Senate Standing Committee

for the

Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

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.

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Commentary on bills

Carbon Tax Plebiscite Bill 2011

Introduced into the Senate on 21 June 2011
By: Senator Abetz

Background

This bill proposes that:

- the Minister responsible for the administration of the *Commonwealth Electoral Act 1918* cause a specified question to be put to the Australian people through a national plebiscite no later than the last Saturday in November 2011;

- the question to be put through the plebiscite is to ask electors, "Do you support the Government's plan to introduce a price on carbon to deal with climate change?";

- the submission of the question and the scrutiny of the result of the plebiscite will be dealt with in the same manner as a referendum under the application of the *Referendum (Machinery Provisions) Act 1984;*

- as soon as practicable after the plebiscite the Electoral Commissioner is required to provide the Minister with a statement setting out the results. The Bill requires the Minister to subsequently table the same statement to each House of Parliament.

The Committee has no comment on this bill.

Consumer Credit Protection Amendment (Fees) Bill 2011

Introduced into the Senate on 21 June 2011
By: Senator Xenophon

Background

This bill amends the *National Consumer Credit Protection Act 2009* relating to credit fees or charges relating to credit contracts.

The bill amends the *Banking Act 1959* to require APRA to prohibit banks with a market share of more than ten percent from charging exit or early termination fees for any loan agreement or mortgage contract. The Bill also:

- inserts a provision into the National Credit Code to provide some guidance on the meaning of 'reasonable'; and
- provides that ASIC may apply to the court for an order to annul or reduce a fee it feels does not meet these criteria.

The Committee has no comment on this bill.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Cybercrime Legislation Amendment Bill 2011

Introduced into the House of Representatives on 22 June 2011
Portfolio: Attorney-General

Background

The bill amends the *Telecommunications (Interception and Access) Act 1979* (the TIA Act), the *Criminal Code Act 1995*, the *Mutual Assistance in Criminal Matters Act 1987* and the *Telecommunications Act 1997* to ensure that Australian legislation meets all the Council of Europe Convention on Cybercrime requirements. The amendments:

- require carriers and carriage service providers to preserve the stored communications and telecommunications data for specific persons when requested by certain domestic agencies or when requested by Australian Federal Police on behalf of certain foreign countries;
- ensure Australian agencies are able to obtain and disclose telecommunications data and stored communications for the purposes of a foreign investigation;
- provide for the extraterritorial operation of certain offences in the TIA Act;
- amend the computer crime offences in the *Criminal Code Act 1995*; and
- create confidentiality requirements in relation to authorisations to disclose telecommunications data.

Possible trespass on personal rights and liberties
Schedules 1 and 2

This bill will introduce amendments necessary to facilitate Australia's accession to the Council of Europe Convention of Cybercrime.

Broadly speaking, the amendments raise privacy concerns in two main ways. First, Schedule 1 establishes powers for agencies to obtain the preservation of stored communications for up to 90 days. Preservation orders may also be made on behalf of a foreign law enforcement agency. Second, Schedule 2, enables the AFP to assist foreign partners by accessing 'communications data'

on an agency-to-agency basis and will enable Australian authorities to provide non-content data (i.e. traffic data) to foreign authorities. Both of these changes are direct efforts to implement the Convention obligations.

Although these provisions give rise to concerns about the disclosure of personal information, the bill also contains a number of important protections and accountability mechanisms that are detailed in the explanatory memorandum and the second reading speech.

In relation to the first area of concern, it should be emphasised that it remains the case that a warrant is required before preserved communications are to be disclosed to agencies and that preservation orders are only available in relation to investigations relating to 'serious' offences.

In relation to the second area of concern - in relation to provisions facilitating the provision of information to foreign law enforcement authorities - it is noteworthy that the relevant provisions are subject to existing safeguards in the *TIA Act* (explanatory memorandum at 34) and that the proposed new section 180F (introduced by item 41 of Schedule 2) imposes a requirement that all decision-makers exercising powers under the new Division be required to have regard to the extent to which the privacy of any affected persons would be likely to be interfered with. The explanatory memorandum indicates at page 42 that the bill's intent is for considerations wider than those relevant in the context of the *Privacy Act* to be considered by authorised officers who make an authorisation to disclose information under the new provisions, including:

> …the amount of information that making the authorisation will give the agency, the relevance of the accessed information to the investigation in question, as well as how third parties' privacy may be impacted by accessing this information.

In these circumstances the Committee leaves to the Senate as a whole the question of whether the bill strikes an appropriate balance of the right to privacy and the policy objectives associated with the implementation of the Convention.

> *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.*

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Government Advertising (Accountability) Bill 2011

Introduced into the Senate on 22 June 2011
By: Senator Xenophon

Background

This bill amends the *Financial Management and Accountability Act 1997* to ban the use of public money to advertise a Government policy unless:

- the policy has been enacted in legislation;
- a resolution has been passed by both Houses of Parliament, agreeing to the expenditure of money for the purpose of advertising a particular policy; or
- in the event of a national emergency, the Minister has obtained consent from the Leader of the Opposition to spend public money for the purpose of advertising a particular policy.

The Committee has no comment on this bill.

Indigenous Affairs Legislation Amendment Bill 2011

Introduced into the House of Representatives on 23 June 2011
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *Aboriginal Land Rights (Northern Territory) Act 1976* to add further parcels of land to Schedule 1 and enable the land to be granted to relevant Aboriginal Land Trusts.

The bill also amends the *Aboriginal and Torres Strait Islander Act 2005* to:

- include a power for the Minister to make guidelines that the Indigenous Land Corporation must have regard to in deciding whether to perform its functions in support of a native title settlement and, if it decides to perform its functions in support of a native title settlement, in performing its functions in support of that settlement; and

- remove the connection between the election of members to the Torres Strait Regional Authority and the Queensland Local Government elections, and to allow for a wider range of options for the composition of the Torres Strait Regional Authority.

Possible delayed commencement
Schedule 3

The amendment in Schedule 3 of the bill is to commence on the earlier of either a day to be fixed by Proclamation or the day after a period of 12 months after the Act receives Royal Assent.

Where there is a 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 case the explanatory memorandum at page 7 states:

> ...A longer than usual default period has been included to ensure that the amendments contained in this Schedule can be proclaimed to commence at a time that will not interfere with the conduct of the next TSRA election process. Providing for commencement by Proclamation, or after a period of

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12 months, will allow the amendments to commence either before the next election period or *after* that period (rather than part-way through the period).

In light of the explanation provided the Committee has no further comment about the possible delayed commencement of this provision.

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

Intellectual Property Laws Amendment (Raising the Bar) Bill 2011

Introduced into the House of Representatives on 22 June 2011
Portfolio: Innovation, Industry, Science and Research

Background

This bill makes a number of amendments relating to intellectual property.

Schedule 1 amends the *Patents Act 1990* to:

- remove restrictions on the information and background taken into account when assessing whether an application is sufficiently inventive to justify a patent;
- prevent the grant of patents for speculative inventions that require too much further work before they can be put into practice;
- address circumstances in which the information disclosed in a patent specification is not sufficient to make the invention across the full scope of each claim; and
- apply a consistent standard of proof across all grounds, so that the Commissioner is not obliged to grant patents which would not pass scrutiny in a court challenge.

Schedule 2 amends the *Patents Act 1990* to:

- clarify that research and experimental activities relating to patented inventions are exempt from infringement; and
- exempt research activities necessary for gaining pre-market or pre-manufacturing regulatory approval from infringement.

Schedule 3 amends the *Patents Act 1990* and *Trade Marks Act 1995* to:

- refine opposition proceedings so that disputes can be settled quickly and inexpensively; and
- shorten timeframes within which divisional applications can be filed.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Schedule 4 amends the *Patents Act 1990* and *Trade Marks Act 1995* to:

- permit a company to act and describe itself as a patent attorney; and
- extend to client-attorney communications the same privilege as currently exists for communications between a lawyer and their client.

Schedule 5 amends the *Patents Act 1990* and *Trade Marks Act 1995* to:

- increase penalties for trademark infringement; and
- allow Australian Customs and Border Protection Service to intercept counterfeit goods at the border.

Schedule 6 amends *Patents Act 1990, Trade Marks Act 1995, Designs Act 2003* and *Plant Breeder's Rights Act 1994* to make a number of changes described as improving the flexibility of the IP rights system for users.

Delayed Commencement
Clause 2

Where there is a 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 bill, table items 2, 4, 5 and 7 respectively provide that items 1 to 86 and 88 to 134 commence on the day after the end of the period of 12 months beginning on the day the Act receives the Royal Assent. The explanation for the commencement date outlined in the explanatory memorandum at page 39 is that it is necessary for the following two reasons:

> The bill requires substantial regulation changes to be made before it commences. Many of these changes are technical and involve complex interactions between the Act and Regulations.

And:

> An extended commencement will give stakeholders time to consider how best to proceed with their applications, particularly in relation to the amendments that raise the substantive requirements for patents. The new higher standards will apply to existing applications or patents that have been filed, but where examination has not been requested at commencement (see item 55, page 130 for further explanation). An extended commencement will give applicants

> time to decide whether to request examination or amend their application before the changes take effect.

In light of the explanations provided the Committee has no further comment about the delayed commencement of these provisions.

> *In the circumstances, the Committee makes no further comment on this matter.*

Retrospective effect
Schedule 1, item 55

Item 55 of Schedule 1 is an application provision dealing with the proposed amendments introduced for the purpose of raising the quality of granted patents. In relation to some of the amendments, the new laws will only apply to applications and patents where, at commencement, there has been no request from the applicant to have their application 'examined' to see whether it meets the substantive requirements of the Act. The explanatory memorandum states (at page 65):

> This strikes a balance between implementing the changes as soon as possible, addressing the need to raise patentability standards, and giving applicants control and certainty over whether the old or new rules apply to them. If an applicant wishes to avoid the new higher standards they can request examination before the commencement: the old rules will apply for the life of the application and any subsequent patent. Additionally, the fixed 12 month commencement period…will give applicants time to consider their business needs and decide whether to request examination under the old or new rules.

In the circumstances the Committee has no concern about this approach and leaves the proposed approach to the consideration of the Senate as a whole.

> *In the circumstances, the Committee makes no further comment on the proposed approach.*

Possible inappropriate delegation of legislative power
Schedule 3, item 15

Item 15 of Schedule 3 introduces a new section 210A into the *Patents Act*. This provision replaces existing criminal sanctions for non-compliance with the exercise of the Commissioners powers (to summons witnesses, receive

evidence or require the production of documents) with non-criminal sanctions. Paragraph 210A(2)(c) allows the Commissioner to take 'actions of a kind that are prescribed by the regulations', in addition to the sanctions specified in the paragraphs 210A(2)(a) and (b). Unfortunately the explanatory memorandum does not address the need to provide for additional sanctions to those specified in the primary legislation. The sanctions are not criminal, but the Committee prefers that important matters are included in primary legislation whenever possible. **The Committee therefore seeks the Minister's advice as to what further sanctions are envisaged and whether it is possible to include these in the primary legislation.**

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

Incorporating material by reference
Schedule 4, items 28 and 58

Item 28 of Schedule 4 seeks to insert a new subparagraph 228(2)(r)(i). The effect of this amendment would be to amend the *Patents Act* to clarify that the regulations may provide for the assessment of the professional conduct of patent attorneys by references to standards of practice established by the Professional Standards Board for Patent and Trade Mark Attorneys as they exist from time-to-time. The explanatory memorandum at page 98 deals with the appropriateness of this delegation of legislative power in detail. In particular it is noted that the relevant professional Code 'will be registered as a legislative instrument and that 'the Government would consult with interested stakeholders prior to any future changes to the Code, and would table any amendments to the Code for parliamentary scrutiny'. In these circumstances, the Committee makes no further comment on this issue.

The same issue arises in relation to item 58, which inserts a new sub-subparagraph 231(2)(ha)(i)(ia) relating to trade mark attorneys.

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

Penalties and offences
Schedule 5, item 27

Item 27 of Schedule 5 amends the *Trade Marks Act* to increase the penalties for existing indictable offences, restructures the elements of the existing offences to promote clarity and consistency, and introduces new summary offences with lower penalties and fault elements (but which are analogous to the existing indictable offences. A number of issues arise for consideration against the scrutiny principles in Standing Order 24(1)(a).

First, the increase in penalties for indictable offences is justified so as to align the trade mark offence penalties with similar offences in the *Copyright Act* and those imposed in other comparable jurisdictions. The explanatory memorandum concludes at page 111 that the new penalties 'more accurately [reflect] the nature of these offences as serious violations of valuable personal property rights and is more likely to act as an appropriate deterrent.'

Second, as is noted in the explanatory memorandum at page 111, the fine-to-imprisonment ratio is higher than the accepted ratio for Commonwealth offences. The justification provided for this is that a higher pecuniary penalty is necessary given that counterfeiting may generate large financial gains and higher fines are necessary to provide a sufficient deterrent.

Third, in relation to the new summary offences, negligence is specified as the fault element in relation to the 'circumstance elements' of the offences. The explanatory memorandum justifies this approach as a response to counter attitudes that violation of intellectual property rights is trivial and a victimless crime which lead to an 'unacceptable failure to ascertain the factual circumstances in which' conduct will be criminal, and the fact that the summary offences carry a lower penalty.

Fourth, strict liability is imposed in relation to the 'circumstance element of the offences regarding whether a particular offence was an offence under section 145 or section 146' (explanatory memorandum at page 112). The justification is (1) that this is consistent with existing policy and law for the indictable offences, and (2) that 'as a general principle, a person should not escape liability through ignorance of the law'. Here is it noted that at page 285 of its *Sixth Report of 2002*, the Committee indicated that 'strict liability may be appropriate to overcome the "knowledge of law' problem, where a physical

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element of the offence expressly incorporates a reference to a legislative provision"'.

Given the detailed justifications provided in relation to each of these issues, **the Committee leaves to the Senate as a whole the question of whether these provisions are appropriate.**

> *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.*

Interactive Gambling and Broadcasting Amendment (Online Transactions and Other Measures) Bill 2011

Introduced into the Senate on 20 June 2011
By: Senator Xenophon

Background

This bill prohibits corporations from offering spot betting, exotic betting, in play betting or similar forms of betting. The bill amends the *Interactive Gambling Act 2001* to:

- enable a customer to suspend or cancel an interactive gambling transaction as long as the transaction has not been completed; and
- make it illegal to induce a customer to use a gambling service.

The bill also amends the *Criminal Code Act 1995* making match-fixing a crime.

Inappropriate delegation of legislation power
Clause 3

Clause 3 of the bill would introduce an offence for a corporation to offer various gambling services. However, subclause 3(2) provides that a number of key terms which define the offence are to have their meaning 'prescribed by the regulations', raising the question of whether this is an appropriate delegation of legislative power. The explanatory memorandum does not address the reasons for this approach. In general, it is preferable that offences be dealt with in primary legislation, and if the bill proceeds to further stages of debate **the Committee requests the Private Senator's advice as to the reasons why these matters are left to the regulations.**

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

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Inappropriate delegation of legislation power
Schedule 3, items 1, 2 and 3

Schedule 3, item 1, of the bill requires the ACMA to impose certain conditions on commercial television broadcasting licences. The key terms of the conditions that are to be imposed, are left to be defined in the regulations. The explanatory memorandum does not address the reasons for this approach.

The same issue arises in relation to items 2 and 3 of the Schedule, which relate to conditions to be imposed on radio broadcasting licences and subscription television broadcasting licences, respectively.

In general, it is preferable that important information is included in primary legislation, and if the bill proceeds to further stages of debate **the Committee requests the Private Senator's advice as to the reasons why these matters are left to the regulations.**

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

Inappropriate delegation of legislation power
Schedule 4, item 1

Schedule 4, item 1 would insert proposed section 135A.3 in the *Criminal Code Act*. This provision makes it an offence for a person to obtain financial advantage in relation to a 'code of sport' by deception. The meaning of 'code of sport' is to be determined by the regulations and the meaning of deception (a central element of the offence) is defined to include 'any other conduct prescribed in the regulations' (see proposed section 135A.1). The penalty for the offence is imprisonment for 10 years or 10000 penalty units or both. Unfortunately the explanatory memorandum does not address this issue. As noted above, in general it is preferable that important information is included in primary legislation, and if the bill proceeds to further stages of debate **the Committee requests the Private Senator's advice as to the reasons why these matters are left to the regulations.**

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

Live Animal Export Restriction Prohibition Bill 2011

Introduced into the House of Representatives on 20 June 2011
By: Mr Wilkie

Note: there are two bills by this title, the other introduced by Senator Xenophon; they appear to have been introduced in identical terms.

Background

This bill amends the *Australian Meat and Live-stock Industry Act 1997* and *Export Control Act 1982* to restrict live animals for slaughter pending its prohibition on 1 July 2014.

Incorporating material by reference
Schedule 1, item 4

Item 4 of the Schedule to this bill seeks to insert a new section 9N into the *Export Control Act 1982*. Proposed subsection 9N(4) provides that live-stock for slaughter may not be exported and a permission or other consent may not be granted under the regulations 'unless the Secretary is satisfied that the live-stock will be treated satisfactorily in the country of destination'. Proposed subsection 9N(5) provides that 'live-stock for slaughter will be treated satisfactorily in the country of destination if they will be, among other things, kept in holding premises that comply with the 'Holding Standards' and (b) treated in accordance with the 'OIE Guidelines'. Proposed subsection 9N(8) defines 'Holding Standards' to mean a number of standards drawn from version 2.3 of the Australian Standards for the Export of Livestock, published by the Department of Agriculture, Fisheries and Forestry. 'OIE Guidelines' is defined to mean the 'relevant sections of the current version of the Terrestrial Animal Health Code published by the OIE (the World Organisation for Animal Health). The appropriateness of this delegation of legislative power is not addressed in the explanatory memorandum. In order to better assess the proposed provision, and if the bill proceeds to further stages of debate, **the Committee requests the Private Senator's advice as to the reasons for the proposed approach.**

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

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Live Animal Export Restriction Prohibition Bill 2011

Introduced into the Senate on 20 June 2011
By: Senator Xenophon

Note: there are two bills by this title, the other introduced by Mr Wilkie; they appear to have been introduced in identical terms

Background

This bill amends the *Australian Meat and Live-stock Industry Act 1997* and *Export Control Act 1982* to restrict live animals for slaughter pending its prohibition on 1 July 2014.

See comments made in relation to the bill above, which is in substantively identical terms.

Live Animal Export (Slaughter) Prohibition Bill 2011

Introduced into the House of Representatives on 20 June 2011
By: Mr Bandt

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.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Schools Assistance Amendment Bill 2011

Introduced into the House of Representatives on 22 June 2011
Portfolio: School Education, Early Childhood and Youth

Background

This bill amends the *Schools Assistance Act 2008* to repeal the current implementation date of 31 January 2012 and substitute a new section 22 which enables a standing regulation to prescribe the national curriculum and associated implementation timeframes.

Delegation of legislative power
Insufficient parliamentary scrutiny
Subsections 22(1) and 22(2)

The existing subsection 22(1) requires that funding agreements for non-systemic schools, or an approved school system, implement the national curriculum as prescribed by regulations on or before 31 January 2012. The proposed new subsection 22(1) provides that funding agreements must require that the relevant authority for the school or system to ensure that the national curriculum prescribed by the regulations is implemented in accordance with the regulations.

Subsection 22(2) provides that despite subsection 14(2) of the *Legislative Instruments Act 2003*, regulations made for the purposes of this section may apply, adopt or incorporate a matter contained in an instrument as in force or existing from time-to-time.

The proposed amendments leave important information to be determined by regulation and therefore raise a question about whether they inappropriately delegate legislative power. They also allow material to be incorporated time-to-time, which means that the substance of the law can be changed without further parliamentary scrutiny. However, the explanatory memorandum (at pages 5 and 6) gives a lengthy and persuasive justification for the proposed changes. In relation to the need to enable the regulations to prescribe for the date by which the national curriculum is to be implemented, it is argued that the staged introduction of the national curriculum and iterative nature of curriculum development require a more flexible approach to setting dates for implementation. In relation to proposed subsection 22(2), the explanatory

memorandum indicates at page 5 that it is designed to allow the regulations to incorporate as the national curriculum 'any new version of the Australian Curriculum authorised by the Standing Council [for School Education and Early Childhood].' Three reasons are given to justify this approach. First, approval by the Standing Council is the culmination of the Australian Curriculum, Assessment and Reporting Authority's extensive curriculum development process, which includes extensive and broad public consultation. Secondly, approval from the Council is to be a precondition to prescribing any new version of the national curriculum and implementation dates. And, thirdly, that each new version of the national curriculum approved by the Standing Council will be made available on a website dedicated to this purpose.

In light of the detailed explanation for the proposed approach the Committee understands the reasons for it and in the circumstances has no further comment.

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

Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011

Introduced into the House of Representatives on 23 June 2011
Portfolio: Tertiary Education, Skills, Jobs and Workplace Relations

Background

This bill amends the *Social Security (Administration) Act 1999* to insert a standalone obligation for a person to inform the Department of events or changes of circumstances that might affect the payment of a social security payment to the person or the person's qualification for a concession card. This obligation will operate both prospectively, and retrospectively to 20 March 2000.

The Bill makes technical amendments to the *Family Assistance and Other Legislation Amendment (Child Care and Other Measures) Act 2011* and to the *Family Assistance Legislation Amendment (Child Care Rebate) Act 2011* to correct errors described as drafting oversights.

The Bill also includes an application provision to provide that the requirements of subsection 6A(1) of the *Social Security (Administration) Act 1999* are taken to have been complied with in relation to decisions made under the social security law by the operation of a computer program for the period 12 June 2001 to the date of Royal Assent.

Retrospective commencement
Schedule 1, item 1

The main purpose of this bill is to create a 'stand alone' obligation for a person to inform the Department of changes in circumstances that might affect their social security payments or their qualification for a concession card. This change operates prospectively and retrospectively, from 20 March 2000. The explanatory memorandum indicates that the change has been proposed in response to a recent decision of the Supreme Court of South Australia (Full Court), which has the consequence of calling into question a large number of convictions for social security fraud. The questionable convictions are those that have been prosecuted by reference to section 135.2 of the Criminal Code 'obtaining a financial advantage'. The Court held, in *Poniatowska v DPP (Cth)*, that as neither section 135.2 nor the social security legislation (the

Administration Act) defined a duty to disclose changes in circumstances that might affect social security benefits, the relevant provision of the *Criminal Code* (section 4.3) that enables an omission to constitute a physical element of an offence could not apply. For this reason, the Court set aside the conviction that had been recorded against the defendant. The Commonwealth has appealed the decision in *Poniatowska* to the High Court and the court has reserved its decision.

Item 1 of schedule 1 of the bill imposes an obligation on specified persons to inform the Department of changes in circumstances that might affect their social security benefits. A person has 14 days after the change in circumstance to fulfil this obligation; however, if a person complies with the general and routine notices that are sent out to every person who receives benefits, then compliance with such a notice also constitutes compliance with the proposed new obligation. This change is given retrospective effect from 20 March 2000, the date the Administration Act commenced. The clear purpose of the item (as recognised in the explanatory memorandum) is to overcome the basis on which the conviction was set aside in *Poniatowska*, by stipulating that (contrary to what the court held in relation to the existing legislation) the Administration Act does impose an obligation to inform of changes of circumstances. As explained above, the effect of this is that section 4.3 of the *Criminal Code* becomes operative so that an omission can constitute the physical element of the offence of 'obtaining financial advantage'.

The Committee accepts that there are situations in which retrospective legislation is justified (most notably when there have been other failings of the legal system that need to be corrected and the effect is not detrimental to any person), liberal and democratic legal traditions have long expressed strong criticisms of retrospective laws that impose criminal guilt. The core objection to such laws is straightforward: persons should not be punished for acts that were not illegal at the time they acted. Not only may individuals be unfairly surprised by the *ex post facto* nature of their legal obligations, such laws show a basic disrespect for citizens insofar as they undermine the idea that law is a system of rules designed to guide human conduct. Further, given that breaches of the criminal law may lead to deprivations of liberty, retrospective *criminal* laws carry added opprobrium. For this reason, it is routinely concluded that there is a moral cost involved with the use of retrospective criminal laws, even if the laws are thought to pursue worthy policy objectives.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

In the explanatory memorandum at page 7 it is stated that the 'Government does not lightly pursue retrospective legislation' and it is argued in detail that this case is thought exceptional for a number of reasons. The first reason is that:

> [I]t would not be appropriate for a significant number of prosecutions conducted from 2000 for social security fraud to be overturned on a previously unidentified legal technicality. Convicted persons would all have been aware that they should have informed the Department of the specified events and changes of circumstances listed in the notices given to them by Centrelink in relation to their social security [benefits].

This reason is said to overcome the objection that citizens would be surprised by the obligation being imposed retrospectively. Although there is some force in this argument, two rejoinders should be noted:

> (1) there is room to debate whether it is apt to describe the defect in social security fraud convictions identified in *Poniatowska* as a 'legal technicality'. The Court held that there was not an obligation to inform and, thus, that the conclusion that an omission could form the basis of the physical element of the offence could not be sustained. That is, the legal defect squarely relates to the question of whether criminal liability was established. This indicates that the category of legislative defects that fall within the category of 'legal technicality', as it is understood in the explanatory memorandum, is a very broad one.
>
> (2) this justification does not address the broader significance of the use of retrospective criminal laws for the Australian legal system. Although it is likely true that many persons were aware that as a matter of social or moral norms or principles they should have informed the Department of their changed circumstances, the South Australian Supreme Court has held that there was no legal obligation to do so. There are many areas where one can imagine an argument being made that citizens should have known that they were doing the wrong thing, but which it would not be appropriate to impose criminal liability after the conduct has occurred (even if it would be appropriate to prospectively so provide).

In addition, there is the point, alluded to above, that there is a general cost to the basic values of a legal system if legislation imposes retrospective laws. There is a general principle involved. This principle may not necessarily be absolute, but there is arguably significant benefit in upholding this principle in

terms of maintaining the legitimacy of the legal system, even if it comes at a cost in terms of other policy objectives.

The second reason proposed in the explanatory memorandum (also at page 7) is that:

> The effect of the retrospective application of this provision is to confirm convictions already made. A failure to comply with the proposed obligation to inform of changes in circumstances is not itself an offence – it only provides a basis for establishing the physical element of certain offences under the Criminal Code.

It is added that these offences are not strict liability offences but include fault elements. It is not clear to the Committee how these observations are relevant to support an argument that it is appropriate for the legislation retrospectively allow for the findings of criminal liability.

The third reason provided in the explanatory memorandum at page 7 is that 'there is no circumstance in which social security fraud could be considered a legitimate activity for a person to engage in'. Although the Committee accepts that this is true, on the current interpretation of the relevant provisions in the *Criminal Code*, the court has held that the offences were not made out in certain circumstances involving omissions to inform of changed circumstances.

The proposed retrospective commencement raises difficult questions of policy and principle on which reasonable minds may differ. As already noted, the principles that underpin the rule of law (including the general requirement of retrospectivity in legislation) are not absolute and even those who defend them typically concede that there are limited situations where departure from these principles may be warranted. **Nevertheless, in the circumstances the Committee has strong reservations about (1) the use of retrospective legislation to impose or confirm criminal guilt, and (2) whether the justifications for its use in this instance are adequate. The Committee leaves to the consideration of the Senate as a whole the question of whether the proposed approach is appropriate.**

> *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.*

Retrospective commencement
Schedule 3

Schedule 3 of the bill deals with another issue that was identified in the wake of the *Poniatowska* decision. The explanatory memorandum explains that 'it has become apparent that Centrelink may not have sufficient records to prove that, for the relevant period, decisions made under the social security law by the operation of a computer program satisfied the requirements in subsection 6A(1) of the *Administrative Act* that the Secretary arranged for the use, under the Secretary's control, of the computer program(s) to make the relevant decision(s)'. For this reason the Schedule provides that the statutory requirements in subsection 6A(1) were fulfilled from 12 June 2001. Although the explanatory memorandum does not give any detailed justification of the retrospective operation of this law, the Committee's view is that it would be more apt to describe the failing being corrected by this aspect of the bill as an 'unidentified legal technicality'. There is no suggestion that the affected decisions may not continue to be challenged on other grounds that may affect their validity.

> *In the circumstances, the Committee makes no further comment on this matter.*

Tax Laws Amendment (2011 Measures No.6) Bill 2011

Introduced into the House of Representatives on 22 June 2011
Portfolio: Treasury

Background

This bill amends various taxations laws as follows:

Schedule 1 amends the *Income Tax Assessment Act 1997* to exempt the outer regional and remote payments made under the Better Start for Children with Disability initiative from income tax.

Schedule 2 amends the *Fringe Benefits Tax Assessment Act 1986* to provide an exemption from fringe benefits tax for transport, from an employee's usual place of residence to their usual place of employment, where the employee is an Australian resident employed in a remote area overseas, under what is commonly known as a fly-in fly-out arrangement.

Schedule 3 amends the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients (DGRs) by adding two entities, (the New Zealand Government's Christchurch Earthquake Appeal Trust and the Cancer Australia Gift Fund) as DGRs, changing the name of one entity, and removing two other entities from the list.

The Committee has no comment on this bill.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

COMMENTARY ON AMENDMENTS TO BILLS

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Bill 2011
[Digest 5/11 – no response required]

On 21 June 2011 the Senate agreed to one Opposition amendment. On 22 June 2011 the House of Representatives agreed to Senate amendment and passed the bill. None of the amendments fall within the Committee's terms of reference.

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Consequential Amendments) Bill 2011
[Digest 5/11 – no comment]

On 21 June 2011 the Senate agreed to one Opposition amendment. On 22 June 2011 the House of Representatives agreed to Senate amendment and passed the bill. None of the amendments fall within the Committee's terms of reference.

Combating the Financing of People Smuggling and Other Measures Bill 2011
[Digest 2/11 and 4/11 & 6/11[amendments] and response in 3/11 Report]

On 16 June 2011 one Government amendment was agreed to, a supplementary explanatory memorandum and an addendum to the explanatory memorandum was tabled in the Senate. On 22 June 2011 the House of Representatives agreed to the Senate amendment and the bill was passed.

The Committee thanks the Minister for introducing this amendment in response to its concern that the authority to issue a notice should be based on a 'reasonable belief' as to relevant matters.

Customs Amendment (Serious Drugs Detection) Bill 2011
[Digest 2/11 and responses in 3/11 & 6/11 Report]

On 22 June 2011 the Senate agreed to one Government amendment and tabled a supplementary explanatory memorandum.

The Committee thanks the Minister for introducing this amendment in response to its concern that the proposed legislation did not include an appropriate safeguard.

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further Election Commitments and Other Measures) Bill 2011
[Digest 4/11, 5/11 &6/11 [amendments] – no response required]

On 22 June 2011 two Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the Senate. On 23 June 2011 the House of Representatives agreed to the Senate amendments and passed the bill. None of the amendments fall within the Committee's terms of reference.

Financial Framework Legislation Amendment Bill (No.1) 2011
[Digest 5/11 – no response required]

On 23 June 2011 the House of Representatives agreed to one Government amendment, which provides that a section 52 instruction is not a legislative instrument. The Committee accepts the view expressed in paragraphs 39 to 42 of the revised explanatory memorandum that the provision is declaratory.

Food Standards Amendment (Truth in Labelling- Palm Oil Bill 2011
[Digest 8/10 – no comment]

On 23 June 2011 the Senate agreed to four Independent (Senator Xenophon) amendments. None of the amendments fall within the Committee's terms of reference.

National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011
[Digest 4/11 and response in 6/11 Report]

On 22 June 2011 a supplementary explanatory memorandum was tabled and 12 Government amendments agreed to in the House of Representatives. On 23 June 2011 a revised explanatory memorandum was tabled in the Senate and the bill was passed on 4 July. The Committee thanks the Minister for the taking the action outlined in its *Sixth Report* and as the bill has passed makes no comment on the other amendments.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Remuneration and Other Legislation Amendment Bill 2011
[Digest 4/11 – no comment]

On the 23 June 2011 seven Government amendments were agreed to in the Senate. Subsequently, on the same day the House of Representatives agreed to the amendments and the bill was passed. 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 & 6/11 [amendments] – no comment]

On 16 June 2011 nine Government amendments were agreed to and a supplementary explanatory memorandum was tabled in the Senate. On 22 June 2011 a revised explanatory memorandum was tabled in the House of Representatives and the bill was passed. None of the amendments fall within the Committee's terms of reference.

Tertiary Education quality and Standards Agency Bill 2011
[Digest 4/11 and 6/11[amendments] and response in 5/11 Report]

On 16 June 2011 an addendum to the explanatory memorandum and a supplementary explanatory memorandum were tabled and 20 Government amendments were agreed to in the Senate. On 22 June 2011 a revised explanatory memorandum was tabled and the bill was passed. 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

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.