

**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 R Siewert

Senator the Hon L Thorp

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.

Broadcasting Services Amendment (Public Interest Test) Bill 2012

Introduced into the Senate on 29 June 2012

By Senator Ludlam

Background

This bill amends the *Broadcasting Services Act 1992* to introduce a public interest test for changes in control of nationally significant media operations.

Retrospective effect

Penalties

Schedule 1, items 1 and 3

This item proposes to insert a new Part 5A into the *Broadcasting Services Act 1992* establishing a public interest test for changes in control of media operations of national significance. Proposed new section 78C places an obligation on a person who was not in a position to exercise control of a media operation of national significance to notify the ACMA if they come to be in such a position on or after 28 June 2012. Proposed section 78D provides that the ACMA can apply the public interest test to such a person if they become aware that a person has come to be in a position to control a media operation of national significance after the same date (whether or not the ACMA becomes aware of this because of a section 78C notice or otherwise). Item 3 of Schedule 1 is an application provision which provides that proposed sections 78C and 78D will apply on or after the commencement of the item, whether or not, respectively, the person or the ACMA becomes aware of the position of control of the media operation before, at or after that commencement. These application provisions commence on the day the Act receives the Royal Assent.

The Committee has recognised that a distinction may be drawn between provisions which commence retrospectively and those which operate on rights and obligations by reference to past events, though the line between the two cases can sometimes be difficult to draw. In this case the proposed new public interest test may be applied to change an affected person's rights and obligations on the basis of whether legal arrangements were entered into at a date prior to the proposed law being passed by the legislature. In this sense, the proposed changes are given legal significance prior to them being enacted

into law. **In these circumstances, the Committee seeks the Senator's advice as to the justification for the proposed approach. The Committee would also appreciate the Senator's advice as to whether the penalties in the bill are consistent with similar provisions in Commonwealth legislation.**

Pending the Senator's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Treasury

Background

This bill amends:

- the *Commonwealth Inscribed Stock Act 1911* to facilitate trading of beneficial interests in Commonwealth Government Securities (CGS) on financial markets in Australia that are accessible to retail investors; and
- the *Corporations Act 2001* to require financial advisers to provide a prescribed information statement to retail clients when they give them personal advice about investing in CGS.

The bill also makes a number of minor amendments.

Standing appropriations

Schedule 1, items 5 and 6, proposed sections 13AA and 13A

These items replace two ‘key standing appropriations’ in the legislation ‘which enable the [Australian Office of Financial Management] to issue and service Commonwealth debt’ (see the explanatory memorandum at page 11). The explanatory memorandum also states, at page 12, that ‘the scope of these two provisions is currently limited to stock...and it is necessary to amend their scope to include depository interests’.

In its *Fourteenth Report of 2005*, the Committee stated at page 272 that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee’s terms of reference relating to the delegation and exercise of legislative power.

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation on the period during which it applies.

In the case of this bill the explanatory memorandum, at page 11, describes the arrangements in terms which indicate that the debt issued by the Commonwealth or the payments of interest and principal for which the Commonwealth is liable, will not be increased. Given the need for the AOFM to be in a position to issue and service Commonwealth debt (see the explanatory memorandum at page 11) and that the provisions replace longstanding existing standing provisions, **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.

Strict liability

Reversal of onus

Schedule 1, item 14, proposed subsections 1020AI(2), 1020AI(3), 1020AI(4) and 1020AI(5)

New subsections 1020AI(3) and (4) make it an offence for a regulated person not to provide particular information statements if they are required to do so. The offence is one of strict liability. This approach is modelled on corresponding existing provisions in the legislation. Further, the explanatory memorandum, at pages 16 to 17, gives a detailed justification of the approach and the appropriateness of the approach has been considered in light of *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. In light of these factors it is suggested that the Committee need not comment further on this aspect of the bill.

It is also noted that that the defendant bears an evidential burden in relation to the matters set out in proposed subsection 1020AI(2), and in relation to subsection 1020AI(6). The explanatory memorandum, at page 18, justifies this approach on the basis that the matters are particularly within the knowledge of the defendant and would be very difficult for the prosecution to prove. The explanatory memorandum suggests that in most circumstances it will be

relatively straightforward for the defendant to prove the relevant matters. Finally the explanatory memorandum notes that the approach is consistent with existing provisions in the legislation. As the case for the reversal of the onus of proof relies upon the matters which may justify this approach set out in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the Committee makes no further comment on the provisions.

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

Customs Amendment (Anti-dumping Improvements) Bill (No. 3) 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* (the Act) to:

- align provisions dealing with countervailable subsidies to accurately reflect the World Trade Organization *Agreement on Subsidies and Countervailing Measures*;
- enable Customs and Border Protection to conduct inquiries to address the circumvention of trade measures by exporters or importers of goods which are subject to measures; and
- amend the sampling provisions that deal with non-cooperation in anti-dumping investigations, reviews under Division 5 or continuation inquiries; and
- make a number of minor amendments to the Act.

The Committee has no comment on this bill.

Customs Amendment (Smuggled Tobacco) Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Attorney-General

Background

This bill amends the *Customs Act 1901* to create new offences for smuggling tobacco products and for conveying or possessing smuggled tobacco products.

The Committee has no comment on this bill.

Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Special Minister of State

Background

This bill amends the *Commonwealth Electoral Act 1918* (the Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) to:

- remove the prescription relating to how postal votes are processed currently set out in the Electoral Act and the Referendum Act. The amendments will also seek to allow for technological developments over time;
- increase the sum to be deposited by or on behalf of a person nominated as a Senator from \$1000 to \$2000;
- increase the sum to be deposited by or on behalf of a person nominated as a Member of the House of Representatives from \$500 to \$1000;
- increase the number of nominators required by a candidate for the Senate or the House of Representatives who has not been nominated by a registered political party from 50 to 100 electors;
- require unendorsed candidates for the Senate who have made a request to be grouped to each be nominated by 100 unique electors; and
- make a number of minor and technical amendments.

Insufficiently defined administrative powers—broad delegation

Schedule 1, item 2, proposed section 28

Schedule 1, item 91, proposed section 138

These items seek to enable the Electoral Commissioner to delegate all or any of his or her powers or functions under the Act, other than those conferred by Parts III and IV to ‘any officer’ or ‘any other member of the Staff of the Electoral Commission’. Delegates under this provision ‘must comply with any directions of the Electoral Commissioner’ (subsection 28(2)).

This broadening of the range of powers and functions which may be delegated by the Electoral Commissioner is claimed to be 'necessary due to the amendments made by subsequent items in Schedule 1 which make the Electoral Commissioner primarily responsible for the receipt and processing of postal vote applications' (see the explanatory memorandum at page 4). Although it is accepted that tasks associated with processing postal vote applications may appropriately be delegated to any member of the staff of the Commission, the Committee is concerned that this power of delegation is overly broad and may enable more significant functions to be delegated without a justification being provided. **The Committee therefore seeks the Minister's advice as to whether these delegations could be framed more narrowly. In particular, the Committee is interested in whether the bill can specify which powers will be able to be delegated to 'any person' and whether the delegation of other powers can be limited to particular positions or classes of people (for example, to AEC state managers or other as appropriate).**

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.

Fisheries Legislation Amendment Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Fisheries Management Act 1991* (FM Act) and the *Fisheries Administration Act 1991* to:

- introduce electronic monitoring (e-monitoring) to Australian boats that are authorised to fish under concessions and scientific permits granted by the Commonwealth; and
- make several minor amendments to the FM Act to clarify and make provisions consistent.

Merits Review

Item 5, proposed section 40B

This item inserts provisions which will empower the AFMA to make section 40A directions to classes of concession and permit holders (which are legislative instruments) and, also, section 40B directions to ‘specific concession or permit holders’ (which are not legislative instruments). The explanatory memorandum indicates that merits review (under section 165 of the FM Act) will not be available in relation to either category of directions.

Although it may be thought that merits review is not appropriate in relation to decisions of a legislative character, it is not clear why directions which are tailored to a specific concession or permit holder should not be reviewable decisions. The explanatory memorandum indicates, at page 9, that merits review is inappropriate in relation to these decisions as it would compromise the ‘flexibility that is required to impose necessary obligations, which might range from an obligation about installing e-monitoring equipment, to an obligation about specific technical requirements for the operation of equipment, the handling of data, or the provision of data to AFMA’.

Merits review, however, is often made available in contexts where decision-makers need to approach particular circumstances with flexibility, having regard to the circumstances of particular cases. As such the Committee is of the view that the justification provided for not excluding merits review in

relation to section 40B directions needs further elaboration. **The Committee therefore seeks the Minister's further advice on this issue.**

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

Health Insurance Amendment (Extended Medicare Safety Net) Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Health and Ageing

Background

This bill amends the *Health Insurance Act 1973* to allow the application of Extended Medicare Safety Net benefit caps to apply where more than one Medicare service is performed on the same patient on the same occasion and is deemed to be 'one professional service'.

The Committee has no comment on this bill.

Maritime Legislation Amendment Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Infrastructure and Transport

Background

This bill amends the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 to implement amendments to the Annexes to the International Convention for the Prevention of Pollution from Ships which were adopted by the Marine Environment Protection Committee of the International Maritime Organization on 15 July 2011.

The Bill also:

- clarifies the application of Federal jurisdiction in the parts of the territorial sea that lie between Australian baselines and 3 nautical miles out to sea from those baselines; and
- repeals the *Stevedoring Levy (Imposition) Act 1998* and the *Stevedoring Levy (Collection) Act 1998*.

Undue trespass— strict liability

Item 62, proposed section 26FEW

This item introduces provisions which make it an offence of strict liability for a ship energy efficiency management plan (SEEMP) not to be carried. The offence is directed at both the owner and master of a ship. The explanatory memorandum states at page 33 that ‘such persons have a shared responsibility and both can be expected to be fully aware of the requirements of the legislation...and the requirement to carry a ship energy efficiency management plan. While the master has immediate responsibility for the ship, he or she is subject to the direction of the shipowner. Shared liability is consistent with offence provisions in other parts of the PPS Act and in other maritime legislation such as the Navigation Act’. In shipping law it is the case that offence provisions have traditionally applied to the master and owner of the ship. The Committee therefore makes no further comment on this issue.

The offence of not carrying a SEEMP is one of strict liability. This approach is justified on the basis that there ‘are difficulties in proving that the ship energy efficiency management plan is not on board but it will be very easy for

a defendant to show that it is on board' (see the explanatory memorandum at page 33). The explanatory memorandum also indicates that the approach taken is consistent with the Committee's sixth report of 2002, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and, also, *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

However, the penalty for the offence (200 units) is set a higher level than that recommended for strict liability offences for individuals (60 penalty units). The explanatory memorandum states that the penalty is set a 'the same level as the existing penalties for equivalent (strict liability) offences under the PPS Act. **In these circumstances, 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.

Reversal of onus of proof

Various

As noted in the Statement of Compatibility with Human Rights (at page 16 of the explanatory memorandum) 'there are numerous provisions throughout the Bill which provide defences for existing strict liability provisions and which have a reverse burden of proof (placing the burden of proof on a defendant)'. **The Committee seeks advice as to whether the approach taken in relation to each of these provisions is consistent with the principles set out in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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.

Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011

Introduced into the House of Representatives on 21 September 2011

Portfolio: Immigration and Citizenship

The Committee considered this bill in *Alert Digest 12 of 2011*. The Minister responded to the Committee's concerns which were published in the *First Report of 2012*. This *Digest* deals with the Government amendments proposed to the bill (BP256) and also repeats the Committee's earlier concerns.

Background

This bill amends the *Migration Act 1958* (the Migration Act) and the *Immigration (Guardianship of Children) Act 1946* (the IGOC Act) to:

- replace the existing framework in the Migration Act for taking offshore entry persons to another country for assessment of their claims to be refugees as defined by the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees*; and
- clarify that provisions of the IGOC Act do not affect the operation of the Migration Act, particularly in relation to the making and implementation of any decision to remove, deport or take a non-citizen child from Australia.

Delegation of legislative power - commencement Proposed Government amendment BP256 (15)

The Federal Register of Legislative Instruments (FRLI) was established on 1 January 2005 under the Legislative Instruments Act 2003 (LI Act) as the authoritative source for legislative instruments and compilations of legislative instruments. The LI Act provides that a legislative instrument does not take effect until it is registered on the FRLI, unless an alternative commencement process is expressly provided for in relevant legislation.

The underlying scrutiny principle is that laws should be readily knowable and accessible before they commence so that people can realistically be guided in their actions on the basis of the laws that apply to them.

Amendment 15 would have the effect that a legislative instrument may commence prior to registration. While the supplementary explanatory memorandum explains the effect of the provision, it does not provide a justification for the approach. **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.

Retrospective effect

Proposed Government amendment BP256 (36)

Amendment 36 would have the effect that Section 198AD (which provides for regional entry persons to be taken to a regional processing country) applies in relation to a regional entry person who enters Australia on or after 13 August 2012. The proposed date is necessarily prior to the date the bill will commence. In effect it will allow for the scheme to commence operation in relation to certain people prior to the legislative foundation for it is secured.

The supplementary explanatory memorandum states that this date 'aligns with the date on which the Expert Panel on Asylum Seekers reported its recommendations to the Government', but does not provide any further justification for the proposed approach (see paragraph 35).

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. The Committee also has a long-standing concern about provisions which could have a retrospective and possibly detrimental effect on a person and requests an explanation of the justification for any such provisions. **In the circumstances, 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.

Previous scrutiny comments and the Minister's reply
(Senate Scrutiny of Bills Committee, *First Report of 2012*)

Alert Digest No. 12 of 2011 - extract

Insufficient Parliamentary scrutiny
Subsection 198AC(5)

Proposed section 198AC imposes an obligation on the Minister to lay before each House of the Parliament (within 2 sitting days of making a designation that a country is an offshore processing country) the following: a copy of the designation; a statement of reasons referring to the matters the Minister is obliged to consider; a copy of any written agreement between Australia and the country relating to the taking of persons to that country; a statement concerning consultations with the Office of the UNHCR; a summary of advice received from that office; and a statement about any arrangements in place for the treatment of persons in the designated country. Subsection 198AC(5) provides that the validity of the designation is not affected by a failure to comply with these requirements. Given that (1) the clear intention for the exercise of the broad discretionary power to make a designation be subject to Parliamentary scrutiny, (2) the limited effectiveness of legal forms of accountability, and (3) the procedural nature of the requirements imposed by proposed section 198AC, the Committee **seeks the Minister's further information as to why subsection 198AC(5) is considered necessary.**

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

Minister's response - extract

Under the heading "Insufficient Parliamentary scrutiny" on page 19 of the Alert Digest the Committee sought "the Minister's further information as to why subsection 198AC(5) is considered necessary.

New subsection 198AC(5) provides that a failure to comply with new section 198AC does not affect the validity of the designation of a country as an "offshore processing country". This subsection is considered necessary to remove any doubt about the interaction between new sections 198AB and 198AC. The only condition intended for the exercise of the Minister's power under new section 198AB is that the Minister thinks that it is in the national interest to so designate a country. While new section 198AC requires the Minister to cause to be laid before each House of Parliament a copy of the designation and other related documents, the requirement to so lay these documents before Parliament is not intended to be interpreted as a legal precondition to the validity of a designation under new section 198AB.

Committee Response

The committee thanks the Minister for this response. The committee's concern with the proposed approach arises because the very broad discretionary power is unlikely to be subject to meaningful judicial review. The committee is unclear why a strict requirement to table documents in Parliament is problematic or undesirable. **The committee's view is that a failure to comply with the requirements may undermine the efficacy of parliamentary scrutiny and leaves the matter to the consideration of the Senate as a whole.**

Alert Digest No. 12 of 2011 - extract

**Trespass on personal rights and liberties
Subsections 198AB(7), 198AD(9), and 198E(3)**

Proposed subsections 198AB(7), 198AD(9), and 198E(3) all state that 'the rules of natural justice do not apply' to an exercise of the power or to the performance of the duty to which each provision refers. The first relates to the Minister's power to make or revoke a designation of a country as an offshore processing country; the second to the Minister's obligation to direct an officer to take an offshore entry person (or class of such persons) to a particular

offshore processing country where there are two or more such countries; and the third relates to the power to determine that section 198AD does not apply to an offshore entry person. The explanatory memorandum merely states, in relation to each of these provisions, that the Minister is not required to give a right to be heard to affected individuals in relation to the power or duty being exercised (see pages 14, 17 and 19). The Committee therefore **seeks the Minister's further advice in relation to the type of natural justice obligations which are thought to be associated with these provisions and why it is considered necessary to specifically exclude them.**

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.

Minister's response - extract

Under the heading "Trespass on personal rights and liberties" on page 19 of the Digest the Committee sought "the Minister's further advice in relation to the type of natural justice obligations which are thought to be associated with these provisions and why it is considered necessary to specifically exclude them.

Natural justice would involve seeking and taking into consideration the comments of potentially affected individuals:

- before any country was designated to be a offshore processing country (under the new section 198AB); and
- before the Minister directed an officer to take a person to a specified country (when there is more than one country designated to be an offshore processing country).

If natural justice were not excluded as a ground of review it would in effect mean that the Minister could not designate an offshore processing country or direct an officer to take a person to a specified country without seeking and taking into consideration comments in relation to every individual offshore entry person affected or likely to be affected. This would negate the policy objective to arrange for persons to be taken quickly for processing offshore in

order to break the people smugglers guarantee that asylum seekers would have their refugee claims processed in Australia.

Committee Response

The Committee thanks the Minister for this response, but is not persuaded that it is necessary to exclude natural justice in order to achieve the policy outcomes sought. The committee notes the High Court's decision in *Kioa v West* (1985) 159 CLR 550, which has the effect that a policy decision that affects people generally, or a class of people in an undifferentiated way, will not be subject to the natural justice fair hearing rule. However, there may be instances in which the powers are exercised in circumstances where matters pertaining to individuals are taken into account and in these exceptional cases it would be consistent with the common law for a fair hearing to be available. **The committee therefore remains concerned about the proposed approach and requests the Minister's further advice about this issue.**

Alert Digest No. 12 of 2011 - extract

**Possible trespass on personal rights and liberties
Schedule 2**

The purpose of amendments in Schedule 2 of the bill is to overcome that part of the High Court's decision in *Plaintiff M70* which held that an unaccompanied minor who is subject to the *Immigration (Guardianship of Children) Act 1946* cannot be removed from Australia under the *Migration Act* unless the Minister, in the exercise of a separate statutory power as guardian of that minor, gives written consent to the removal or taking from Australia of the minor, having regard to the minor's interests. The explanatory memorandum states at page 29 that the High Court's decision 'does not align with the Government's policy intention, namely, that the Minister's consent under the *IGOC Act* is not required for a non-citizen child to be removed from Australian under the *Migration Act*.

However, other than stating that prior to the High Court's decision the law was understood such that the *Migration Act* is not subject to the *IGOC Act*, the

explanatory memorandum does not say anything to further explain the reasons for the amendments or explain why they should not be considered as unduly restricting rights of children to have their individual interests considered prior to them being removed from Australia.

The second reading speech does state that ‘a blanket inability of the government of the day to transfer unaccompanied minors to a designated country provides an invitation to people smugglers to send boatloads of children to Australia’ and that ‘no government can stand for the gaming of the system and risking children’s lives in this way’.

Thus, although the amendments may be thought to diminish protection to the rights of children extended by the IGOC Act, the Minister’s argument that children’s lives may be protected by implementing the amendments is noted. Further, the second reading speech notes that the Minister will retain the power to personally intervene to determine that a minor should not be taken to a designated processing country. This is said to be ‘an important safety valve to be used in individual cases’.

Given the importance of this issue and the absence of an explanation for the approach in the explanatory memorandum which accompanies the bill, the Committee seeks the Minister's advice as to **whether the proposed amendments, including the discretionary ‘safety valve’ power, unduly encroaches upon a child’s right to have their best interests considered in making decisions which affect them.**

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.

<i>Minister's response - extract</i>

Under the heading "Possible trespass on personal rights and liberties" on page 20 of the Digest the Committee sought "the Minister's advice as to whether the proposed amendments, including the discretionary 'safety valve' power, unduly encroaches upon a child's right to have their best interests considered in making decisions which affect them."

The proposed amendments to the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) reflect the policy intention that the functions, duties and powers under the *Migration Act 1958* are not fettered by the Minister's separate role as a guardian under the IGOC Act.

The proposed amendments will ensure that, in his or her capacity as guardian, the Minister will have the same rights, powers, duties, obligations and liabilities as natural parents. Further to this, it ensures that the Minister is not given special powers that cannot be accessed by other persons in a parental role, and of which other children do not have the benefit.

This policy intention reflected in the proposed amendments does not unduly encroach upon a child's right to have their best interests considered in making decisions which affect them. Rather, the proposed amendments have the affect of ensuring that all relevant considerations in the decision to transfer a child (including best interests of the child considerations) rest with the relevant officer under section 198A of the Migration Act.

Prior to any possible transfer there would be an assessment by the section 198A officer of the individual circumstances of the case. This includes an assessment of the best interests of the child and assessments to ensure compliance with Australia's international obligations.

Paragraph 3(1) of the Convention on the Rights of the Child (CROC) provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

All decisions affecting children made in the immigration portfolio include a consideration of the child's best interests, and the proposed amendments to the IGOC Act do not change this - they simply ensure that the best interests are being considered by the appropriate decision maker, which is the officer exercising the power under section 198A rather than the Minister (or his or her delegate) in his or her role as guardian under the IGOC Act.

Committee Response

The Committee thanks the Minister for this detailed response and notes that the best interests of the child will still be considered in making a transfer decision.

Renewable Energy (Electricity) Amendment (Excessive Noise from Wind Farms) Bill 2012

Introduced into the Senate on 29 June 2012

By: Senators Madigan and Xenophon

Background

The bill amends the *Renewable Energy (Electricity) Act 2000* to provide the Regulator with the authority to ensure that accredited power stations that are wind farms, either in whole or in part, do not create excessive noise.

The Committee has no comment on this bill.

Tax Laws Amendment (2012 Measures No. 4) Bill 2012

Introduced into the House of Representatives on 28 June 2012

Portfolio: Treasury

Background

This bill amends various taxation laws.

Schedule 1 amends the *Fringe Benefits Tax Assessment Act 1986* and the *Income Tax Assessment Act 1997* implement changes to the treatment of living-away-from-home (LAFH) allowances and benefits by:

- treating LAFH allowances as part of an employee's assessable income rather than as fringe benefits; and
- allowing certain income tax deductions.

Schedule 2 amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure that in circumstances where a representative of an incapacitated entity is a creditor of that entity, the correct provision of the GST Act is applied.

Schedule 3 to the bill amends Schedule 3 to the *Tax Laws Amendment (2012 Measures No. 2) Act 2012* to ensure that no interest is payable if an overpayment of income tax arises, or if additional tax becomes payable, due to the deduction under the pre-rules in Part 1 or under the interim rules in Part 2 of Schedule 3 to that Act.

The Committee has no comment on this bill.

Transport Safety Investigation Amendment Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Infrastructure and Transport

Background

This bill amends the *Transport Safety Investigation Act 2003* (TSI Act) to:

- provide state and territory government Ministers with a responsibility for rail a right to request the Australian Transport Safety Bureau (ATSB) to conduct an investigation in their jurisdiction;
- clarify the ATSB's capacity to conduct investigations within, or to or from, a Commonwealth Territory; and
- provide that On-Board recording and restricted information may be disclosed in accordance with the regulations.

Undue trespass -- Privacy Items 4 and 5

The provisions proposed by these items provide that it is a defence to any prohibition on copying or disclosing restricted information and On-Board Recording information, if the copying or disclosing was done by a person performing functions or exercising powers under, or in connection with, the TSI Act or Regulations.

The effect of the provisions is to extend an existing defence which is limited to actions performed under the Act to include those undertaken pursuant to the regulations (see the explanatory memorandum at page 6). The Statement of Compatibility with Human Rights states that to the extent that the disclosure of restricted information under the regulations involves 'personal information the right to privacy may be engaged'. It comments, however, that 'this will be the subject of any prescribed regulations' and that the 'regulations will be subject to the requirement to provide a statement of compatibility with human rights'. In the circumstances the Committee makes no further comment on this issue.

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

Veterans' Affairs Legislation Amendment Bill 2012

Introduced into the House of Representatives on 27 June 2012

Portfolio: Veterans' Affairs

Background

This bill amends Veterans' Affairs and other portfolio legislation to:

- clarify arrangements for the payment of travel expenses for treatment under the Veterans' Entitlements Act (VE Act) and the Australian Participants in British Nuclear Tests (Treatment) Act;
- provide for the more timely provision of special assistance by way of a legislative instrument in place of the current requirement for a regulation;
- ensure that the debt recovery provisions will be applicable to all relevant provisions of the VE Act, the regulations and any legislative instrument made under the VE Act;
- make technical amendments to provisions in the Military Rehabilitation and Compensation Act that refer to legislative instruments;
- amend the Military Rehabilitation and Compensation Act to replace obsolete references to pharmaceutical allowance and telephone allowance with references to the MRCA supplement;
- rationalise the maintenance income provisions of the VE Act by repealing redundant definitions and operative provisions and aligning remaining definitions with the Social Security Act;
- exempt as income for the purposes of the social security income test, bereavement payments in respect of indigent veterans or members;
- exempt from income tax, reimbursements made under the Repatriation Pharmaceutical Benefits Scheme and the MRCA Pharmaceutical Benefits Scheme, including payments under the new Veterans' Pharmaceutical Reimbursement Scheme; and
- make minor technical amendments.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Consumer Credit Legislation Amendment (Enhancements) Bill 2012

[Digest 12/11 – awaiting response]

On 26 June 2012 the House of Representatives agreed to 69 Government amendments and tabled a supplementary memorandum.

Migration Legislation Amendment (The Bali Process) Bill 2012

[Digest 2/12 – awaiting response]

On 27 June 2012 the House of Representatives agreed to one Independent (Mr Wilkie) and the bill was read a third time. On 28 June 2012 the Senate tabled a revised explanatory memorandum. The Committee has no comment on this additional material.

Social Security Legislation Amendment Bill 2011

[Digest 1/12 – no comment]

On 28 June 2012 the Senate tabled a supplementary explanatory memorandum. On 29 June 2012 the Senate agreed to two Government amendments and on the same day the House of Representatives agreed to the Senate amendments. The Committee has no comment on this additional material.

Stronger Futures in the Northern Territory Bill 2012

[Digest 1/12 – response in 2nd Report]

On 28 June the Senate tabled a supplementary explanatory memorandum and a further supplementary explanatory memorandum. On the 29 June 2012 the Senate agreed to five Government and seven Opposition amendments. On the same day the House of Representatives agreed to the Senate amendments. The Committee has no comment on this additional material.

Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2012

[Digest 1/12 – no response required]

On 28 June the Senate agreed to and also tabled a supplementary explanatory memorandum and a further supplementary explanatory memorandum. On

29 June 2012 the Senate agreed to two Government amendments and the House of Representatives agreed to the Senate amendments. The Committee has no comment on this 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*

Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012 — Schedule 1, item 5, section 13AA; and Schedule 1, item 7, paragraphs 13A(c) and (d)

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

Nil