

Senate Standing Committee
for the
Scrutiny of Bills

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Members of the Committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator the Hon Bill Heffernan	LP, New South Wales
Senator the Hon Kate Lundy	ALP, Australian Capital Territory
Senator Rachel Siewert	AG, Western Australia

Secretariat

Ms Toni Dawes, Secretary
Mr Glenn Ryall, Principal Research Officer
Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Phone: 02 6277 3050
Email: scrutiny.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_scrutiny

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 or the provisions of bills not yet before 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 on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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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.

ACT Government Loan Bill 2014

Introduced into the House of Representatives on 27 November 2014

Portfolio: Finance

Background

This bill seeks to confer legislative authority on the Commonwealth to enter into a loan agreement with the ACT for an amount not exceeding \$1 billion for the purpose of allowing the ACT to undertake an asbestos remediation program.

The bill also appropriates the Consolidated Revenue Fund (CRF) of \$750 million for the loan of money to the ACT for the purposes of the program and for purposes related to that program.

The committee has no comment on this bill.

Australian Broadcasting Corporation Amendment (Local Content) Bill 2014

Introduced into the Senate on 27 November 2014

By: Senator Xenophon

Background

This bill amends the *Australian Broadcasting Corporation Act 1983* to insert specific local content provisions into the Australian Broadcasting Corporation's Charter.

The committee has no comment on this bill.

Fair Work Amendment (Bargaining Processes) Bill 2014

Introduced into the House of Representatives on 27 November 2014

Portfolio: Employment

Background

This bill amends the *Fair Work Act 2009* (the Act) to:

- provide a new additional approval requirement in Part 2-4 of the Act for enterprise agreements that are not greenfields agreements; and
- provide further guidance regarding the circumstances in which a protected action ballot order can be made.

The committee has no comment on this bill.

Family Tax Benefit (Tighter Income Test) Bill 2014

Introduced into the Senate on 27 November 2014

By: Senator Leyonhjelm

Background

This bill amends the *A New Tax System (Family Assistance) Act 1999* to reduce the Family Tax Benefit A payment by amending the income test.

The committee has no comment on this bill.

Federal Courts Legislation Amendment Bill 2014

Introduced into the House of Representatives on 27 November 2014

Portfolio: Attorney-General

Background

This bill amends the *Federal Court of Australia Act 1976* to provide an arrester with the power to use reasonable force to enter premises in order to execute an arrest warrant.

The bill also amends the *Federal Circuit Court of Australia Act 1999* to

- confer jurisdiction on the Federal Circuit Court of Australia to hear certain Commonwealth tenancy disputes;
- enable additional jurisdiction in relation to tenancy disputes to which the Commonwealth is a party to be conferred on the Federal Circuit Court of Australia by delegated legislation; and
- enable delegated legislation to be made to modify the applicable State and Territory law where appropriate.

Undue trespass on personal rights and liberties—arrest powers; use of force

Schedule 1, item 10, proposed section 55A of the *Federal Court of Australia Act 1976*

This item will amend the *Federal Court of Australia Act 1976* to provide an arrester with the power to use reasonable force to enter premises in order to execute an arrest warrant. An ‘arrester’ must be a court sheriff or a police officer (subsection 55A(1)) and force to enter premises can only be used if an arrester reasonably believes the arrestee is on the premises. The power to enter a dwelling house between 9 pm one day and 6 am the next day is limited to circumstances where the arrester reasonably believes that it would not be practicable to make the arrest there or elsewhere at another time (subsection 55A(3)).

The committee notes that the approach taken to the safeguards that apply to the use of force (see subsection 55A(4)) is consistent with the *Guide to Framing of Commonwealth Offences, Infringement Notices and Enforcement*

Powers and the general provisions in Part IAA, Division 4 of the Crimes Act 1914.

In the circumstances, the committee makes no further comment on this item.

Delegation of legislative power

Schedule 2, item 4, proposed section 10AA of the *Federal Circuit Court of Australia Act 1999*

This item confers jurisdiction on the Federal Circuit Court of Australia in relation to specified Commonwealth tenancy disputes.

The item provides that the Minister may, by legislative instrument, confer additional jurisdiction on the Federal Circuit Court of Australia in relation to Commonwealth tenancy disputes (proposed subsection 10AA(2)). The explanatory memorandum states that this approach ‘aims to reduce the burden of making future legislative amendments to the *Federal Circuit Court of Australia Act 1999* if it is considered appropriate for the Federal Circuit Court to have jurisdiction to determine additional Commonwealth tenancy disputes’ (p. 17).

The item also provides that the Minister may, by legislative instrument, make provision for and in relation to any of the matters listed in proposed subsection 10AA(3) in respect of a Commonwealth tenancy dispute. This ‘aims to ensure, as far as possible, that the rights of the parties to the Commonwealth tenancy dispute are not substantially different from the rights of parties to tenancy disputes’ by enabling the Minister to ‘flexibly respond to particular issues in relation to particular state or territory regimes which might arise in the context of conferral of jurisdiction on a federal court’ (p. 17).

The conferral of jurisdiction on federal courts and the modification of such jurisdiction are matters of considerable importance and thus may be more appropriately dealt with in primary legislation. In addition, these matters may raise complex legal issues. **In light of this, the committee seeks advice from the Attorney-General in relation to:**

- **the rationale for providing for the implementation of these important matters in delegated legislation (beyond the aim of ‘reducing the burden of making future legislative amendments’);**
- and**

- **if it is not proposed that these matters be dealt with in primary legislation—whether the bill can be amended to ensure that these matters are dealt with in *regulations* (rather than legislative instruments) as this would ensure that the regulations relating to these important (and potentially complex) matters are drafted by the OPC and considered by the Federal Executive Council.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Freedom to Marry Bill 2014

Introduced into the Senate on 27 November 2014

By: Senator Leyonhjelm

Background

This bill amends the *Marriage Act 1961* to allow persons the freedom to marry regardless of sex, sexual orientation and gender identity.

The committee has no comment on this bill.

Gambling Harm Reduction (Protecting Problem Gamblers and Other Measures) Bill 2014

Introduced into the House of Representatives on 24 November 2014

By: Mr Wilkie

Background

This bill provides a regulatory framework relating to the operation of poker machines in Australia.

The committee has no comment on this bill.

Parliamentary Service Amendment Bill 2014

Introduced into the House of Representatives on 27 November 2014

By: Speaker of the House of Representatives

Background

This bill amends the *Parliamentary Service Act 1999* to provide that the Commissioner of the Australian Federal Police (AFP), or a Deputy Commissioner or a senior executive AFP employee who is nominated by the Presiding Officers, may be a member of the Security Management Board.

The bill also amends the existing functions of the Board to include the operation of security measures.

The committee has no comment on this bill.

Regulator of Medicinal Cannabis Bill 2014

Introduced into the Senate on 27 November 2014

By: Senators Di Natale, Macdonald, Leyonhjelm and Urquhart

Background

This bill provides for the establishment of a Regulator of Medicinal Cannabis who is responsible for formulating rules for licensing the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis.

Delegation of legislative power

General comment

This bill may be characterised as framework legislation, which aims to introduce a regulatory regime for the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis.

The subject matter of the bill is of considerable significance and it is therefore a matter of concern, based on the committee's scrutiny principles, that core elements of the regulation of medicinal cannabis are left to be established and defined through the rules (rather than primary legislation). The rules will play a significant role in the operation of the registration scheme established under Division 2 of the bill. Even more significantly the schemes for:

- the licensing of medicinal cannabis (Division 3);
- the authorisation of patients and carers (Division 4);
- experimental licensing (Division 5); and
- import and export (Division 7)

are all to be determined in the rules. These schemes are central to the operation of the legislation. Division 6 provides for the making of medicinal cannabis standards.

Leaving so much substantive detail to be rules limits the role that the committee can undertake in examining the legislation. For example, subclause 59(2) provides that the rules may provide that a decision made under the rules is a merits reviewable decision. However, the committee

cannot examine the appropriateness of the approach to review rights that may be taken under the rules.

Noting the above, there is a question as to whether the approach of providing that all of these significant matters be dealt with in the rules constitutes an appropriate delegation of legislative power. Clause 63 confers the rule-making power on regulator. **The committee therefore seeks the Senators' advice as to why the medicinal cannabis standards and the core schemes for the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis should not be included in the primary legislation.**

If it is not proposed that these matters be dealt with in the primary legislation, the committee also seeks the Senators' advice as to whether the bill can be amended to ensure that the matters are dealt with in regulations (rather than rules) as this would ensure that the regulations (which, in effect, establish core elements of the scheme) are drafted by the OPC and considered by the Federal Executive Council.

Pending the Senators' 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.

Tax Laws Amendment (Tax Transparency) Bill 2014

Introduced into the House of Representatives on 24 November 2014

By: Dr Leigh

Background

This bill amends the *Tax Laws Amendment (2013 Measures No. 2) Act 2013* to bring forward to 2012-13 the requirement for the tax commissioner to publish certain tax information for corporate entities with a total income of \$100 million or more.

The committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014

[Digest 10/14 – Report 13/14]

On 24 November 2014 the House of Representatives agreed to two Government amendments, the Parliamentary Secretary to the Prime Minister (Mr Frydenberg) presented a supplementary explanatory memorandum and the Parliamentary Secretary to the Minister for Communications (Mr Fletcher) presented a replacement explanatory memorandum and the bill was read a third time.

Replacement explanatory memorandum—additional information in relation to schedule 5, item 2

This item seeks to retrospectively validate certain powers relating to airport investigations. **The committee thanks the Minister for including additional information in relation to this item in the replacement explanatory memorandum (see pp 82–83), as requested by the committee in its *Thirteenth Report of 2014* (p. 699).**

Government amendment (2) on sheet GZ107 (proposed paragraph 122(3)(ga) of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AML/CTF Act))

The supplementary explanatory memorandum states that the amendments to schedule 6 will, among other things:

...clarify that the ATO can disclose certain information obtained under the AML/CTF Act to enable the ATO to share information received from regulated businesses about funds transfers with the taxpayer from whom, or to whom, the transfer was made (p. 6).

The supplementary explanatory memorandum continues by suggesting that the amendment will not limit the right to privacy ‘as disclosures will be made to the person about whom the personal information relates’ (p. 6). However, on its face, the proposed paragraph appears to allow broader disclosure so long as it relates to ‘the performance of the entrusted investigating official’s duties’ (proposed subparagraph 122(3)(ga)(ii)).

In order to assess the impact that this amendment may have on the right to privacy, **the committee seeks the Minister's advice as to the circumstances in which information will be able to be disclosed under proposed paragraph 122(3)(ga), and, in particular, whether disclosures could be made to persons or organisations other than 'the person about whom the personal information relates'.**

Pending the Minister'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.

Telecommunications Legislation Amendment (Deregulation) Bill 2014

[Digest 15/14 – no comment]

On 25 November 2014 the House of Representatives agreed to one Government amendment and the Parliamentary Secretary to the Minister for Communications presented a supplementary explanatory memorandum and the bill was read a third time.

The committee has no comment on this amendment and additional explanatory material.

Racial Discrimination Amendment Bill 2014

[Digest 13/14 – no comment]

On 27 November 2014 Senator Day tabled a replacement explanatory memorandum in the Senate.

The committee has no comment on this additional explanatory 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 44th Parliament.

Bills introduced with standing appropriation clauses in the 44th Parliament since the previous *Alert Digest*

Nil

Other relevant appropriation clauses in bills

ACT Government Loan 2014 — Clause 4: special appropriation clause – for a specified purpose and finite amount