

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Casino Control Amendment Bill 2010

Issue: Proposed Clause 28 – Removal of Criminal Liability – Personal Physical Integrity

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| 15. | The Committee is concerned about the immunity provided to individuals who are involved in the removal of an excluded person from casino premises. In particular, the Committee draws attention to a previous incident in which the unjustifiably forceful removal of a casino patron occasioned in that person's death. |
| 16. | The life, health and safety of all individuals is of paramount concern and the Committee is of the view that the criminal justice system is best left to determine criminal conduct in circumstances where a casino patron has been injured or killed while being removed. |
| 17. | The Committee is concerned that affording immunity to a class of individuals in certain circumstances may facilitate conduct that will directly compromise the life, health or safety of casino patrons, unduly trespassing on personal rights and liberties. To this end, the Committee refers this matter to Parliament. |
| 18. | The Bill is not specific about what the standard of 'in good faith' will actually be and with which party the onus will lie. The Committee resolves to write to the Minister and the Attorney-General to seek advice on this matter. |

Issue: Proposed Clause 27 – Excludes Merits Review

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| 23. | The Committee recognises the public interest in information-sharing about excluded individuals by Commissioners across the States and Territories, especially concerning the exclusion of individuals due to criminal associations or gambling problems. However, the Committee expresses its concern with administrative decisions – such as exclusion orders – that may be either non-reviewable and / or where the reasons for the decision are not required to be disclosed. |
| 24. | As proposed clause 26 seeks to extend the operation of exclusion orders by requiring its application to casinos Australia-wide, the Committee refers this matter to Parliament for consideration that it may be unduly dependent on non-reviewable decisions. |

2. Credit (Commonwealth Powers) Bill 2010

Issue: Strict Liability Offences in the Commonwealth legislation – implications arising from the Bill's adoption of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

- 25. The Committee notes that there are various sections under the national legislation containing strict liability offences as identified in the Standing Committee for the Scrutiny of Bills' *Alert Digest Report No. 9 of 2009*.**
- 26. The Committee considers the letter received from the Senate's Standing Committee for the Scrutiny of Bills and its' *Alert Digest 9 of 2009*, where the Senate Standing Committee drew attention to the substantial number of strict liability offences included in the national legislation. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.**
- 27. In particular, the Committee notes that under the Commonwealth *National Consumer Credit Protection Act 2009*, section 290 (2) deals with a person who must not refuse or fail to comply with a requirement made under sections 258 (2)(a) or 274 (4), 284 (1), (2) or (4), which are all strict liability offences. Under section 290 (2), the criminal penalty is 10 penalty units or 3 months' imprisonment or both.**
- 28. The Committee is concerned with the Bill's adoption of the national legislation (such as under clauses 4 and 6), in relation to the strict liability offences contained in the national legislation where such offences carry a possible criminal penalty of 3 months' imprisonment. The imposition of strict liability with potential a penalty of imprisonment is generally considered as inappropriate. Therefore, the Committee refers this to Parliament to consider whether the adoption of the national legislation may lead to undue trespasses on individual rights and liberties with regard to the strict liability offences attracting potential penalties of imprisonment under the national legislation.**
- 29. The Committee also resolves to write to the Minister to seek advice on whether the concerns identified by the Senate's Standing Committee for the Scrutiny of Bills with regard to the strict liability offences in the national legislation may require further attention given the context of the Bill's adoption of the national legislation.**

Issue: Henry VIII clauses (which allow amendment of an Act by a Regulation) of the Commonwealth legislation - implications arising from the Bill's adoption

of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

38. The Committee notes the letter received from the Standing Committee for the Scrutiny of Bills, especially in relation to their concerns with regard to the extent to which 'Henry VIII' clauses have been used to change powers, entitlements and obligations conferred by the principal Commonwealth legislation. The Standing Committee for the Scrutiny of Bills expressed that they do "not condone the use of 'Henry VIII' clauses as a standard drafting practice, even in cases where the explanatory memorandum provides reasons for that use or where the bill reflects COAG agreement". They considered that "the apparent increasing reliance on the use of regulations to potentially alter fundamental functions, powers, obligations, entitlements and rights conferred by a principal piece of legislation is cause for concern".
39. The Committee shares the concerns of the Senate's Standing Committee for the Scrutiny of Bills and refers to Parliament the question of whether the Bill's adoption of the national legislation (such as provided by clauses 4 and 6), may also give rise to 'Henry VIII' clauses that would permit subordinate legislation such as regulations to amend or take precedence over the principal legislation, which could constitute an inappropriate delegation of legislative power.
40. The Committee resolves to write to the Minister to seek advice on whether the concerns expressed by the Senate's Standing Committee for the Scrutiny of Bills with regard to the 'Henry VIII' provisions in the national legislation may require further attention in the context of this Bill's adoption of the national legislation.

Issue: Matters which should be regarded by Parliament – implications from the Bill's adoption of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

43. The Committee resolves to write to the Minister to seek advice on whether the concerns raised by the Senate's Standing Committee for the Scrutiny of Bills with regard to sections 171 (4) and (5) under the national legislation as not being subject to Parliamentary scrutiny could constitute an inappropriate delegation of legislative power (since this may involve matters that should be regarded by Parliament), and could require further attention with the proposed adoption of the national legislation.

Issue: Commencement by proclamation – Clause 2 - Provide the executive with unfettered control over the commencement of an Act.

45. The Committee accepts the above reasons provided in the Agreement in Principle speech and has not identified any issues regarding Clause 2.

3. Crimes (Administration Of Sentences) Amendment Bill 2010

15. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

4. Crimes Amendment (Police Pursuits) Bill 2010

Issue: Schedule 1 – Excessive Punishment

15. Although the Committee shares the view that driving a vehicle recklessly or dangerously to escape pursuit by a police officer is a serious offence, the penalties provided for may be regarded as disproportionate to the gravity of the offence.

16. The Committee notes that prevention of police pursuits is an issue of public safety. However, in light of that fact that no damage, injuries or deaths are required for a prison sentence to be imposed and given the Bill's potential effects on young drivers and first offenders, the Committee considers that the penalties may be regarded as excessive and refers the matter to Parliament.

5. National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010

Issue: Clause 2 – Commencement by proclamation – Provides the executive with unfettered control over the commencement

10. The Committee recognises the difficulties in determining commencement dates for projects that are reliant on the actions of other jurisdictions and notes that the short term trading market is not yet ready for operation. It has therefore not identified any issues under s 81(1)(b)(iv) of the *Legislation Review Act 1987*.

Issue: Clause 1 - Insufficient scrutiny of legislative power

6. National Parks And Wildlife Amendment Bill 2010

Issue: Strict Liability – Schedule 1 [32] – proposed section 86(4) – Harming or desecrating Aboriginal objects and Aboriginal places:

25. The Committee notes that proposed section 84(4) is a strict liability offence. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the authorities prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.

26. The Committee recognises the seriousness of the offence of harm to Aboriginal places as they are culturally significant sites. The imposition of strict liability with a potential penalty of imprisonment for 2 years will generally be considered as inappropriate especially in the absence of any defences or reasonable excuse. Therefore, the Committee refers this to Parliament to consider whether the proposed section 86(4) of Schedule 1 [32] may lead to undue trespasses on personal rights and liberties with regard to its' strict liability attracting a potential penalty of imprisonment.
27. The Committee also notes that the proposed section 86(2) is a strict liability offence in relation to harming an Aboriginal object (whether or not the person knows it is an Aboriginal object). However, this offence does not attract a penalty of imprisonment. Furthermore, there are defences available under the proposed section 87 such as subsections (1), (2) and (3) for this offence. In particular, proposed section 86(2) provides a defence of due diligence. Accordingly, the Committee does not consider the strict liability offence provided by the proposed section 86(2) as unduly trespassing on personal rights and liberties.

Issue: Retrospectivity – Schedule 1 [116] – proposed section 188D(9) – Validation – provisions relating to certain existing access roads on National Park Estate lands:

30. The Committee will always be concerned with any retrospective effect of legislation which may adversely impact on personal rights when the proposed section 188D(9) provides that the section is taken to have commenced on 1 January 1999. The Committee refers this to Parliament to consider whether the retrospective application of the proposed section 188D may adversely impact and unduly trespass on personal rights.
31. The Committee asks Parliament to consider whether the proposed section could include a provision that the amendment does not operate to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing at the relevant time, or to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done at the relevant time when the proposed section is taken to have commenced on 1 January 1999.

Issue: Matters such as definitions which should be regarded by Parliament – Schedule 1 [2] – proposed section 5(1)(g):

33. The Committee notes that the exclusion from the definition of 'harm' in relation to an object or place for the purposes of the Principal Act could be re-defined and modified by regulations (subordinate legislation) under the proposed section 5(1)(g) of schedule 1 [2], and refers to Parliament to consider whether this may inappropriately delegate legislative power.

Issue: Ill-Defined and Wide Powers – Schedule 1 [117] – proposed section 204; and Schedule 2 [10] – proposed section 141M – Orders regarding monetary benefits - No default maximum of penalty:

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| 39. | Proposed section 204(2) of Schedule 1 [117] of Division 3 of the new Part 15 to be inserted into the <i>National Parks and Wildlife Act 1974</i> , reads that: the amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act. |
| 40. | Proposed section 141M(2) of Schedule 2 [10] of Division 3 of the new Part 9B to be inserted into the <i>Threatened Species Conservation Act 1995</i> , reads that: the amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act. |
| 41. | Therefore, no default maximum amount appears to be set by the Bill for the above provisions. The Committee is concerned that the failure to provide a default maximum amount of an additional penalty may constitute ill-defined or wide powers and an inappropriate delegation of legislative power, and refers this to Parliament. |

Issue: Commencement by proclamation - Clause 2 - Provide the executive with unfettered control over the commencement of an Act.

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| 43. | The Committee accepts the advice received above and has not identified any issues regarding Clause 2. |
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7. State Senate Bill 2010*

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| 5. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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8. Workers Compensation Amendment (Commission Members) Bill 2010

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| 8. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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