

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 the Hon Ian Macdonald (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.

• 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.

Agriculture, Fisheries and Forestry Legislation Amendment Bill (No.1) 2012

Introduced into the House of Representatives on 21 March 2012

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill makes amendments to the following portfolio Acts:

- *Wine Australia Corporation Act 1980* to reduce the record keeping requirements of persons, or their agents, who supply or receive wine goods that are packaged for sale to a consumer; and provide that a vintage year occurs between 1 September to 31 August;
- *Fisheries Management Act 1991* to make compliance with a direction to close a fishery a condition on all types of statutory fishing concessions; and make technical amendments;
- *Fisheries Administration Act 1991* to enable co-management arrangements to be implemented;
- *Primary Industries Levies and Charges Collection Act 1991* to enable the secretary to remit all or part of a penalty imposed for the late payment of a levy or charge;
- *Farm Household Support Act 1992* to remove specific references to departments and secretaries.

The bill also makes technical amendments to the *Export Control Act 1982*, the *Primary Industries and Energy Research and Development Act 1989* and the *Quarantine Act 1908*. The bill also repeals the *States Grants (War Service Land Settlement) Act 1952*.

The Committee has no comment on this bill.

Broadcasting Services Amendment (Anti-siphoning) Bill 2012

Introduced into the Senate on 22 March 2012

Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Broadcasting Services Act 1992* in relation to free-to-air television coverage of anti-siphoning events by:

- restricting the acquisition of rights to televise anti-siphoning events by subscription television licensees;
- restricting the conferral of online coverage rights on content service providers; imposing coverage obligations on free-to-air broadcasting (anti-hoarding rules);
- imposing notification requirements concerning the acquisition and cessation of rights to televise anti-siphoning events, or entitlements to confer such rights, on commercial television broadcasting licensees, national broadcasters and their program suppliers; and
- requiring the minister to cause a review of anti-siphoning before 31 December 2014

The Committee has no comment on this bill.

Coastal Trading (Revitalising Australian Shipping) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Infrastructure and Transport

Background

This bill is part of a package of five bills in relation to the Australian shipping industry. The bill provides for:

- the regulatory framework for access by vessels to coastal trading in Australia
- three types of licences which authorise vessels to carry passengers or cargo between ports in Australia;
- the application process for licences;
- the decision-making process including criteria when granting a licence;
- condition and cancellation of licences;
- ministerial exemptions from the Act;
- appointment and enforcement of legislative requirements;
- the review of certain decisions by the Administrative Appeals Tribunal; and
- the delegation of functions and powers by the Minister and Secretary.

Self-incrimination

Clause 82

The Committee routinely comments on provisions that abrogate the common law privilege against self-incrimination. This provision removes the operation of the privilege in relation to failures to comply with a notice issued under clause 79 of the Bill. Clause 79 requires a person to provide information, produce a document or thing or to answer questions.

The Committee has, however, accepted that there may be circumstances where the abrogation of the privilege is justified. Notably, the Committee has indicated that it is easier to justify the abrogation of the privilege where the legislation provides for a use and derivative use immunity. Subclause 82(2) does provide for a use and derivative use immunity in relation to criminal proceedings and civil proceedings for a contravention of a civil penalty provision.

Nevertheless, the Committee is concerned that the explanatory memorandum does not justify the abrogation of the privilege against self-incrimination. Even where abrogation of the privilege is subject to the inclusion of a use and derivative use immunity the Committee expects that a justification for the abrogation of the privilege will be provided in the explanatory memorandum. **The Committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, 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.

Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Infrastructure and Transport

Background

This bill is part of a package of five bills in relation to the Australian shipping industry. The bill makes transitional arrangements and amends the:

- *Australian Maritime Safety Authority Act 1990* to enable the Australian Maritime Safety Authority to disclose information to a person for the purpose of the administration or enforcement of a Commonwealth law relating to coastal trading;
- *Navigation Act 1912* to remove the definition of, and regulatory arrangements for, coastal trading; provide that the qualifications and employment of masters and seamen apply to ships used to engage in coastal trading under a general licence; and remove reference to a review of certain decisions by the Administrative Appeals Tribunal; and
- *Occupational Health and Safety (Maritime Industry) Act 1993* and the *Seafarers Rehabilitation and Compensation Act 1992* to provide that those Acts apply to vessels engaged in coastal trading under certain licence conditions.

The Committee has no comment on this bill.

Customs Amendment (Anti-dumping Improvements) Bill (No.2) 2012

Introduced into the House of Representatives on 21 March 2012

Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* to:

- clarify that the Chief Executive Officer of the Customs and Border Protection Service and the minister have the power to take all facts available into account when determining whether a countervailable subsidy has been received, the amount of a countervailing subsidy, and when certain parties fail to provide information within a reasonable period;
- enable the level of duties of an anti-dumping measure to be recalculated during a continuation inquiry; and
- remove the need to include profit when calculating the normal value of a good in its country of origin.

The Committee has no comment on this bill.

Customs Tariff Amendment (Schedule 4) Bill 2012

Introduced into the House of Representatives on 21 March 2012

Portfolio: Home Affairs

Background

This bill amends *Customs Tariff Act 1995* by consolidating concessions of similar coverage and removing redundant or rarely used concessions.

The bill also makes consequential amendments to the *A New Tax System (Goods and Services Tax) Act 1999*, *A New Tax System (Luxury Car Tax) Act 1999* and *A New Tax System (Wine Equalisation Tax) Act 1999*.

The Committee has no comment on this bill.

Customs Tariff (Anti-dumping) Amendment Bill (No.1) 2012

Introduced into the House of Representatives on 21 March 2012

Portfolio: Home Affairs

Background

This bill amends the *Customs Tariff (Anti-Dumping) Act 1975* to allow the Minister to use different forms of interim dumping duty from those currently used. The forms of interim dumping duty which the Minister will be able to use will include an ad valorem (percentage) duty, a fixed amount of duty, a combination duty, or a floor price.

The Committee has no comment on this bill.

Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Sustainability, Environment, Water, Population and Communities

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to establish an Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development as a statutory authority to provide scientific advice on coal seam gas and large coal mining developments which may have significant impacts on water resources.

The Committee has no comment on this bill.

Federal Financial Relations Amendment (National Health Reform) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Treasury

Background

This bill implements changes to federal financial arrangements to health and hospital services as set out in the National Health Reform Agreement, endorsed by the Commonwealth and the States on 2 August 2011.

The bill amends the *Federal Financial Relations Act 2009* to:

- index and subsequently adjust the National Disability specific purpose payment;
- replace the National Healthcare specific purpose payment with National Health Reform payment funding; and
- remove the requirement to separately determine components of GST revenue for the purposes of the Minister's annual determination of GST revenue.

The Committee has no comment on this bill.

Health Insurance (Dental Services) Bill 2012

Introduced into the House of Representatives on 19 March 2012

By: Mr Dutton

Background

This bill requires the Minister for Health, in conjunction with such other Ministers as may be necessary, to redress past and future inequities that have arisen from the operation of subsection 10(2) of the *Health Insurance (Dental Services) Determination 2007*.

Delegation of legislative power

Retrospective effect

Sub-item 2(1) and paragraph 6(1)(e)

The purpose of this Bill is to overcome the effect of a Ministerial Determination, issued in 2007, which had the effect of requiring dental practitioners to repay a claimed Medicare benefit in circumstances in which a practitioner had not complied with certain requirements to provide information about procedures which had been conducted.

Rather than providing for a particular mechanism for overcoming the operation of this Determination, the bill requires the Minister to ‘fully redress the inequity’ (clause 4) by undertaking one or more of a number of alternative courses of action specified. The possible actions which may be taken by the Minister are set out in clause 6, and include the taking of ‘such other action as is necessary to redress the inequity’ (paragraph 6(1)(e)).

One of the possible actions the Minister may take, is to ‘amend the Determination...so that it has the effect that it would have if it were amended by the Parliament in accordance with the amendments set out in Schedule 1’. Were the Minister to take this course of action the effect would be that a new Ministerial Determination would have retrospective effect, as subitem 2(1) of Schedule 1 of the Bill provides that the amendments would apply in relation to dental services provided ‘before the commencement’ of this Schedule.

Where it is thought necessary to change the operation of legal requirements with retrospective effect it is preferable for Parliament to take this decision rather than providing an option to a Minister to do so. **The committee**

therefore seeks the Member's advice as to the justification for the necessity of including this possible delegation of legislative power to the Minister.

Pending the Member'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.

Health Insurance (Dental Services) Bill 2012 [No.2]

Introduced into the Senate on 21 March 2012

By: Senator Bushby

Background

This bill requires the Minister for Health, in conjunction with such other Ministers as may be necessary, to redress past and future inequities that have arisen from the operation of subsection 10(2) of the *Health Insurance (Dental Services) Determination 2007*.

The bill is in identical terms to the bill introduced in the House of Representatives by Mr Dutton, discussed above.

Delegation of legislative power

Retrospective effect

Sub-item 2(1) and paragraph 6(1)(e)

For the reasons outlined in relation to the identical bill discussed in the section above, **the Committee seeks the Senator's advice as to the justification for the necessity of including this possible delegation of legislative power to the Minister.**

Pending the Member'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.

Live Animal Export (Slaughter) Prohibition Bill 2012

Introduced into the Senate on 22 March 2012

By: Senator Rhiannon

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 Legislation Amendment (Student Visas) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Immigration and Citizenship

Background

This bill amends *Education Services for Overseas Students Act 2000* and the *Migration Act 1958* to implement recommendation 24 of the independent *Strategic Review of the Student Visa Program*, conducted by the Hon. Michael Knight AO.

The bill abolishes the automatic cancellation of student visas for unsatisfactory course attendance or academic progress, enabling each case to be considered on its merits

The Committee has no comment on this bill.

National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Health and Ageing

Background

This bill amends the *National Health Reform Act 2011* to establish the Administrator of the National Health Funding Pool and the National Health Funding Body as set out in the National Health Reform Agreement agreed to by the Council of Australian Governments on 2 August 2011.

Reversal of burden of proof

Item 27, proposed subsection 268(2)

Proposed subsection 268(1) provides that a person who is or was the Administrator commits an offence if they disclose or use ‘protected Administrator information’. Subsection 268(2) provides for a number of exceptions. These exceptions relate to situations in which the disclosure or use is justified by reference to Commonwealth or State or Territory law, COAG directions, the fact the disclosure is to a responsible Minister, has the consent of the person or relates to information that has already lawfully been made available to the public. The explanatory memorandum states that ‘it would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing information should reasonably be aware of the basis for their disclosure’ (see the explanatory memorandum at page 8).

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt. The Committee has, however, accepted that reversal of the onus of proof may be justifiable where a matter may be said to be peculiarly within the knowledge of the accused or where the proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused. Nevertheless it is suggested that a blanket statement that it would be difficult for the prosecution to prove the relevant matters, which relate to nine different exceptions, does not provide a sufficient basis for the Committee to be assured that the approach is justified in each instance.

The same issue arises in relation to proposed subclause 269(2)

The Committee would prefer that placing the onus of proof on a defendant in the circumstances outlined in 268(2)(a) to 268(2)(i) was explained in more detail and **the Committee therefore seeks the Minister's further advice about this matter.**

Pending the Minister'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.

Delegation of legislative power

Item 27, proposed paragraph 279(3)(c)

Proposed subsection 279(2) prohibits the publication of information which is likely to enable the identification of a particular patient by specified persons or bodies. Proposed paragraphs 279(3)(a) and (b) provide that subsection (2) does not apply if consent is obtained from the patient (if over 18 years) or the patient's surviving partner. Proposed paragraph 279(3)(c) enables the regulations to authorise other individuals who may give consent to the publication of the information. The explanatory memorandum does not state why it is not possible to specify further individuals who may appropriately give consent for the purposes of this provision. **The Committee therefore seeks the Minister's further advice as to the need to deal with this issue in the regulations.**

Pending the 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.

Delegation of legislative power, 'Henry VIII' clause

Item 27, proposed paragraph 282(2)

This provision enables regulations (made under proposed subsection 282(1)) to modify the operation of a number of important Commonwealth statutes in so far as they may relate to things done by, or in relation to, the Administrator, the Funding Body CEO or the Funding Body. It is the practice of the Committee to comment on so-called Henry VIII clauses. Such clauses enable

delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government.

The Committee accepts that there may be justification for the use of such clauses but expects the issue to be addressed in explanatory memoranda. In this instance, subsection 282(3) provides that regulations under subsection 282(2) may only be made with the agreement of all members of the Standing Council on Health. The approach adopted appears to be a solution to a genuine problem, namely, that relevant decision-makers may potentially be subject to nine different sets of administrative law and related requirements. The explanatory memorandum explains at page 11 that:

...the simple solution of the states adopting the Commonwealth legislation as it stands would not be acceptable to the states, as Commonwealth legislation would not contain appropriate references to state entities. (e.g. in exemptions for Cabinet material from the operation of the Commonwealth Freedom of Information legislation).

The proposed approach also envisages (see page 11 of the explanatory memorandum) that:

...the regulations will modify the Commonwealth Acts so that they could apply effectively as laws of the states, conferring appropriate rights and obligations on state responsible Ministers and referring appropriately to state entities.

In light of the comprehensive explanation provided the Committee leaves the appropriateness of this approach to the consideration of the Senate as a whole.

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

Retrospective validation of action

Subitem 28(2)

This subitem provides that any action undertaken by a Minister of the Commonwealth or of a State before the commencement of the amendments that relates to the Administrator and that would have been valid if that Part and the corresponding provisions of the other jurisdictions had been in force at

the time, is taken to be valid. The effect is that that it is possible that an action that was not authorised by law will nonetheless be treated as having been valid after the commencement of the of the amendments.

In general it is not appropriate for members of the executive government to treat legislative proposals as law prior to their enactment and commencement. However, the explanatory memorandum at page 11 indicates that the purpose of the provision is to enable the appointment of an Administrator in all jurisdictions, even where a particular jurisdiction has not enacted the legislation. Given the cooperative nature of this legislative scheme and the fact that there do not appear to be any possible adverse effects on individuals, the Committee **leaves the appropriateness of this approach to the consideration of the Senate as a whole.**

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

National Vocational Education and Training Regulator (Charges) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Tertiary Education Skills, Science and Research

Background

This bill enables the National VET Regulator, known as the Australian Skills Quality Authority, to impose charges on NVR registered training organisations for compliance audits and substantiated complaint investigations conducted by the Regulator.

Delayed commencement

Clause 2

The substantive provisions of the Bill will not commence until 1 Jan 2013. Where there is a delay in commencement of legislation longer than six months (or a possible delay, depending on when passage of the bills occurs) 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. While the Committee is aware that there are circumstances in which the proposed approach may be appropriate, it expects that the justification will be addressed in the explanatory memorandum. In this instance the explanatory memorandum does not appear to outline the justification for the proposed commencement of the bill. **The Committee therefore seeks the Minister's advice as to the rationale for the proposed commencement of the bill, and any possible delay in commencement.**

Pending the Minister's reply, 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.

Delegation of legislative power

Part 2, item 9 and Part 3, item 12

The object of this bill is to enable the Regulator to charge registered training organisations for compliance audits and the investigation of complaints which are substantiated.

Item 9 of Part 2 requires the Minister to make a legislative instrument determining the formula for calculating the charge payable under the Part 2. The charges are premised on a cost recovery basis. The explanatory memorandum states that the charges payable under Part 2 have been subject to extensive consultation and the details of the charges payable and the consultation process have been made publicly available in a 'Cost Recovery Impact Statement'.

The same issue arises in relation the charge payable under Part 3.

In light of the stated cost recovery approach, the use of a formula, and the detailed consultation the Committee makes no further comment on this delegation of legislative power.

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

National Water Commission Amendment Bill 2012

Introduced into the Senate on 22 March 2012

Portfolio: Sustainability, Environment, Water, Population and Communities

Background

This bill amends the *National Water Commission Act 2004* to:

- continue the National Water Commission (NWC) beyond its current sunset date of 30 June 2012;
- revise the functions and operations of the NWC;
- close the Australian Water Fund (AWF) Account and remove the NWC's ability to administer any AWF funds;
- reduce the number of NWC commissioners to five; and
- provide for a review of the NWC's performance by the end of 2017, with further reviews every five years; and make technical amendments.

The Committee has no comment on this bill.

Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill introduces a new payment for eligible working fathers and partners who are caring for a child born or adopted from 1 January 2013.

The bill makes minor amendments to the *Paid Parental Leave Act 2010* to:

- amend the provisions which permit 'keeping in touch days'; and
- clarify the operation of a number of provisions, such as debt recovery, notice and the provisions relating to delegation of the Secretary's powers under the Act.

The bill also amends the *Fair Work Act 2009* to clarify unpaid parental leave arrangements where there is a stillborn or infant death.

Retrospective effect

Part 1 of Schedule 2

The explanatory memorandum states that this Schedule makes a number of minor amendments to the *Paid Parental Leave Act* to improve clarity and consistency. Part 1 of the Schedule commences retrospectively, from the time the *Paid Parental Leave Act* commenced. The explanatory memorandum states, at page 43, that 'no person's rights will be adversely affected' by this retrospective commencement.

However, the Committee is unclear about whether this is correct in relation to the operation of item 8. This item proposes to insert a new subsection 257(7) into the *Paid Parental Leave Act*. This subsection provides that a failure, by the SSAT, to comply with a requirement to notify a person who is dissatisfied with the outcome of a review, that they may apply to the AAT for a review of the decision, does not affect the validity of the decision. The explanatory memorandum at page 45 justifies this by reference to the fact that the

approach is consistent with an equivalent notification requirement in *A New Tax System (Family Assistance) (Administration) Act 1999*.

Although that may be accepted, it is conceivable that the failure to notify a person of their right to seek review (in the AAT) of an SSAT decision may contribute to them being out of time to lodge such an appeal. The effect of the amendment proposed in item 8 may impact on such a person's ability to successfully challenge the decision in judicial review proceedings, which would appear to the committee to constitute an adverse impact on a person's right. **The Committee therefore seeks the Minister's advice as to why it is necessary to provide for the retrospective commencement of this provision and confirmation that it could not conceivably adversely affect a person's rights.**

Pending the Minister'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.

Poker Machine Harm Reduction (\$1 Bets and Other Measures Bill 2012

Introduced into the Senate on 22 March 2012

By: Senators Di Natale, Madigan and Xenophon

Background

This bill implements a recommendation from the Productivity Commission's 2010 report on Gambling and provides for the regulation of other parameters of poker machine operation in order to limit the rate of loss to users of such machines.

The bill also provides that the minister is to take all reasonable steps to implement uniform national standards for poker machines in relation to harm minimisation, with particular reference to maximum losses, to take effect from 1 January 2015 and for the establishment of a national monitoring network.

Penalties

Subclause 10(5)

Subclause 10(5) provides that a pecuniary penalty, determined by the Federal Court under subclause 10(2), for contravening the civil penalty provisions in clause 7 'is not to exceed 2,000 penalty units for each contravention'. A continuing area of concern for the Committee in its scrutiny of bills is the maintenance of consistency between penalty provisions across Commonwealth legislation. As the explanatory memorandum does not address the appropriateness of the maximum penalty, **the Committee seeks the Senators' advice as to the justification for the proposed approach.**

Pending the Senators' 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.

Shipping Reform (Tax Incentives) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Infrastructure and Transport

Background

This bill is part of a package of five bills in relation to the Australian shipping industry. The bill provides for the mechanism for tax concessions for the shipping industry by:

- the issue of certificates to applicants who meet certain requirements;
- first time applicants being issued with a notice to confirm they meet the necessary requirements;
- enabling the department to collect and collate data; and
- enabling disputed decisions to be reviewed.

The Committee has no comment on this bill.

Shipping Registration Amendment (Australian International Shipping Register) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Infrastructure and Transport

Background

This bill is part of a package of five bills in relation to the Australian shipping industry. The bill amends the *Shipping Registration Act 1981*:

- to establish a new Australian International Shipping Register and Australian General Register;
- to establish the administration of the International Register by providing for the application process for registration;
- relating to employment conditions for seafarers;
- relating to collective agreement negotiation processes;
- relating to enforcement powers for the Australian Maritime Safety Authority; and
- to establish a civil penalty and infringement notice regime.

The bill also makes consequential amendments to the *Australian Maritime Safety Authority Act 1990*, the *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* and the *Navigation Amendment Act 2011*.

Delegation of legislative power

Item 34, proposed subsection 33B(3)

This proposed subsection enables additional requirements relating to the cancellation of registration to be prescribed by the regulations. As the committee prefers that important matters be included in primary legislation whenever this is appropriate, given the significance of the power to cancel registration, and as this matter is not addressed in the explanatory memorandum the Committee **seeks the Minister's advice as to the rationale for the proposed approach.**

Pending the 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.

Delegation of legislative power

Schedule 1, item 96

Proposed subsection 83(5) provides that the regulations may provide for offences and for the imposition of civil penalties. Although proposed subsection 96(5A) states that the penalties established must not be more than 50 penalty units for an individual or 250 penalty units for a body corporate, no justification is given for the need for providing for the imposition of penalties in regulations rather than in the primary act. The maximum penalties that may be imposed are consistent with the approach recommended by the *Guide to Framing Commonwealth Offences*, however, **the Committee seeks the Minister's advice as to the need for such penalties to be dealt with in regulations.**

Pending the 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.

Trespass on personal rights or liberties

Schedule 2, item 13

This item provides that employment related legislation specified in this Part of the bill, including the *Fair Work Act 2009*, does not apply to ships registered in the International Register when they are engaged in international trading. The explanatory memorandum states at page 15 that this approach reinforces 'the object of the AISR to provide an internationally competitive international register'.

The Statement of Compatibility, at page 5 of the explanatory memorandum, argues that the Bill, along with the Navigation Act, does nonetheless protect the right of workers to just and favourable conditions of work' and that the protections are in accordance with the Maritime Labour Convention (see also page 17 of the explanatory memorandum). **In these circumstances the**

Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

Pending the Minister'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.

Reversal of burden of proof

Schedule 3, item 4, proposed subsection 61BM(3)

This proposed subsection imposes an evidential burden of proof on a defendant who wishes to rely on a 'mistake of fact' defence in relation to a civil penalty provision. This is a standard provision in relation to the availability of a mistake of fact exception and the explanatory memorandum at page 22 identifies the accepted rationale for such an approach, namely, that the defendant's evidence about his or her state of mind with respect to having a mistaken belief is peculiarly within the knowledge of the defendant.

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

Skills Australian Amendment (Australian Workforce and Productivity Agency) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Tertiary Education, Skills, Science and Research

Background

This bill makes amendments to the *Skills Australia Act 2008* to:

- change the name of the existing Skills Australia body to the Australian Workforce and Productivity Agency;
- broaden the object of the Act to include the provision of advice on the allocation of Commonwealth industry skills and workforce development funding including the National Workforce Development Fund;
- broaden the functions of the body to allow for a stronger research, analysis and advisory role, and to specifically address improvements in Australian workforce productivity;
- expand the size of the body from a total of seven to ten members, including an independent chair; and
- expand on the current membership criteria to reflect the transition to a union and industry-led body.

The Committee has no comment on this bill.

Solar Hot Water Rebate Bill 2012

Introduced into the House of Representatives on 19 March 2012

By: Mr Hunt

Background

This bill provides for the remaining portion of expenditure allocated to the Solar Hot Water Rebate in 2011-2012 to be reinstated.

The Committee has no comment on this bill.

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

Introduced into the House of Representatives on 21 March 2012

Portfolio: Treasury

Background

This bill amends various taxation laws.

Schedule 1 amends the *Income Tax Assessment Act 1997* to implement the 2011-12 Budget measure to disallow deductions against government assistance payments from 1 July 2011.

Schedule 2 amends the *Income Tax Assessment Act 1997* to remove access to the trading stock exception to the capital gains tax primary code rule for certain assets (primarily shares, units in a trust and land) owned by a complying superannuation entity.

Schedule 3 amends the *Income Tax Assessment Act 1997* to exempt from income tax ex-gratia payments to New Zealand non-protected special category visa holders for the floods that occurred in New South Wales and Queensland in early 2012.

Schedule 4 amends the *Income Tax Assessment Act 1936* (ITAA 1936) to phase out, from 1 July 2012, the dependent spouse tax offset for taxpayers who maintain a dependent spouse born on or after 1 July 1952.

The Schedule also amends the ITAA 1936 so a taxpayer eligible for an amount of offset in respect of an invalid or carer spouse is not also entitled to the equivalent amount of dependent spouse tax offset as a component of their zone, overseas forces or overseas civilian tax offset.

Schedule 5 makes miscellaneous amendments to the taxation laws.

Legislation by press release
Retrospective application
Schedule 1

The amendments in this schedule will apply from 1 July 2011 (item 4), having been announced on 10 May 2011 in the 2011-12 Budget. The amendments are designed to disallow deductions against government assistance payments, in response to a High Court ruling which held that students receiving Youth Allowance were able to deduct study expenses from their assessable income.

The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the Executive. While the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process, a similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

The Committee has in the past been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, and this has usually been limited to publication of a draft bill within six calendar months after the date of that announcement. It is regrettable that it has taken well over six months from the announcement of this legislative change for the bill to be brought before the Parliament. **In the circumstances the Committee seeks the Minister's advice as to the justification for the delay and the rationale for seeking to apply these provisions retrospectively.**

Pending the Minister'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.

Legislation by press release
Retrospective application
Schedule 2, item 6

This Schedule makes amendments that remove access to an exception from certain rules associated with capital gains tax. The amendments appear to be

to the detriment of certain superannuation entities and life insurance companies. The explanatory memorandum at page 16 indicates that the amendments have been a response to such entities departing from the ‘general industry practice’, and claiming the exception. This has, it is said, created ‘potential uncertainty regarding the appropriate tax treatment of gains and losses made from the sale of shares owned by complying superannuation entities’.

The justification for retrospective application is that the amendments were announced on 10 May 2011 and, at page 18 of the explanatory memorandum, that there is a need to ‘promote certainty regarding the appropriate tax treatment of certain assets owned by a complying superannuation entity’. Although some proposed amendments in Schedule 4 apply from 1 July 2011, the explanatory memorandum states at page 5 that ‘no taxpayers are disadvantaged’. While noting this, the Committee observes that it is regrettable that it has taken well over six months from the announcement of this legislative change for the bill to be brought before the Parliament. **In the circumstances the Committee seeks the Minister's further advice as to the justification for the delay and the rationale for seeking to apply these provisions retrospectively.**

Pending the Minister'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.

Tax Laws Amendment (Shipping Reform) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Treasury

Background

This bill is part of a package of five bills in relation to the Australian shipping industry. The bill amends the *Income Tax Assessment Act 1997* to provide for:

- a new category of exempt income for ship operators under certain circumstances;
- an accelerated depreciation of shipping vessels through a cap of 10 years to the effective life of those vessels;
- roll-over relief from income tax for eligible ship owners; a refundable tax offset for employers of Australian resident seafarers in certain circumstances; and
- the disclosure of tax information by the Australian Taxation Office in certain circumstances.

The bill also amends the *Income Tax Assessment Act 1936* to exempt from royalty withholding tax payments made for the lease of shipping vessels in certain circumstances.

The Committee has no comment on this bill.

Telecommunications Interception and Other Legislation Amendment (State Bodies) Bill 2012

Introduced into the House of Representatives on 22 March 2012

Portfolio: Attorney-General

Background

This bill amends four Commonwealth Acts to facilitate telecommunications interception and access powers for the Victorian Independent Broad-Based Anti-Corruption Commission (IBAC) by:

- removing the Victorian Office of Police Integrity (OPI) as an authority eligible to intercept communications;
- enabling the Victorian Inspectorate to receive intercepted information as part of its oversight and complaints functions;
- enabling the IBAC and the Victorian Inspectorate to use and communicate information for relevant purposes under the *Telecommunications (Interception and Access) Act 1979*;
- making amendments to the *Taxation Administration Act 1953*, *Privacy Act 1988* and *Crimes Act 1914* to replace references to the OPI with references to the IBAC.

The Committee has no comment on this bill.

Wheat Export Marketing Amendment Bill 2012

Introduced into the House of Representatives on 21 March 2012

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill implements the recommendations of the Productivity Commission's report into wheat export marketing arrangements by amending the *Wheat Export Marketing Act 2008* to transition the wheat export industry to full deregulation by:

- abolishing the Wheat Export Accreditation Scheme and the Wheat Export Charge on 30 September 2012;
- winding up Wheat Exports Australia on 31 December 2012; and
- removing the access test requirements for grain port terminal operators on 30 September 2014.

The bill also makes consequential amendments to the *Criminal Code Act 1995* and repeals the *Wheat Export Marketing Act 2008* on 1 October 2014.

Delayed commencement

Schedule 3

The provisions in this schedule will commence on 1 October 2014. The explanatory memorandum indicates that the delay is necessary to provide industry sufficient time to adjust to the new trading environment. It is also the case that the provisions will only commence if the Minister has made a decision to accept a self-regulatory industry code of conduct to replace the 'access test' which would be repealed by schedule 3. Overall the bill is designed to transition to a fully deregulated market for bulk wheat export. It is suggested that the delay in commencement for Schedule 3 is a central part of this overall policy (see page 5 of the explanatory memorandum). **The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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.

Broad Delegation

Proposed subsection 7(4) and subsection 8(2)

This proposed subsection provides that the Secretary may make a written determination that the 'access test' which would otherwise be applicable does not apply in relation to a specified provider if 'there are special circumstances that justify the Secretary doing so'. The explanatory memorandum at page 7 lists a number of considerations to which the Secretary may have regard, though they are not mentioned in the bill.

The same issue arises in relation to subsection 8(2).

The Committee seeks the Minister's advice as to whether any consideration has been given to providing further legislative guidance as to how these discretions will be exercised, such as by prescribing matters which the Secretary must consider.

Pending the Minister's reply, 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.

Reversal of Onus

Proposed subsection 8(3)

Subsection 8(3) provides for an exception in relation to an offence of exporting wheat where there has been a failure to pass the access test (subsection 8(1)). The exception is available where wheat is exported in 'a bag' or 'a container' that is capable of holding not more than 50 tonnes of wheat. The explanatory memorandum at page 8 merely repeats the effect of these provisions and does not justify them. The Committee's long-standing expectation is that an explanation will be given for provisions which reverse the onus of proof by placing an evidential burden onto a defendant and that it will take into account the guidance provided in the Guide to formulating

Commonwealth Offences published by the Attorney-General. Although the matters are would clearly be within a defendant's knowledge, it is not clear that they would 'peculiarly' be within his or her knowledge. The Committee therefore seeks the Minister's advice as to the justification for the proposed approach.

Pending the Minister'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.

Delegation of Legislative Power, 'Henry VIII' clause Schedule 2, subitem 39(2)

This subitem enables regulations to be made pursuant to subitem 39(1) dealing with transitional matters to modify the provisions of Part 2 of Schedule 2 of this bill. Thus, the subitem is a so-called Henry VIII provision, insofar as it enables delegated legislation to modify the operation of primary legislation passed by the Parliament. The explanatory memorandum contains a detailed justification for this approach at pages 21-22. It states:

This regulation-making power has been included to ensure that the Governor-General has sufficient power to make regulations that will address any transitional issues relating to the amendments or repeals made by Schedule 2. There is a need for flexibility in this situation so that any unforeseen issues that occur as a result of the amendments or repeals make by Schedule 2, e.g. staffing matters, can be dealt with. The power is restricted to transitional issues and is envisaged to be of short duration given the operation of Schedule 3 [which repeals the whole Act, and commences on 1 October 2014].

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

COMMENTARY ON AMENDMENTS TO BILLS

Broadcasting Services Amendment (Regional Commercial Radio) Bill 2011

[Digest 1/12 – no comment]

On 19 March 2012 the Senate tabled a supplementary explanatory memorandum and a revised supplementary memorandum. On 21 March 2012 the Senate agreed to three Government amendments. On 22 March the House of Representatives tabled a revised explanatory memorandum and passed the bill without amendment. The committee has no comment on the additional material.

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011

[Digest 1/12 – no response required]

On 22 March 2012 the House of Representatives agreed to six Government amendments and tabled a supplementary explanatory memorandum.

Proposed section 1528 will allow for regulations to be made to prescribe circumstances in which 'a ban on conflicted remuneration does not apply to a benefit given to a licensee or representative' in specified circumstances (see page 7 of the supplementary explanatory memorandum). While the explanatory memorandum notes the effect of the provision, it does not explain why this important matter is relying on subordinate legislation rather than including it in the primary act. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

Corporations Amendment (Future of Financial Advice) Bill 2011

[Digest 13/11 – no response required]

On 22 March 2012 the House of Representatives agreed to 18 Government amendments and tabled a supplementary explanatory memorandum and a replacement explanatory memorandum. The committee has no comment on the additional material.

Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

[Digest 1/12 – no comment]

On 21 March 2012 the Senate agreed to 12 Government amendments and tabled a supplementary explanatory memorandum. On 22 March 2012 the House of Representatives tabled a revised explanatory memorandum and passed the bill without amendment.

One of the amendments reverses the burden of proof for an offence by requiring an 'apparent indirectly responsible entity' to pay to an outworker a specified amount, unless the entity has proved to the court's satisfaction that it is not liable to pay the outworker or that the liability is less than alleged. While the revised explanatory memorandum notes generally that the purpose of the Bill is to enhance protections for vulnerable workers, it is not clear as to the justification for reversing the onus of proof. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

Insurance Contracts Amendment Bill 2012

[Digest 1/12 & 4/12 [amendments] – response in 3rd Report]

On 20 March 2012 the Senate tabled a revised explanatory memorandum. The committee has no comment on the additional material.

Road Safety Remuneration Bill 2011

[Digest 1/12 – no response required]

On 15 March 2012 the House of Representatives tabled a supplementary explanatory memorandum and on 19 March 2012 agreed to 64 Government amendments. On 20 March 2012 the Senate tabled a revised explanatory memorandum and passed the bill without amendment.

Amendments 33(3) to 33(5) seek to provide that the regulations may prescribe a code of conduct 'to facilitate the effective and efficient collective bargaining for road transport collective agreements' (see paragraph 22 of the supplementary explanatory memorandum). The committee usually prefers to see important matters included in the primary act rather than in subordinate legislation. **In the absence of an explanation for the approach in the explanatory memorandum, the committee seeks the Minister's advice as to the justification for it.**

Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2011

[Digest 1/12 – response in 4th Report]

On 19 March 2012 the House of Representatives agreed to one Government amendment, tabled a supplementary explanatory memorandum and the bill was read a third time. On 20 March 2012 the Senate tabled a revised explanatory memorandum and passed the bill without amendment. The committee has no comment on the additional material.

Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011

[Digest 14/11 – no comment]

On 19 March 2012 the Senate tabled a supplementary explanatory memorandum. On 20 March 2012 the Senate agreed to one Government amendment. On the same day the House of Representatives agreed to the Senate amendment and the bill was passed. The Committee has no comment on the additional material.

Telecommunications Universal Service Management Agency Bill 2011

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

On 19 March 2012 the Senate tabled a supplementary explanatory memorandum. On 20 March 2012 the Senate agreed to six Government amendments and requested a further two be made by the House of Representatives. On the same day the requested Senate amendments were made by the House of Representatives. On 21 March 2012 the remaining six Senate amendments were agreed to by the House of Representatives and the bill was passed. The Committee has no comment on the additional material.

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

The Chairs and Deputy Chairs of Commonwealth, and state and territory Scrutiny Committees have noted (most recently in 2000) difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because ‘national scheme’ bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the identification of national schemes of legislation, the Committee’s practice is to note bills that give effect to such schemes as they come before the Committee for consideration.

Federal Financial Relations Amendment (National Health Reform) Bill 2012

National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012

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*

Wheat Export Marketing Amendment Bill 2012 — Schedule 2, Part 1, item 15 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*) [NB bill replaces existing standing appropriation in Part 5, Division 6 of the *Wheat Export Marketing Act 2008*]

Other relevant appropriation clauses in bills

Nil