

**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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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

Assisting Victims of Overseas Terrorism Bill 2012

Introduced into the Senate on 1 March 2012

By: Senator Brandis

Background

This bill proposes the establishment of a framework to facilitate financial assistance for Australians killed or injured, or their next of kin, as a result of international terrorist acts.

Inappropriate delegation of legislative power

Clause 6

This bill proposes the establishment of a framework, similar to State and Territory victims of crime compensation schemes, for Australians killed or injured, or their next of kin, as a result of international terrorist acts. Subclause 6(1) requires the Minister to, by legislative instrument, determine guidelines for the operation of the scheme. Subclause 6(2) provides that the guidelines must include details on the eligibility requirements to be satisfied before a recommendation may be made to the Minister for payment of financial assistance.

The Committee generally prefers that important matters be dealt with in primary legislation. The bill authorises a compensation framework to be developed through delegated legislation and provides little by way of guidance as to the substance of the eligibility requirements. Although the Committee accepts that framework legislation may be appropriate in certain circumstances, it expects that the explanatory memorandum will provide a detailed explanation of why it is considered necessary to deal with important questions in delegated legislation.

The Committee notes that clause 8 of the bill imposes a requirement on the Minister to consult with representatives of a number of affected or interested groups prior to making the guidelines and then twice each year after the commencement of the framework. The importance of ensuring that the guidelines reflect the concerns of affected and interested groups may be part of a justification for the delegation of legislative power, however in the absence of discussion of the need for delegated legislation **the Committee**

seeks the Senator's advice as to an explanation for the proposed approach.

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

Corporations Legislation Amendment (Audit Enhancement) Bill 2012

Introduced into the House of Representatives on 29 February 2012

Portfolio: Treasury

Background

The bill amends the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2004* to:

- provide for directors of a listed company or listed registered scheme to extend the five year auditor rotation period for up to two years if specified criteria are met;
- introduce a requirement for audit firms to publish an annual transparency report if they conduct audits of ten or more Australian listed companies, listed registered schemes, authorised deposit-taking institutions or insurances companies;
- remove the auditor independence function from the Financial Reporting Council and replace it with a role to provide the Minister and professional accounting bodies strategic policy advice and reports in relation to the quality of audits conducted by Australian auditors;
- provide ASIC with the power to issue public audit deficiency reports on individual audit firms; and
- allow ASIC to communicate directly with an audited body in specified circumstances.

Strict liability

Item 18, Schedule 1, Part 2, subsection 332A(3)

This proposed provision makes offences relating to the failure by auditors to comply with the annual transparency reporting requirements offences of strict liability. The explanatory memorandum, at pages 32 and 33, states that this:

...is designed to provide an incentive across the firm or audit company to foster an effective culture of compliance.

It is also the case that the applicable penalties (see item 19) are within the limits set out in the *Guide to Framing Commonwealth Offences*. Although the Committee prefers to see explanatory memoranda deal with the justification for strict liability in more detail and, in particular, for close attention to be paid to the principles stated in the *Guide to Framing Commonwealth Offences*, in the circumstances **the Committee leaves this matter to the consideration of the Senate as a whole.**

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

Inappropriate delegation of legislative power
Item 18, Schedule 1, Part 2, subsection 332B(1)

The information to be included in an annual transparency report must contain information to be prescribed by the regulations. The explanatory memorandum sets out a long list of the sort of information that will be required. However, the Committee generally prefers that important matters be dealt with in primary legislation. No explanation is given as to why delegated legislation is appropriate for these provision. Without further information it appears to the Committee that at least some of these requirements could be dealt with in primary legislation. **The Committee therefore seeks the Treasurer's advice as to the justification for the proposed approach.**

Pending the Treasurer's reply, 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.

Trespass on personal rights and liberties, collective responsibility and reversal of burden of proof
Item 18, Schedule 1, Part 2, section 332G

This provision provides that an offence that would otherwise be committed by a firm in relation to an annual transparency report is taken to have been committed by each member of the firm. The explanatory memorandum states at page 33 that this is designed to impose 'a form of collective liability...to encourage a 'culture of compliance' across the whole firm'. Subsection 332G(4) provides for exceptions, namely, if the member of the firm does not know of the circumstances that constitute the contravention concerned or

knows of the circumstances but takes reasonable steps to correct the contravention as soon as possible. The *Note* to this subsection states that in relation to these exceptions the defendant bears an evidential onus of proof.

In the Committee's view the imposition of collective responsibility should be strictly justified. In addition, the necessity to impose an evidential burden on defendants to establish the exceptions is not addressed in the explanatory memorandum. Although the question of whether steps have been taken to correct a contravention about which a person has knowledge is matter which is peculiarly within the knowledge of the defendant, it is less clear that it is appropriate to require that the defendant bear an evidential burden in relation to the question of whether or not they know of the circumstances that constitute a contravention of the provision concerned. Although the defendant's lack of knowledge of a matter may obviously be said to be something peculiarly within their knowledge, it may not always be apparent what evidence may readily be available to demonstrate a lack of knowledge by the defendant.

The Committee therefore seeks the Treasurer's advice as to the justification for the imposition of collective responsibility and for the imposition of an evidential burden on defendants.

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.

Equal Opportunity for Women in the Workplace Amendment Bill 2012

Introduced into the House of Representatives on 1 March 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *Equal Opportunity for Women in the Workplace Act 1999*. The bill provides for the following amendments to reflect the focus on gender equality in the workplace including:

- amending the name of the Act to the *Workplace Gender Equality Act 2012*;
- amending the coverage of the Act to include all employers and employees in the workplace;
- introducing a new reporting framework in which relevant employers are required to report against gender equality indicators; and
- introducing amendments relating to transparency associated with compliance with the Act and the consequences of non-compliance.

Inappropriate delegation of legislative power

Item 55, Schedule 1, subsection 19(1)

This provision requires the minister to, by legislative instrument, set minimum standards in relation to specified gender equality indicators, specified relevant employers and specified reporting periods. The Committee prefers that the use of delegated legislation is fully explained. In this case the explanatory memorandum does not address this point, but indicates at page 2 that the development of these standards will be evidence-based and that the Minister must consult the Agency prior to making the standards. It is also envisaged (see subsection 31(3)) that the Minister will consult with other relevant persons, such as industry and employee organisations. **In these circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

Fair Work (Job Security and Fairer Bargaining) Amendment Bill 2012

Introduced into the House of Representatives on 27 February 2012

By: Mr Bandt

Background

This bill amends the *Fair Work Act 2009* to provide for:

- Fair Work Australia to have regard to job security and workloads of employees who will be covered by a workplace determination during a dispute;
- a requirement for an employer to give three days notice of a lockout or any change in normal operation preparatory to a lockout;
- Fair Work Australia to have the capacity to make orders that only suspend or terminate the specific action that is causing significant economic harm or threatening to endanger the life, the personal safety or health, or the welfare, of the population or causing significant damage to the Australian economy; and
- the introduction of changes regarding permitted matters capable of settlement.

The Committee has no comment on this bill.

Indirect Tax Laws Amendment (Assessment) Bill 2012

Introduced into the House of Representatives on 29 February 2012

Portfolio: Treasury

Background

This bill amends various laws relating to indirect taxation.

Schedule 1 amends the *Taxation Administration Act 1953*, the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and other taxation Acts to harmonise the current self acting system that applies to the goods and services tax, the luxury car tax, the wine equalisation tax and fuel tax credits with the self assessment system for income tax.

Schedule 2 amends the *A New Tax System (Goods and Services Tax) Act 1999* and the *Fuel Tax Act 2006* to legislate the Commissioner of Taxation's power to make a determination allowing a taxpayer to take into account, on his or her goods and services tax or fuel tax return for the current tax period or fuel tax return period, errors made in working out net amounts and net fuel amounts for preceding tax periods or fuel tax return periods.

Schedule 3 amends the GST Act to confirm that the luxury car tax and the wine equalisation tax are part of the 'net amount' that is calculated under the GST Act. Schedule 3 also makes amendments to create a single 'net amount' definition that applies differently to reflect differing circumstances.

Schedule 4 makes technical corrections and other minor amendments to the taxation laws. These amendments are part of the Government's commitment to the care and maintenance of the tax system.

The Committee has no comment on this bill.

Low Aromatic Fuel Bill 2012

Introduced into the Senate on 1 March 2012

By: Senator Siewert

Background

This bill is to promote the supply of low aromatic fuel and control the supply of other fuels in certain areas by providing the Minister with the power to designate certain Low Aromatic Fuel (LAF) and Fuel Control Areas.

Trespass on personal rights and liberties, reversal of onus Subclauses 8(4), 10(2) and 12(2)

This provision provides for exceptions to offences relating to the transportation and possession of regular unleaded petrol for supply in a low aromatic fuel area. The first exception is that the conduct is covered by a Ministerial exemption and that any conditions of the exemption have been complied with. The second is that the corporation has engaged in the conduct in order to comply with a direction under an emergency law (the *Liquid Fuel Emergency Act 1984* or a law prescribed by the regulations—see clause 5). It is likely to be the case that circumstances relating to both of these exceptions are matters which can be said to be peculiarly within the knowledge of the defendant, though it is regrettable that the explanatory memorandum does not address the question.

The same issue also arises in relation to subclause 10(2) in relation to an offence of failing to comply with requirements determined by legislative instruments and subclause 12(2) in relation to general fuels requirements.

As it appears that the provisions relate to matters which can be said to be peculiarly within the knowledge of the defendant, the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Inappropriate delegation of legislative power Clauses 11 and 12

Clause 11 of the bill empowers the Minister to determine requirements relating to the supply, transport, possession or storage of a fuel in, or in relation to, a low aromatic fuel area or a fuel control area. Contravention of a requirement made under clause 11 constitutes an offence pursuant to clause 12. There may be reasons that justify enabling these important requirements in regulations rather than including them in the primary legislation. **However, as the explanatory memorandum does not address the justification for setting out the content of an offence in a legislative instrument, the Committee seeks the Senator's explanation as to why the proposed approach is justified.**

Pending the Senator's reply, 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.

Native Title Amendment (Reform) Bill (No.1) 2012

Introduced into the Senate on 29 February 2012

By: Senator Siewert

Background

This bill amends the *Native Title Act 1993* by:

- re-defining 'traditional' to ensure that laws and customs can be considered traditional if they remain identifiable through time;
- providing for prior extinguishment to be disregarded by agreement;
- providing clarification of the meaning of negotiating in good faith.

The Committee has no comment on this bill.

Public Service Amendment Bill 2012

Introduced into the House of Representatives on 1 March 2012

Portfolio: Prime Minister

Background

This bill amends the *Public Service Act 1999* by:

- revising the Australian Public Service (APS) Values, clarify the roles and responsibilities of Secretaries and amending their employment arrangements, and establishing APS leadership groups;
- revising and clarifying the roles and functions of the Public Service Commissioner; and
- amending the day-to-day workforce management of the APS through a range of operational amendments.

The bill also provides for consequential and transitional provisions which:

- validate actions and decisions taken before commencement;
- cover aspects of the transition to the new employment framework; and
- make consequential amendments to other legislation where appropriate.

Inappropriate delegation of legislative power

Item 70, Schedule 1, subsection 72E(1)

Proposed subsection 72E(1) provides that the regulations may authorise the use or disclosure of personal information. Disclosures thereby authorised would mean that they would be authorised by law for the purposes of the *Privacy Act 1988*. Given that the disclosure of personal information raises privacy concerns and the explanatory memorandum does not address the issue **the Committee seeks the Prime Minister's advice as to why the primary legislation cannot deal with the issue.**

Pending the Prime Minister's reply, 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 legislative power
Items 75, 76 and 79

These items contain notes that the disallowance and sunset provisions of the legislative instruments do not apply to the legislative instruments which are referred to. As the explanatory memorandum does not address why this is appropriate **the Committee seeks the Prime Minister's advice as to the justification for the proposed approach.**

Pending the Prime Minister's reply, 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.

Special Broadcasting Service Amendment (Natural Program Breaks and Disruptive Advertising) Bill 2012

Introduced into the Senate on 27 February 2012

By: Senator Ludlam

Background

This bill amends the *Special Broadcasting Service Act 1991* to phase out advertising within television programs.

Delayed commencement

The intention of the bill is described as ‘phasing out’ advertising within television programs, and this is achieved by introducing new requirements each year for three years from 1 January 2013. Unfortunately the explanatory memorandum does not address the question of delayed commencement, but in the circumstances the Committee makes no further comment.

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

Tax and Superannuation Laws Amendment (2012 Measures No.1) Bill 2012

Introduced into the House of Representatives on 1 March 2012

Portfolio: Treasury

Background

This bill amends various taxation and superannuation laws.

Schedule 1 to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999* to ensure that a supply made by a health care provider to an insurer, a statutory compensation scheme operator, a compulsory third party scheme operator or a government entity, is treated as a GST-free supply to the extent that the underlying supply from the health care provider to an individual is a GST-free health supply.

Schedule 2 to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to restore the policy intent that the non commercial activities of government related entities are not subject to goods and services tax.

Schedule 3 to this Bill amends the *Income Tax Assessment Act 1997* to temporarily pause the indexation of the superannuation concessional contributions cap so that it will remain fixed at \$25,000 up to and including the 2013-14 financial year.

Schedule 4 to this Bill amends the *Income Tax Assessment Act 1997*, the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*, the *Taxation Administration Act 1953*, and the *Taxation (Interest on Overpayments and Early Payments) Act 1983* to allow eligible individuals the option to effectively have excess concessional contributions of \$10,000 or less refunded to them.

Schedule 5 permits the Australian Taxation Office to disclose details of an individual's superannuation interests and superannuation benefits to a regulated superannuation fund or public sector superannuation scheme, an approved deposit fund, retirement savings account provider or their administrators.

Schedule 6 to this Bill amends the *Superannuation Industry (Supervision) Act 1993* to require employers to report, on payslips, any information prescribed in the regulations about superannuation contributions.

Schedule 7 to this Bill amends the *Taxation Administration Act 1953* to provide the Commissioner of Taxation with a legislative discretion to withhold entitlements to high risk refunds pending refund integrity checks of a taxpayer's claim.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012

[Digest 14/11 – response in 1st Report]

On 28 February 2012 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

Crimes Legislation Amendment (Powers and Offences) Bill 2011

[Digest 1 & 2/12 – response in 3rd Report]

On 1 March 2012 the House of Representatives agreed to five Government amendments and tabled two supplementary explanatory memoranda. The Committee notes the proposed additional safeguards relating to sharing personal information.

Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011

[Digest 12/11 – no response required]

On 29 February 2012 the Senate agreed to five Government and four Australian Greens amendments and tabled a supplementary explanatory memorandum. On 1 March 2012 the House of Representatives agreed to the Senate amendments and the bill was passed. The Committee has no comment on the additional material.

Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011

[Digest 8/11 – responses 12th/11 and 1st & 2nd/12 Report]

On 27 February 2012 an addendum to the explanatory memorandum was tabled in the Senate. On 29 February 2012 the Senate agreed to the bill without amendment. In the circumstances the Committee has no comment on the additional material. The Committee has no comment on the additional material.

Fairer Private Health Insurance Incentives Bill 2012 and related bills

[Digest 8/11 – no comment]

On 27 February 2012 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

National Health Amendment (Fifth Community Pharmacy Agreement Initiatives) Bill 2012

[Digest 1/12 – no comment]

On 27 February 2012 a revised explanatory memorandum was tabled in the Senate. On 1 March 2012 the Senate agreed to the bill without amendment. The Committee has no comment on the additional material.

National Radioactive Waste Management Bill 2010

[Digest 8/10 – no comment]

On 27 February 2012 a supplementary explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

Stronger Futures in the Northern Territory Bill 2011

[Digest 1/12 – response in 1st Report]

On 27 February 2012 the House of Representatives agreed to two Governments and five Opposition amendments and tabled a supplementary explanatory memorandum. On 29 February 2012 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

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 since the previous *Alert Digest*

Nil

Other relevant appropriation clauses in bills

Nil