* to prohibit the export of live animals for slaughter.

The Committee has no comment on this bill.

Migration Amendment (Declared Countries) Bill 2011

Introduced into the Senate on 16 June 2011

By: Senator Hanson-Young

Background

This bill seeks to amend the *Migration Act 1958* to require that any agreement to send asylum seekers to a third country is brought before both houses of Parliament as a disallowable instrument.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Combating the Financing of People Smuggling and Other Measures Bill 2011

[Digest 2/11 & 4/11 [amendments] and response in 3/11 Report]

On 16 June 2011 the Senate agreed to one Government amendment and tabled an addendum to the explanatory memorandum and a supplementary explanatory memorandum in response to issues raised by the Senate Scrutiny of Bills Committee.

The Committee thanks the Minister for this comprehensive action to address its concerns.

Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011

[Digest 2/11 & 4/11 [amendments] and response in 3/11 Report]

On 14 June 2011 a revised explanatory memorandum was tabled in the Senate. The Committee is disappointed that the Minister did not take the opportunity to include the information it suggested incorporating in its *Third Report of 2011*.

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further Election Commitments and Other Measures) Bill 2011

[Digest 4/11 & 5/11 [amendments] – no response required]

On 16 June 2011 a revised explanatory memorandum was tabled in the Senate, which incorporates the terms of the supplementary explanatory memorandum introduced into the House of Representatives on 31 May 2011. The Committee restates the view it expressed in Digest 5/11 (in the *Amendments* section) that it does not agree with the suggestion that merits review should be limited to natural persons, but has no further comment on the amendment proposed in new section 1167A(3D).

Product Stewardship Bill 2011

[Digest 4/11 – no response required]

On 15 June, fifteen Government, one Opposition and three Australian Greens amendments were agreed to and a supplementary explanatory memorandum

was tabled in the Senate. None of the amendments fall within the Committee's terms of reference.

Social Security Legislation Amendment (Job Seeker Compliance) Bill 2011

[Digest 4/11 & 5/11[amendments] – no comment]

On 14 June a revised explanatory memorandum was tabled in the Senate. On 16 June 2011 the bill was passed in the Senate without amendment. The Committee has no comment on this bill.

Tertiary Education Quality and Standards Agency Bill 2011

[Digest 4/11 and response in 5/11 Report]

On 16 June 2011 20 Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the Senate. None of the amendments fall within the Committee's terms of reference.

Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011

[Digest 4/11 – no comment]

On 16 June 2011 nine Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the Senate. None of the amendments fall within the Committee's terms of reference.

SCRUTINY OF STANDING APPROPRIATIONS

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

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

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

Bills introduced with standing appropriation clauses in the 43rd Parliament from the previous *Alert Digest*

Nil

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

Nil