SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTH REPORT

OF

2008

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MEMBERS OF THE COMMITTEE

Senator the Hon C Ellison (Chair)
Senator M Bishop (Deputy Chair)
Senator J Collins
Senator D Cameron
Senator the Hon J Troeth

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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 2008

The Committee presents its Seventh Report of 2008 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills and Act which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Aged Care Amendment (2008 Measures No. 1) Act 2008

Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 *****

Horse Disease Response Levy Bill 2008 *****

Horse Disease Response Levy Collection Bill 2008 *****

Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 *****

Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008 *****

Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008 *****

Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008 *****

***** Although these bills have not yet been introduced in the Senate, the Committee may report on the proceedings in relation to these bills, under standing order 24(9).

Aged Care Amendment (2008 Measures No. 1) Act 2008

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 1 of 2008*. The Minister for Ageing responded to the Committee's comments in a letter dated 28 July 2008. A copy of the letter is attached to this report.

Although this bill has passed both Houses and received Royal Assent on 18 February 2008 the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 1 of 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Health and Ageing

Background

This bill amends the *Aged Care Act 1997*, the *Aged Care (Bond Security) Act 2006* and the *Aged Care (Bond Security) Levy Act 2006* to simplify both the fees and charges paid by residents of aged care facilities and the subsidies paid by the Government for residents who cannot fully meet their own care and accommodation costs. The bill:

- applies a new income test that treats all income in the same way, irrespective of whether it is income from a pension or income from a private source;
- combines the current concessional resident supplement and pensioner supplement into a single asset-tested accommodation supplement;
- provides that the maximum level of the new accommodation supplement will be increased through delegated legislation;
- broadens eligibility for community care grants for providers of Community Aged Care Packages and extends eligibility to providers of Extended Aged Care at Home and Extended Aged Care at Home – Dementia packages; and
- extends the application of aged care legislation to include the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

The new arrangements are proposed to take effect from 20 March 2008.

The bill also contains application, technical and transitional provisions.

While this bill has already been passed by both Houses and was assented to on 18 February 2008, the following comments are provided by the Committee for the information of Senators.

Insufficiently defined administrative powers
Schedule 1, item 130, subsection 78B-3(2)

Proposed new subsection 78B-3(2), to be inserted by item 130 of Schedule 1, provides that if the Secretary of the Department of Health and Ageing requires further information to determine an application for flexible care grants, the Secretary may give to the applicant a notice requesting the further information within the period specified in the notice or, if no period is specified in the notice, within 28 days after receiving the notice. Proposed new subsection 78B-3(3) provides that failure to provide the additional information within the required timeframe will result in the application being taken to have been withdrawn.

Where a bill confers powers of this nature on an official, the Committee has an expectation that these powers will be exercised in a way that is not arbitrary or unreasonable. The clause as currently written would allow the Secretary to request information within very short periods of time, should he or she choose to do so, without having regard to the circumstances of the applicant or what would be considered reasonable in the normal course of events.

The Committee **seeks the Minister's advice** as to why it was considered necessary for the Secretary to be able to specify a period of less than 28 days for the production of additional information and whether it might be possible to limit this power in some way so as to ensure that it is not used in an arbitrary or unreasonable manner.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Relevant extract from the response from the Minister

Your letter has been referred to me as the Minister for Ageing.

This Act implemented changes to enable grants to be paid to providers of the flexible care types Extended Aged Care at Home and Extended Aged Care at Home Dementia by creating a broadly similar program for flexible care grants as applies for community care grants.

In response to your enquiry, I can advise that the provisions outlined for the application of flexible care grants in subjection 78B-3(2) were directly based on provisions within the *Aged Care Act 1997* for residential care grants (subsection 71-3(1)) and community care grants (subsection 76-3(2)). Provisions for flexible care were designed to mirror these arrangements to maintain consistency in the treatment of aged care grant applications.

I can also reassure the Committee that the Department of Health and Ageing has a long history of successfully administrating both the residential and community care grant schemes. It reports that the provisions allowed in relation to further information work well, that it can extend the time period allowed (under subsection 96-7(2)); and has no recorded complaints from an applicant in relation to the time provided for supply of further information.

I trust that the above information is of use.

The Committee thanks the Minister for this response.

Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2008*. The Minister for the Environment, Heritage and the Arts responded to the Committee's comments in a letter dated 22 July 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2008

Introduced into the House of Representatives on 18 June 2008
Portfolio: Environment, Heritage and the Arts

Background

This bill amends the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act), the *Great Barrier Reef Marine Park (Environmental Management Charge—Excise) Act 1993*, the *Great Barrier Reef Marine Park (Environmental Management Charge—General) Act 1993*, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the *Legislative Instruments Act 2003*, with the aim of providing a robust regulatory framework to support long-term protection and ecologically sustainable management of the Great Barrier Reef.

Schedule 1 establishes a new objects section for the GBRMP Act, which focuses on the administration and management of the Great Barrier Reef Marine Park to ensure long-term protection of the environment, biodiversity and heritage values of the reef, and to allow ecologically sustainable use of the reef.

Schedule 2 requires one member of the GBRMP Authority to be an Indigenous person and establishes a capacity for the authority to conduct business outside of formal meetings.

Schedule 3 requires the Authority to publicly consult on a proposal to proclaim an area as a part of the Marine Park, or to remove an area from the Marine Park, and updates the matters that must be considered in developing zoning plans and plans of management.

Schedule 4 contains amendments relating to environmental impact assessment and approval. It establishes the Great Barrier Reef Marine Park as a 'matter of national environmental significance' and establishes the *Environment Protection and Biodiversity Conservation Act 1999* as the primary basis for environmental impact assessment and approval requirements applying to the Marine Park.
Schedule 5 establishes a single investigations regime for the purposes of both the GBRMP Act and the EPBC Act. It establishes a broader range of enforcement mechanisms, including enforceable directions and enforceable undertakings, and introduces civil penalty and infringement notices regimes.

The bill also contains application, consequential, saving and transitional provisions.

Incorporating matter as in force from time to time
Schedule 1, item 25

Proposed new subsection 66(13) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 25 of Schedule 1, provides that 'the regulations may make provision in relation to a matter by applying, adopting, or incorporating any matter contained in any instrument or other writing as in force or existing from time to time', in derogation of subsection 14(2) of the *Legislative Instruments Act 2003*. The Committee routinely draws attention to provisions that seek to incorporate into delegated legislation material 'as in force from time to time' where that incorporation involves material that appears not to be subject to sufficient parliamentary scrutiny.

The Committee notes that the explanatory memorandum (paragraph 18) seeks to justify the incorporation of extrinsic material as in force from time to time on the basis that "regulations made under the GBRMP Act 'call up' various statutory instruments made under Queensland legislation… Currently, whenever Queensland amends its legislation or management plans, the regulations under the GBRMP Act must also be amended. The change proposed by this item will avoid this need by allowing the GBRMP Regulations to require compliance with Queensland legislation and management plans as in force from time to time."

The Committee notes, however, that the bill does not place any limits on the extrinsic material that may be applied, adopted or incorporated. That is, it does not limit it to Queensland legislation and management plans. As such, the Committee considers that this clause may insufficiently subject the exercise of legislative power to parliamentary scrutiny, and **seeks the Minister's advice** as to whether there might be some limit put on the exercise of this power.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

The Committee seeks my advice in relation to schedule 1, item 25 of the above Bill. This item provides that regulations made under the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as it is in force from time to time (rather than only as in force at a particular point in time). This is in derogation of subsection 14(2) of the *Legislative Instruments Act 2003.* The Committee asks whether there might be some limit put on the exercise of this power.

The Great Barrier Reef is the subject of complex jurisdictional and regulatory arrangements. Its protection is dependent on interrelated Commonwealth and Queensland marine and national parks that are managed and regulated in an holistic and integrated manner. Uniquely, the Commonwealth Great Barrier Reef Marine Park extends over Queensland Coastal Waters to the low water mark. Queensland is responsible for the management of fisheries in waters adjacent to the Queensland coast, including the waters of the Commonwealth Great Barrier Reef Marine Park. Overlaying all of this are other Commonwealth and Queensland laws, notably the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), which regulates matters such as threatened species and World Heritage values (the Great Barrier Reef is a World Heritage Area).

Given these jurisdictional realities, delivering effective protection for the Great Barrier Reef with a minimum of regulatory and administrative complexity, duplication and 'red tape' requires an integrated and collaborative approach across jurisdictions and legislative regimes. A key mechanism for achieving this is a capacity to apply, adopt or incorporate matters established under one law, in another. The explanatory memorandum for the above Bill (at paragraph 18) gives the example of fisheries management plans established under Queensland fisheries

legislation. Regulations under the GBRMP Act 'incorporate' these plans by requiring that fishing in the Marine Park be done in accordance with such plans.

This is but one example of a wide variety of matters that could potentially be applied, adopted or incorporated by regulations under the GBRMP Act in order to provide a more consistent, simple and effective regulatory framework. Other potential examples include plans for the recovery of protected species and the protection of habitat critical to such species established under both Commonwealth and Queensland environmental laws; spatial management plans for areas where Commonwealth and Queensland marine parks overlap; and instruments, plans and codes related to shipping, maritime safety and pollution established under Commonwealth and Queensland law, as well as internationally. It is not possible to be definitive about particular matters or classes of matter where application, adoption or incorporation could be appropriate and of value.

Given these considerations, I do not propose to place limits on the power for regulations under the GBRMP Act to make provision in relation to a matter by applying, adopting or incorporating other matters as they are in force from time to time. I note that any regulations seeking to do so will be subject to parliamentary scrutiny. This provides a capacity for Parliament to consider any proposal to apply, adopt or incorporate a particular matter as it is in force from time to time and object should it raise concerns.

Thank you for raising this matter with me.

The Committee thanks the Minister for this response, which addresses its concerns.

Horse Disease Response Levy Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2008*. The Minister for Agriculture, Fisheries and Forestry responded to the Committee's comments in a letter dated 4 July 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2008

Introduced into the House of Representatives on 21 February 2008
Portfolio: Agriculture, Fisheries and Forestry

Background

Introduced with the Horse Disease Response Levy Collection Bill 2008 and the Horse Disease Response Levy (Consequential Amendments) Bill 2008, this bill imposes a levy on the initial registration of horses. The aim of the levy is to assist the horse industry to repay any amount paid by the Commonwealth on behalf of the horse industry in the event of an outbreak of an emergency horse disease.

Imposing a levy by regulation
Clause 5

Clause 5 of this bill provides that the rate of horse disease response levy imposed by clause 4 is to be fixed by regulations, with no upper limit being set in the bill. The Committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by regulation. This creates a risk that the levy may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power.

For example, the Committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

In this instance, the Committee notes that the explanatory memorandum provides no explanation as to why the rate of the levy needs to be set by regulation. Similarly, the explanatory memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of this power, such as specifying a maximum amount above which the levy cannot be set by regulation, or a formula for calculating the amount of the levy. The Committee **seeks the Minister's advice** in respect of these matters.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

I note the committee's view on setting levy rates by regulation and that the Explanatory Memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of this power.

The horse disease response levy arrangements were being introduced at the request of industry. This followed wide consultation with industry members and support at the time from the Australian Racing Board, Australian Harness Racing and the Australian Horse Industry Council. The primary legislation requires that the minister take into account the views of industry bodies in setting the operative levy rate.

The provisions of the Emergency Animal Disease Response Agreement (the EADRA) will place an effective limit on the levy rate. Responses to emergency horse diseases will be implemented under the EADRA, which provides limits linked to the industry's gross value of production on the amount of expenditure, including the horse industry's share of response costs and associated levy rates. All parties, including industry, must agree on a response and its cost before it can proceed.

Arrangements for determining the cost of a response and industry's share of these costs are set out in the EADRA. These vary according to the disease and whether it affects just the horse industry or other animal industries as well. If the industry wishes the Australian Government to fund its share of costs, subject to repayment through a statutory levy, the EADRA provides for repayment within a reasonable period, generally expected to be no longer than ten years.

These arrangements provide a transparent mechanism for establishing what the operative levy rate needs to be for each response to an emergency horse disease on a case-by-case basis. They also provide the industry with a veto power if it is not prepared to support or fund any emergency response to an animal disease affecting horses. If a response is not agreed, the horse disease response levy is not activated.

To ensure that industry has the certainty to be able to commit to emergency responses quickly so that eradication and control remains feasible, it is necessary that it has the confidence in the levy arrangements to enable its potential funding to be met.

I believe the provisions of the EADRA also provide an effective ceiling on the horse disease response levy and provide the horse industry a direct veto on responses to emergency horse diseases, the costs of these responses and any levies to fund such responses.

I agree with the committee's assessment that, where the rate of a levy needs to be changed frequently and expeditiously, it would be better done through amending regulations rather than the enabling statute.

In my view, this Bill does not breach principle 1(a)(iv) of the committee's terms of reference.

The Committee thanks the Minister for this response.

Horse Disease Response Levy Collection Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2008*. The Minister for Agriculture, Fisheries and Forestry responded to the Committee's comments in a letter dated 4 July 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2008

Introduced into the House of Representatives on 21 February 2008
Portfolio: Agriculture, Fisheries and Forestry

Background

Introduced with the Horse Disease Response Levy Bill 2008 and the Horse Disease Response Levy (Consequential Amendments) Bill 2008, this bill provides for collection and administration of a horse disease response levy on the initial registration of horses. The bill:

- provides for the collection of horse disease response levies by persons or bodies that register horses;
- outlines the liability of horse registration bodies regarding the horse disease response levy payments made by horse owners to the Commonwealth;
- provides for penalties to apply to unpaid levies and for the remission of any penalties resulting from late payment; and
- includes information gathering powers.

The bill also contains application provisions.

Insufficiently defined administrative powers
Subclause 14(1)

Subclause 14(1) provides that an 'authorised person may give a person a written notice requiring the person to give the authorised person, within the time specified in the notice, specified information or documents relevant to the operation of this Act.' Where a bill confers powers of this nature on an official, the Committee has an expectation that these powers will be exercised in a way that is not arbitrary or unreasonable. The clause as currently written would allow the authorised person to request information within very short periods of time, should he or she choose to do so, without having regard to the circumstances of the person affected or what would be considered reasonable in the normal course of events.

The Committee **seeks the Minister's advice** as to why it was considered necessary for the authorised person to be able to specify the timeframe in which information or documents must be supplied and whether it might be possible to limit this power in some way so as to ensure that it is not used in an arbitrary or unreasonable manner.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Relevant extract from the response from the Minister

I thank the committee for its comments but I do not intend to amend this provision. The intention was to draft provisions that were similar to those applying to other agriculture industries, subject to the provisions of subclause 23(a) of the *Primary Industries Levies and Charges Collection Act 1991* (the Collection Act). The term 'reasonable' was not used as it was considered that the wording of the subclause was clear and there was sufficient control over how an authorised person could exercise their powers.

It is not intended that such a power would be used unreasonably. It can only be exercised by an authorised person who is appointed by the Secretary of the Department of Agriculture, Fisheries and Forestry and who is appointed or engaged under the *Public Service Act 1999* (the Public Service Act). The person must have suitable qualifications and experience to properly exercise the powers of an authorised person and comply with any directions of the Secretary.

Any person employed under the Public Service Act is required to uphold the APS Values and comply with the APS Code of Conduct in order to protect the integrity of the APS and engender public confidence in public administration in both an official and private capacity. The APS Values state that services must be delivered fairly, effectively, impartially and courteously to the Australian public. This ensures that powers are not exercised in a way that is arbitrary or unreasonable.

The Committee thanks the Minister for this response.

Strict liability
Subclause 15(1)

Subclause 15(3) provides that the offence created by subclause 15(1) – of refusing or failing to give a return, information or document that a person is required to give – is an offence of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance, the Committee notes that the explanatory memorandum merely states that 'this clause provides for strict liability offence provisions to ensure that the Commonwealth's horse disease response levy collection requirements… are adhered to.' It does not indicate whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs in February 2004, was consulted in the framing of this offence. The Committee notes, however, that the maximum penalty for the offence is 60 penalty units, which is the maximum proposed in that *Guide*.

The Committee **seeks the Minister's advice** whether the recommendations in the *Guide* were considered in the drafting of this clause.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

> I thank the committee for its comments. The intention was to draft provisions that were similar to those applying to other agriculture industries, subject to the provisions of the Collection Act, which is the case.
>
> The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered when drafting was undertaken on the matter of strict liability. The strict liability provisions ensure that the Commonwealth's horse disease response levy collection requirements are adhered to.

The Committee thanks the Minister for this response.

Wide delegation
Subclause 20(1)

Subclause 20(1) would permit the Secretary of the Department to 'delegate all or any of his or her powers under this Act or the regulations to an APS employee in the Department'. The Committee has consistently drawn attention to legislation which allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Where such delegations are made, the Committee considers that an explanation of why such broad delegations are considered necessary should be included in the explanatory memorandum. In this instance the explanatory memorandum provides no explanation as to why this wide power of delegation is considered necessary. The Committee **seeks the Minister's advice** as to the reason for this wide power of delegation and whether it should be limited in some way.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Relevant extract from the response from the Minister

I thank the committee for its comments. The intention was to draft provisions that were similar to those applying to other agriculture industries, subject to the provisions of the *Primary Industries Levies and Charges Collection Act 1991*, which is the case.

The Committee thanks the Minister for this response.

Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2008*. The Minister for Resources and Energy responded to the Committee's comments in a letter received on 1 August 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2008

Introduced into the House of Representatives on 18 June 2008
Portfolio: Resources, Energy and Tourism

Background

Part of a package of four bills, this bill amends the *Offshore Petroleum Act 2006* and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to establish a system of offshore titles that will authorise the transportation by pipeline and injection and storage of greenhouse gas substances in geological formations under the seabed. The bill:

- provides for the release of offshore acreage over which greenhouse gas titles may be obtained, establishes the system of titles that will authorise title-holders to engage in greenhouse gas related operations, and confers on the responsible Minister regulatory powers in relation to those titles and activities;
- seeks to balance the rights of the new storage industry with the rights of the petroleum industry;
- preserves pre-existing rights of the petroleum industry as far as is practicable to minimise sovereign risk to existing title holders' investment in Australia's offshore resources;
- establishes new categories of project inspectors and OHS inspectors; and

- provides for the meaning of a greenhouse gas substance to be extended in the future should the injection and storage of other greenhouse gases be permitted under the *Environment Protection (Sea Dumping) Act 1981*.

The bill also makes consequential amendments to the *Offshore Petroleum (Royalty) Act 2006*, the *Petroleum Excise (Prices) Act 1987*, the *Petroleum Resource Rent Tax Assessment Act 1987* and a number of other Acts to change definitions and references to petroleum titles.

Uncertain commencement
Multiple Schedules

The table to subclause 2(1) provides a range of commencement dates for various provisions within this bill, many of which are linked to the commencement of provisions in other Acts. For example, item 2 in the table to subclause 2(1) provides that Schedule 1 of this bill will commence on the later of a) the day after the Act receives the Royal Assent; and b) immediately after the commencement of item 32 of Schedule 1 to the *Offshore Petroleum Amendment (Miscellaneous Measures) Act 2008*. Reference to that Act advises that item 32 of Schedule 1 commences 'immediately after the commencement of subsections 22(3) and (4) of the *Offshore Petroleum Act 2006*. These provisions of the *Offshore Petroleum Act 2006* commence on Proclamation. However, item 32 of Schedule 1 to the *Offshore Petroleum Amendment (Miscellaneous Measures) Act 2008* repeals subsections 22(3) and (4) of the *Offshore Petroleum Act 2006*.

It appears, therefore, that the effect of item 2 in the table to subclause 2(1), when stated in full, is that subsections 22(3) and (4) of the *Offshore Petroleum Act 2006* will come into force on Proclamation, thereby bringing item 32 of Schedule 1 to the *Offshore Petroleum Amendment (Miscellaneous Measures) Act 2008* into force (with the effect that subsections 22(3) and (4) of the *Offshore Petroleum Act 2006* will immediately be repealed), which in turn will bring Schedule 1 of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* into force.

Similarly, item 6 in the table to subclause 2(1) provides that Schedule 2, items 58 to 61, of this bill will commence on the later of a) the day after the Act receives the Royal Assent; and b) immediately after the commencement of Schedule 2 to the *Offshore Petroleum (Repeals and Consequential Amendments) Act 2006.* Reference to that Act advises that Schedule 2 will commence 'at the same time as Chapter 2 of the *Offshore Petroleum Act 2006* commences'. Reference to that Act indicates that Chapter 2 is to commence on 'a single day to be fixed by Proclamation', which does not appear to have occurred.

These problems of constant cross referencing to other Acts occur throughout the commencement provisions and the Committee notes that it is extremely difficult to ascertain when it is intended for the various provisions in this bill to commence. The Committee further notes that the explanatory memorandum is silent on the commencement clauses of the bill and, consequently, casts no light on the issue, nor does the explanatory memorandum provide any rationale for apparent extended delays in commencement.

The commencement provisions in this bill are some of the most complex that the Committee has encountered. In these circumstances, it is unacceptable for the explanatory memorandum to offer no guidance or clarity to the reader about the effect of these provisions.

The Committee **seeks the Minister's advice** about the dates on which each of the items listed in the table to subclause 2(1) are due to commence, and why this information, along with an explanation for any extended delay, was not included in the explanatory memorandum, consistent with Drafting Direction No. 1.3.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

> The complexity in the commencement table provisions contained within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* was largely a result of the amendments being introduced prior to the commencement of the *Offshore Petroleum Act 2006* and the *Australian Energy Market Amendment (Gas Legislation) Act 2007*.

As both Acts commenced on 1 July 2008, an opportunity now exists to simplify the commencement table. It is therefore proposed that a parliamentary amendment be moved to replace the existing commencement table with a simplified version reflecting that the Acts mentioned above have commenced.

The Committee thanks the Minister for this response and for the commitment to amend the commencement provisions.

Strict liability
Schedule 1, item 169, new subsections 249AW(2) and 249BZA(2)

New subsection 249AW(1) of the *Offshore Petroleum Act 2006*, to be inserted by item 169 of Schedule 1, creates the offence of failing to comply with a direction given by the responsible Commonwealth Minister which, by virtue of new subsection 249AW(2), is an offence of strict liability. New subsection 249BZA(1) of that Act, also to be inserted by item 169 of Schedule 1, creates a similar offence, which by virtue of new subsection 249BZA(2), is also an offence of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In these instances, the Committee notes that the explanatory memorandum (paragraphs 152 and 219 respectively) seeks to justify this imposition of strict liability on the ground that the offence 'could be difficult to establish if the prosecution were required to prove intention with respect to an omission to do the things required.' There is, however, no indication in the explanatory memorandum that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered in the framing of these offences.

The Committee **seeks the Minister's advice** whether consideration was given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in developing these offence provisions.

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.

Relevant extract from the response from the Minister

Strict liability offences of failure to comply with directions – Generally-applicable comments

Item 169 of Schedule 1 creates a number of offences of strict liability. These offences consist of failure by the holder of a greenhouse gas title to comply with a direction given by the responsible Commonwealth Minister under a preceding provision of the Bill. The directions in each case will be directions to the title-holder to take, or to refrain from taking, action of a particular kind. The purpose of giving the direction in each case is to deal with the risk that the greenhouse gas title-holder's operations could have a significant adverse impact on one or more of: operations of existing or future petroleum title-holders, resources of the seabed (including potentially commercial petroleum), the environment, human health or safety or other users of the sea.

Greenhouse gas title-holders are engaging in a high-investment, high-return commercial activity where compliance with regulatory requirements could be viewed by the title-holder as involving unnecessary, excessive and avoidable costs. Operations will take place at remote locations under conditions that make first-hand monitoring by project inspectors a practical impossibility. Regulatory staff will in practice be dependent on reporting by the title-holder in order to ascertain whether there has been compliance. The imposition of strict liability will therefore be important to the integrity of the regulatory regime. Moreover, given the very high cost of carrying out any operations offshore, it is important that the penalty for non-compliance be high enough to be a real disincentive to cost-cutting behaviour by licensees.

Proposed subsections 249AW(2) and 249BZA (2)

Proposed sections 249AV and 249BZ provide for the responsible Commonwealth Minister to give a direction to a greenhouse gas assessment permittee or a greenhouse gas holding lessee, respectively, for the purpose of eliminating, mitigating or managing the risk that operations under the permit or lease could have a significant adverse impact on operations under an existing or future petroleum title. Proposed sections 249AW and 249BZA make it an offence to fail to comply with a direction and subsections 249AW(2) and 249BZA(2) make it an offence of strict liability.

The general considerations set out above are applicable to both offences. The following further comments are made in relation to these offences.

Proposed sections 249AV and 249BZ, in their application to greenhouse gas assessment permittees and holding lessees, constitute one of the means by which the Bill enables the responsible Commonwealth Minister to balance the competing interests of greenhouse gas title-holders and existing and future petroleum title-holders. Greenhouse gas operations and petroleum operations utilise the same kinds of geological formations, often in the same geological basin, and there is therefore the potential for greenhouse gas and petroleum title-holders' activities to impact on one another, either directly or indirectly.

Given the technical complexity of offshore drilling operations and also the regulator's dependence on the title-holder for the provision of operational and monitoring data, any offence provision that requires proof of any level of fault on the part of the title-holder is likely to be difficult or even impossible to enforce. Lack of effective enforcement will leave present and future petroleum title-holders vulnerable to having the value of their resource affected. It will also substantially hinder the responsible Commonwealth Minister in performing his or her core role of balancing the competing interests of greenhouse gas and petroleum interests, and the community interest in the orderly exploitation of both kinds of community resource. Strict liability is therefore important to the effectiveness of the regulatory regime.

In relation to the proposed penalty of 100 penalty units, the very high level of expenditure that is routinely incurred in offshore exploration activities makes the normal upper limit of 60 penalty units for strict liability offences inadequate to operate as a meaningful deterrent. The proposed 100 penalty units is seen as necessary for that purpose.

The imposition of strict liability offences is therefore considered to be justified in these circumstances, as well as the higher than normal level of penalties for such offences.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

The Committee thanks the Minister for this comprehensive response.

Strict liability
Schedule 1, item 169

New sections 249CY, 249CZB and 249CZD of the *Offshore Petroleum Act 2006*, all to be inserted by item 169 of Schedule 1, create offences of strict liability for failing to comply with a direction given by the responsible Commonwealth Minister. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In these instances, the Committee notes that the explanatory memorandum makes no reference to these strict liability provisions. The Committee therefore **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing these offences.

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.

Relevant extract from the response from the Minister

Proposed subsections 249CY(2), 249CZB(2) and 249CZD(2)

Proposed section 249CX provides for the responsible Commonwealth Minister to give a greenhouse gas injection licensee a direction for the purpose of eliminating, mitigating or managing the risk that operations carried out under the licence could have a significant adverse impact on a geological formation that contains, or is likely to contain, a petroleum pool or otherwise compromise the exploitation of any petroleum that occurs as a natural resource.

Proposed sections 249CZ and 249CZA provide for the responsible Commonwealth Minister to give a greenhouse gas injection licensee a direction in order to deal with a 'serious situation'. Section 249CZ defines 'serious situation' in terms of leakage of greenhouse gas, unpredicted behaviour of injected greenhouse gas, adverse impact on the geotechnical integrity of a geological formation or inherent unsuitability of the storage formation. Directions under section 249CZA may require the injection licensee to carry on operations in a particular manner, to cease or suspend operations

or to carry out specified activities for the purpose of eliminating, mitigating, managing or remediating the 'serious situation'.

Proposed section 249CZC provides for the responsible Commonwealth Minister to give a direction for the purpose of eliminating the risk that greenhouse gas operations under the injection licence could have a significant adverse impact on a commercial discovery of petroleum in an area where the injection licence area overlaps a pre-commencement petroleum title area. Where elimination of the risk is not practicable, the responsible Commonwealth Minister must give a direction for the purpose of mitigating, managing or remediating the risk.

Proposed sections 249CY, 249CZB and 249CZD make it an offence to fail to comply with the direction and subsection (2) in each case makes the offence one of strict liability.

The general considerations set out above are applicable to all three offences. The following further comments are made in relation to these offences.

Greenhouse gas operations and petroleum operations utilise the same kinds of geological formations, often in the same geological basin, and there is therefore the potential for greenhouse gas and petroleum title-holders' activities to impact on one another, either directly or indirectly. Proposed sections 249CX and 249CZA, in their application to greenhouse gas injection licensees, enable the responsible Commonwealth Minister to balance the competing interests of greenhouse gas injection licensees and the interests of the community in the protection of seabed petroleum resources. Section 249CZA also gives the responsible Commonwealth Minister the necessary powers to protect the environment, geological formations and other seabed resources from unpredicted adverse effects of greenhouse gas migration. Section 249CZC enables the responsible Commonwealth Minister to protect the rights of pre-commencement petroleum title-holders.

Given the technical complexity of offshore greenhouse gas injection and storage operations and also the regulator's dependence on the title-holder for the provision of operational and monitoring data, any offence provision that requires proof of any level of fault on the part of the title-holder is likely to be difficult or even impossible to enforce. Strict liability is therefore important to the effectiveness of the regulatory regime.

In relation to the proposed penalty of 100 penalty units, the very high level of expenditure that is routinely incurred in offshore resources activities makes the normal upper limit of 60 penalty units for strict liability offences inadequate to operate as a meaningful deterrent. The proposed 100 penalty units is seen as necessary for that purpose.

The imposition of strict liability offences is therefore considered to be justified in these circumstances, as well as the higher than normal level of penalties for such offences.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

The Committee thanks the Minister for this comprehensive response.

Strict liability
Schedule 1, item 169

Proposed new subsection 249CZE(7) of the *Offshore Petroleum Act 2006*, to be inserted by item 169 of Schedule 1, creates an offence of strict liability for failing to apply for a site closing certificate in relation to an identified greenhouse gas storage formation. Subsection 249CZE(11) of the same Act, also to be inserted by item 169 of Schedule 1, creates an offence of strict liability for failing to comply with a direction given by the responsible Commonwealth Minister. Unfortunately, the Committee notes that the explanatory memorandum makes no reference to these two sub-sections and, as such, provides no rationale for the application of strict liability to these offences.

The Committee therefore **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing these offences.

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.

Relevant extract from the response from the Minister

Proposed section 249CZE

Proposed subsection 249CZE(3) provides that, where injection operations in an injection licence area have ceased, the licensee must make an application for a site closing certificate. Proposed subsection 249CZE(8) also provides for the responsible Commonwealth Minister to direct an injection licensee to make an application for a site closing certificate. Failure to make an application is in each case an offence of strict liability, under subsections (7) and (11) respectively.

These requirements to apply for a site closing certificate are not merely administrative processes. They are critical steps in the regulatory supervision of the offshore injection and storage regime. Their purpose is to ensure that an injection licensee does not abandon an operations site before the responsible Commonwealth Minister is able to ensure that the licensee has taken all the remedial and precautionary measures necessary to ensure that injected greenhouse gas does not, over time, cause damage to other resources of the seabed, the environment, human health and safety and other users of the sea and seabed.

The general considerations set out above apply to both offences. The following further comments are made in relation to these offences.

The application for a site closing certificate and the reports and other documents that accompany it will be the responsible Commonwealth Minister's major source of information about the cessation of injection operations and about the remedial and precautionary work program that needs to be carried out by the licensee in the site-closing (decommissioning) period. The work carried out in this period will be for the medium and long term protection of resources, the environment and other interests. At this stage of the project, the injection licensee stands to gain no further commercial benefit from carrying out the site-closing work program. Strict liability is therefore considered necessary in order to ensure the integrity of the regulatory regime.

In relation to the proposed penalty of 100 penalty units, the very high level of expenditure that is routinely incurred in offshore resources activities makes the normal upper limit of 60 penalty units for strict liability offences inadequate to operate as a meaningful deterrent. The proposed 100 penalty units is seen as necessary for that purpose.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

The Committee thanks the Minister for this comprehensive response.

Strict liability
Schedule 1, item 191

New subsection 298-290(4) of the *Offshore Petroleum Act 2006*, to be inserted by item 191 of Schedule 1, creates the offence of failing to comply with a notice from the responsible Commonwealth Minister to produce or make available a document which, by virtue of new subsection 298-290(5), is an offence of strict liability.

The Committee notes that the explanatory memorandum, at paragraph 488, states only that section 298-290 'includes offence provisions which are similar to those in sections 298-288 and 298-289.' However, the offences created by those sections are not offences of strict liability.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing this offence provision.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

Proposed subsection 298-290(4)

The pattern of fault-based liability and strict liability in proposed sections 298-288, 298-289 and 298-290 follows that in existing sections 288, 289 and 290 of the *Offshore Petroleum Act 2006*.

The Committee thanks the Minister for this response.

Strict liability
Schedule 1, item 200

New subsection 316-307(1) of the *Offshore Petroleum Act 2006*, to be inserted by item 200 of Schedule 1, creates the offence of failing to comply with a direction from the responsible Commonwealth Minister which, by virtue of proposed new subsection 316-307(2), is an offence of strict liability. Unfortunately, the Committee notes that the explanatory memorandum provides no rationale for the application of strict liability in this instance.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing this offence.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

Proposed section 316-307

Proposed section 316-305 confers a general power on the responsible Commonwealth Minister to give a direction to a greenhouse gas title-holder. Proposed section 316-307 makes it an offence to fail to comply with a direction and subsection 316-307(2) makes the offence one of strict liability. Strict liability has been imposed for the following reasons.

Greenhouse gas title-holders are engaging in a high-investment, high-return commercial activity where compliance with regulatory requirements could be viewed by the title-holder as involving unnecessary, excessive and avoidable costs. Moreover, operations will take place at remote locations under conditions that make

first-hand monitoring by project inspectors a practical impossibility. Regulatory staff will in practice be dependent on reporting by the title-holder in order to ascertain whether there has been compliance. The imposition of strict liability will therefore be necessary in order to ensure the integrity of the regulatory regime.

In relation to the proposed penalty of 100 penalty units, the very high level of expenditure that is routinely incurred in offshore resources activities makes the normal upper limit of 60 penalty units for strict liability offences inadequate to operate as a meaningful deterrent. The proposed 100 penalty units is seen as necessary for that purpose.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

The Committee thanks the Minister for this response.

Strict liability
Schedule 1, item 238

New subsection 335-329(9) of the *Offshore Petroleum Act 2006*, to be inserted by item 238 of Schedule 1, creates the offence of entering or being present in a greenhouse gas safety zone, in breach of a notice issued by the responsible Commonwealth Minister which, by virtue of proposed new subsection 335-329(10) is an offence of strict liability.

The Committee notes from the explanatory memorandum (paragraph 548) that the offence provisions in this section, including the strict liability offence, are 'intended to act as a deterrent to persons whose dangerous navigation or other conduct could place at risk the lives of scores of people on board offshore structures', but that the explanatory memorandum provides no rationale for why the offence in 335-329(9) should be one of strict liability.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing this offence.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

Proposed section 335-329

Proposed section 335-329 provides for the establishment of safety zones around greenhouse gas wells, structures and equipment and prohibits the entry of categories of vessels into the safety zones. These safety zones are, to an extent, intended for the protection of injection infrastructure. They are, however, also in large part intended for the protection of members of the workforce that may be on board any structure.

The circumstances in which an infringement may occur are very varied. They can range from an incursion by a vessel whose crew are oblivious to the existence of the structure to a foreign fishing vessel being deliberately brought in close to the structure, or even tied-up to it, in order for the crew to fish. The vessels used in incursions may be non-compliant in a number of respects and may not have adequate maps or navigational equipment. The strict liability offence in subsection 335-329(10) is therefore necessary to ensure the effectiveness of the prohibition in all circumstances.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

The Committee thanks the Minister for this response.

Legislative instruments – declarations
Schedule 1

Numerous provisions in Schedule 1 declare a direction, notice or instrument not to be a legislative instrument. They are proposed new subsections 177B(3), 181A(7), 249AL(9), 249AUBA(4), 249AV(6), 249BZ(6), 249CXA(8), 249CZA(10), 249CZC(10), 261(8), 275(8), 316-305(10), 335-329(11) and 406-407(4).

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision. The Committee notes that, in these instances, the explanatory memorandum is silent as to the nature of the provisions.

The Committee **seeks the Minister's advice** whether each of these provisions is declaratory in nature or provides for a substantive exemption, and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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.

Relevant extract from the response from the Minister

Schedule 1

The provisions of the Bill referred to below provide in each case that an instrument or direction made or promulgated under the relevant section 'is not a legislative instrument'.

Proposed subsections 177B(3) and 181A(7)

These provisions are merely declaratory, and are included for the avoidance of doubt.

Proposed subsection 249AL(9)

Proposed section 249 is in the same terms, in relevant respects, as the equivalent (petroleum) provision in section 84 of the *Offshore Petroleum Act 2006*. The Australian Government Solicitor advised in 2005 in relation to the drafting of section 84 that bid assessment criteria made public under the precursor provision in the *Petroleum (Submerged Lands) Act 1967* (which also was in relevantly the same terms) were not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, but that the matter was not free from doubt. On that basis, subsection 84(9) was included in the Offshore Petroleum Act to put the matter beyond doubt. On the same basis, proposed subsection 249AL(9) has been included in the present Bill to put the matter beyond doubt.

Proposed subsections 249AUBA(4), 249AV(6), 249BZ(6), 249CXA(8), 249CZA(10), 249CZC(10), 261(8), 275(8) and 316-305(10)

Proposed subsections 249AUBA(4), 249AV(6), 249BZ(6), 249CXA(8), 249CZA(10), 249CZC(10), 261(8), 275(8) and 316-305(10) are merely declaratory, and are included for the avoidance of doubt.

Proposed subsection 335-329(11)

As per the Explanatory Memorandum to the *Offshore Petroleum Act 2006*, a notice under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Proposed subsection 406-407(4)

Proposed subsection 406-407(4) is merely declaratory, and is included for the avoidance of doubt.

The Committee thanks the Minister for this response, and notes that it would have been helpful if this information was included in the explanatory memorandum.

Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2008*. The Minister for Resources and Energy responded to the Committee's comments in a letter received on 1 August 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2008

Introduced into the House of Representatives on 18 June 2008
Portfolio: Resources, Energy and Tourism

Background

Part of a package of four bills, this bill amends the *Offshore Petroleum (Annual Fees) Act 2006* by adding greenhouse gas titles to the titles in respect of which annual fees are payable.

Uncertain commencement
Schedules 1 to 3

Items 2, 3 and 4 in the table to subclause 2(1) provide that Schedules 1-3 of this bill will commence after various provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* commence. As noted earlier in this Alert Digest, the commencement provisions in the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 are such that it is extremely difficult to ascertain when it is intended for the various provisions in that bill to commence. The Committee further notes that the explanatory memorandum is silent on the commencement clauses of both of these bills and, consequently, casts no light on the issue.

The Committee **seeks the Minister's advice** about the dates on which Schedules 1, 2 and 3 of the Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008 are due to commence, and why this information, along with an explanation for any extended delay, was not included in the explanatory memorandum, consistent with Drafting Direction No. 1.3.

Pending the Minister's advice 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.

Relevant extract from the response from the Minister

Schedules 1 to 3, proposed subsection 2(1)

The Table in subclause 2(1) of the Bill provides for Schedules 1, 2 and 3 to commence at the same time as specified provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*. Now that the *Offshore Petroleum Act 2006* has commenced, it is possible to say that Schedules 1, 2 and 3 of the Bill will commence on the day after the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* receives Royal Assent. A parliamentary amendment will be moved to replace the existing commencement table within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* with a simplified version.

The Committee thanks the Minister for this response.

Setting a fee by regulation
Schedule 1, item 5, proposed new section 4A

Proposed new subsection 4A(3) of the *Offshore Petroleum (Annual Fees) Act 2006*, to be inserted by item 5 of Schedule 1, would permit the amount of the fee referred to there to be set by regulation. The Committee has consistently drawn attention to legislation which provides for the rate of a fee to be set by regulation.

This creates a risk that the fee may, in fact, become a tax. It is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

In this instance, the Committee notes that the explanatory memorandum makes no reference to the fact that the rate of the fee is to be set by regulation. However, the Committee further notes that the proposed new section 4A is very similar to existing section 4 of the *Offshore Petroleum (Annual Fees) Act 2006*, on which the Committee commented in *Alert Digest No. 8 of 2005*. The Parliamentary Secretary's response to the concerns expressed at that time was to assure the Committee that the fees represented no more than recovery of the relevant administrative costs, which met the Committee's concerns.

At that time, the Committee indicated that the Parliamentary Secretary might care to consider including a clause giving legislative force to the assurance that the fees would be no more than cost recovery. The Committee **seeks the Minister's advice** as to whether the fees contained in the present bill are aimed at no more than cost recovery and, if so, whether further consideration has been given to giving legislative effect to that limitation.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

Schedule 1, item 5

Proposed subsection 4A(3) of the *Offshore Petroleum and Greenhouse Gas Storage (Annual Fees) Act 2006* ('Annual Fees Act') provides for the amount of the annual fee for greenhouse gas titles to be set by regulations. The Committee has raised the issue that legislation which provides for the rate of a fee to be set by regulation creates a risk that the fee may, in fact, become a tax. The Committee comments that it is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Australian Government Solicitor has advised that the constitutional basis for the Annual Fees Act not being an Act that imposes taxation is that it imposes charges for the right to exploit a natural resource (i.e. the pore space below Commonwealth waters), which is in the nature of a fee for a privilege. An Act that imposes a fee for a privilege is not a taxing Act. The 'non-tax' status of the annual fees therefore does

not depend on the fees recovering no more than the cost of administration of the licensing scheme.

The distinction between a fee for a privilege and a cost-recovery fee (fee for service) needs to be maintained for the purposes of this Act. This is because, while the annual fees for offshore titles are in fact aimed at no more than cost recovery, the kinds of administrative costs that can be recovered through a fee for service, within the constitutional meaning of that term, do not include all of the actual costs of administering offshore titles and regulating the operations of title-holders. If a legislative requirement were included in the Annual Fees Act that the level of fees must not exceed the costs of administration, some costs could not be recovered from titleholders and would have to be funded from other sources.

It is therefore not proposed to include such a requirement in the Annual Fees Act.

The Committee thanks the Minister for this response.

Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2008*. The Minister for Resources and Energy responded to the Committee's comments in a letter received on 1 August 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2008

Introduced into the House of Representatives on 18 June 2008
Portfolio: Resources, Energy and Tourism

Background

Part of a package of four bills, this bill amends the *Offshore Petroleum (Registration Fees) Act 2006* by adding greenhouse gas titles to the titles in respect of which transfers and dealings will attract the imposition of registration fees.

Uncertain commencement
Schedules 1 to 3

Items 2, 3 and 4 in the table to subclause 2(1) provide that Schedules 1-3 of this bill will commence after various provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* commence. As noted earlier in this Alert Digest, the commencement provisions in the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 are such that it is extremely difficult to ascertain when it is intended for the various provisions in that bill to commence. The Committee further notes that the explanatory memorandum is silent on the commencement clauses of both of these bills and, consequently, casts no light on the issue, nor does the explanatory memorandum provide any rationale for apparent extended delays in commencement.

The Committee **seeks the Minister's advice** about the dates on which Schedules 1, 2 and 3 of the Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008 are due to commence, and why this information, along with an explanation for any extended delay, was not included in the explanatory memorandum, consistent with Drafting Direction No. 1.3.

Pending the Minister's advice the Committee draws Senators' attention to these 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.

Relevant extract from the response from the Minister

> The Table in subclause 2(1) of the Bill provides for Schedules 1, 2 and 3 to commence at the same time as specified provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act* 2008. Now that the *Offshore Petroleum Act 2006* has commenced, it is possible to say that Schedules 1, 2 and 3 of the Bill will commence on the day after the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* receives Royal Assent. A parliamentary amendment will be moved to replace the existing commencement table within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* with a simplified version.

The Committee thanks the Minister for this response.

Setting a tax by regulation
Schedule 1, item 17, new sections 6A and 6B

Items 2, 3 and 4 in the table to subsection 6A(2) and items 5 and 6 in the table to subsection 6B(2) of the *Offshore Petroleum (Registration Fees) Act 2006*, to be inserted by item 17 of Schedule 1, provide that the amount of the fees referred to in those items is to be set by regulation, with no upper limit specified in the primary legislation. Proposed new subsections 6A(4) and 6B(6) of that Act, also to be inserted by item 17 of Schedule 1, declare that the fees to be imposed by those sections, are 'imposed as a tax.'

The Committee has noted in the past, with similar provisions, that to set the amount of a tax by delegated legislation may be regarded as an inappropriate delegation of legislative power.

The Committee notes that the explanatory memorandum in respect of this bill, which is less than a page long, makes no reference to the fact that the bill imposes a tax by regulation. The Committee further notes that the proposed new sections 6A and 6B are very similar to existing clauses 5 and 6 of the *Offshore Petroleum (Registration Fees) Act 2006*, on which the Committee commented in *Alert Digest No. 8 of 2005*. The Parliamentary Secretary's response to the concerns expressed at that time included the comment that:

a general review of policy issues in this legislation is to be carried out by the Department of Industry, Tourism and Resources in consultation with the States, Northern Territory and industry. This may possibly lead to the introduction of legislative amendments at a later point in time. I have asked the Department to include in that review' the question of whether an upper limit should be set in the Act for the prescribed amounts. The review could also consider the alternative of merely inserting a new provision stating that these amounts cannot increase by more than the consumer price index. (Scrutiny of Bills, *Ninth Report of 2005*, p. 196)

The Committee **seeks the Minister's advice** as to whether this foreshadowed review has been undertaken and whether consideration was given to the matters outlined above.

Pending the Minister's advice, the Committee draws Senators' attention to these 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.

Relevant extract from the response from the Minister

The Committee has asked whether the policy review foreshadowed in 2005 has been undertaken and whether consideration was given to setting an upper limit in the Act for the prescribed amounts.

The review of policy issues raised during the re-write of the *Petroleum (Submerged Lands) Act 1967* is continuing. Forty-eight policy issues were raised by stakeholders during the re-write and the review has dealt with 30 issues. As a result, a number of proposed amendments to the *Offshore Petroleum Act 2006* are expected to be introduced into the Parliament in the Spring Session. It is envisaged that 10 of the

remaining issues will be addressed later in 2008 and the remaining 8 in the first half of 2009.

The proposal to limit increases in the prescribed amounts to no more than the CPI was considered inappropriate as costs incurred in regulating the petroleum sector frequently bear no relation to movements in the CPI (for example, the cost of obtaining petroleum industry expertise has increased significantly over recent years due to the booming resources sector). Rather than setting a limit to the prescribed amounts, it would be preferable to keep the amounts under regular review to ensure that the total fees (both annual fees and registration fees) recover the actual costs incurred in regulating petroleum activities in the offshore area.

The Committee thanks the Minister for this response.

Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2008*. The Minister for Resources and Energy responded to the Committee's comments in a letter received on 1 August 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2008

Introduced into the House of Representatives on 18 June 2008
Portfolio: Resources, Energy and Tourism

Background

Part of a package of four bills, this bill amends the *Offshore Petroleum (Safety Levies) Act 2003* by extending the imposition of those levies to greenhouse gas facilities and greenhouse gas pipelines in Commonwealth waters.

Commencement by Proclamation
Schedule 1

Item 2, in the table to subclause 2(1) provides that Schedule 1 of this bill will commence 'immediately after Schedule 1 to the *Offshore Petroleum (Safety Levies) Amendment Act 2006*, which in turn is scheduled to commence 'at the same time as Part 4.8 of the *Offshore Petroleum Act 2006* commences.' Part 4.8 of the *Offshore Petroleum Act 2006* is to commence on a 'single day to be fixed by Proclamation', which does not appear to have occurred.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force, and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. In this instance, the Committee notes that the explanatory memorandum provides no advice as to why this Schedule is to commence on Proclamation, nor why the bill does not specify a period by which the Schedule either commences, or is taken to be repealed.

The Committee **seeks the Minister's advice** regarding why Schedule 1 of this bill is to commence on Proclamation and whether the commencement clause should also be subject to a provision that, if the Schedule has not commenced by some fixed date, the Schedule will be automatically treated as having been repealed.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

> The Table in subclause 2(l) of the Bill provides for Schedules 1 and 2 to commence at the same time as specified provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*. Now that the *Offshore Petroleum Act 2006* has commenced, it is possible to say that Schedules 1 and 2 of the Bill will commence on the day after the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* receives Royal Assent. A parliamentary amendment will be moved to replace the existing commencement table within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* with a simplified version.

The Committee thanks the Minister for this response.

Uncertain commencement
Schedule 2

Item 3, in the table to subclause 2(1) provides that Schedule 2 will commence 'immediately after the commencement of item 1 of Schedule 4 of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*.' As noted earlier in this Alert Digest, the commencement provisions in the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 are such that it is extremely difficult to ascertain when it is intended for the various provisions in that bill to commence.

The Committee further notes that the explanatory memorandum is silent on the commencement clauses of both of these bills and, consequently, casts no light on the issue, nor does the explanatory memorandum provide any rationale for apparent extended delays in commencement.

The Committee **seeks the Minister's advice** about the date on which Schedule 2 of the Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008 is due to commence, and why this information, along with an explanation for any extended delay, was not included in the explanatory memorandum, consistent with Drafting Direction No. 1.3.

Pending the Minister's advice, 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.

Relevant extract from the response from the Minister

> The Table in subclause 2(l) of the Bill provides for Schedules 1 and 2 to commence at the same time as specified provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*. Now that the *Offshore Petroleum Act 2006* has commenced, it is possible to say that Schedules 1 and 2 of the Bill will commence on the day after the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* receives Royal Assent. A parliamentary amendment will be moved to replace the existing commencement table within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* with a simplified version.

The Committee thanks the Minister for this response.

Chris Ellison
Chair

THE HON JUSTINE ELLIOT MP
MINISTER FOR AGEING

Senator the Hon Christopher Ellison
Chair
Standing Committee for the Scrutiny of Bills
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Senator Ellison

Thank you for your letter of 13 March 2008 to the Minister for Health and Ageing, the Hon Nicola Roxon MP, regarding the *Aged Care Amendment (2008 Measures No.1) Act 2008*. Your letter has been referred to me as the Minister for Ageing.

This Act implemented changes to enable grants to be paid to providers of the flexible care types Extended Aged Care at Home and Extended Aged Care at Home Dementia by creating a broadly similar program for flexible care grants as applies for community care grants.

In response to your enquiry, I can advise that the provisions outlined for the application of flexible care grants in subsection 78B-3(2) were directly based on provisions within the *Aged Care Act 1997* for residential care grants (subsection 71-3(1)) and community care grants (subsection 76-3(2)). Provisions for flexible care were designed to mirror these arrangements to maintain consistency in the treatment of aged care grant applications.

I can also reassure the Committee that the Department of Health and Ageing has a long history of successfully administrating both the residential and community care grant schemes. It reports that the provisions allowed in relation to further information work well, that it can extend the time period allowed (under subsection 96-7(2)); and has no recorded complaints from an applicant in relation to the time provided for supply of further information.

I trust that the above information is of use.

Yours sincerely

JElliot

JUSTINE ELLIOT
28/7/08.

RECEIVED
22 JUL 2008
Senate Standing C'ttee for the Scrutiny of Bills

The Hon Peter Garrett AM MP

Minister for the Environment, Heritage and the Arts

Senator the Hon Chris Ellison
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

22 JUL 2008

Dear Senator

I refer to *Alert Digest No. 6 of 2008* of the Senate Standing Committee for the Scrutiny of Bills, in particular, the Committee's comments on the Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008.

The Committee seeks my advice in relation to schedule 1, item 25 of the above Bill. This item provides that regulations made under the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as it is in force from time to time (rather than only as in force at a particular point in time). This is in derogation of subsection 14(2) of the *Legislative Instruments Act 2003*. The Committee asks whether there might be some limit put on the exercise of this power.

The Great Barrier Reef is the subject of complex jurisdictional and regulatory arrangements. Its protection is dependent on interrelated Commonwealth and Queensland marine and national parks that are managed and regulated in an holistic and integrated manner. Uniquely, the Commonwealth Great Barrier Reef Marine Park extends over Queensland Coastal Waters to the low water mark. Queensland is responsible for the management of fisheries in waters adjacent to the Queensland coast, including the waters of the Commonwealth Great Barrier Reef Marine Park. Overlaying all of this are other Commonwealth and Queensland laws, notably the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), which regulates matters such as threatened species and World Heritage values (the Great Barrier Reef is a World Heritage Area).

Given these jurisdictional realities, delivering effective protection for the Great Barrier Reef with a minimum of regulatory and administrative complexity, duplication and 'red tape' requires an integrated and collaborative approach across jurisdictions and legislative regimes. A key mechanism for achieving this is a capacity to apply, adopt or incorporate matters established under one law, in another. The explanatory memorandum for the above Bill (at paragraph 18) gives the example of fisheries management plans established under Queensland fisheries legislation. Regulations under the GBRMP Act 'incorporate' these plans by requiring that fishing in the Marine Park be done in accordance with such plans.

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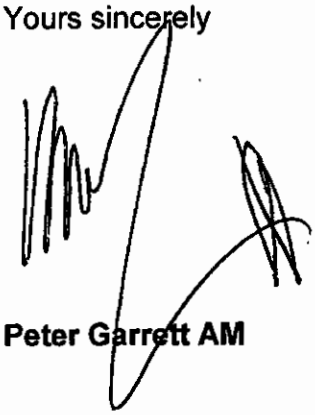
This is but one example of a wide variety of matters that could potentially be applied, adopted or incorporated by regulations under the GBRMP Act in order to provide a more consistent, simple and effective regulatory framework. Other potential examples include plans for the recovery of protected species and the protection of habitat critical to such species established under both Commonwealth and Queensland environmental laws; spatial management plans for areas where Commonwealth and Queensland marine parks overlap; and instruments, plans and codes related to shipping, maritime safety and pollution established under Commonwealth and Queensland law, as well as internationally. It is not possible to be definitive about particular matters or classes of matter where application, adoption or incorporation could be appropriate and of value.

Given these considerations, I do not propose to place limits on the power for regulations under the GBRMP Act to make provision in relation to a matter by applying, adopting or incorporating other matters as they are in force from time to time. I note that any regulations seeking to do so will be subject to parliamentary scrutiny. This provides a capacity for Parliament to consider any proposal to apply, adopt or incorporate a particular matter as it is in force from time to time and object should it raise concerns.

Thank you for raising this matter with me.

Yours sincerely



Peter Garrett AM

The Hon. Tony Burke MP

Minister for Agriculture, Fisheries and Forestry

4 JUL 2008

Senator the Hon. Christopher Ellison
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ellison Chris

I note that the Scrutiny of Bills *Alert Digest No. 1 of 2008* (12 March 2008) contained a number of comments on the Horse Disease Response Levy Bills. I wish to respond to the comments from the Senate Standing Committee for the Scrutiny of Bills on the legislation.

Horse Disease Response Levy Bill 2008

Imposing a levy by regulation—clause 5

I note the committee's view on setting levy rates by regulation and that the Explanatory Memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of this power.

The horse disease response levy arrangements were being introduced at the request of industry. This followed wide consultation with industry members and support at the time from the Australian Racing Board, Australian Harness Racing and the Australian Horse Industry Council. The primary legislation requires that the minister take into account the views of industry bodies in setting the operative levy rate.

The provisions of the Emergency Animal Disease Response Agreement (the EADRA) will place an effective limit on the levy rate. Responses to emergency horse diseases will be implemented under the EADRA, which provides limits linked to the industry's gross value of production on the amount of expenditure, including the horse industry's share of response costs and associated levy rates. All parties, including industry, must agree on a response and its cost before it can proceed.

Arrangements for determining the cost of a response and industry's share of these costs are set out in the EADRA. These vary according to the disease and whether it affects just the

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horse industry or other animal industries as well. If the industry wishes the Australian Government to fund its share of costs, subject to repayment through a statutory levy, the EADRA provides for repayment within a reasonable period, generally expected to be no longer than ten years.

These arrangements provide a transparent mechanism for establishing what the operative levy rate needs to be for each response to an emergency horse disease on a case-by-case basis. They also provide the industry with a veto power if it is not prepared to support or fund any emergency response to an animal disease affecting horses. If a response is not agreed, the horse disease response levy is not activated.

To ensure that industry has the certainty to be able to commit to emergency responses quickly so that eradication and control remains feasible, it is necessary that it has the confidence in the levy arrangements to enable its potential funding to be met.

I believe the provisions of the EADRA also provide an effective ceiling on the horse disease response levy and provide the horse industry a direct veto on responses to emergency horse diseases, the costs of these responses and any levies to fund such responses.

I agree with the committee's assessment that, where the rate of a levy needs to be changed frequently and expeditiously, it would be better done through amending regulations rather than the enabling statute.

In my view, this Bill does not breach principle 1(a)(iv) of the committee's terms of reference.

Horse Disease Response Levy Collection Bill 2008

Insufficiently defined administrative powers—subclause 14(1)

I thank the committee for its comments but I do not intend to amend this provision. The intention was to draft provisions that were similar to those applying to other agriculture industries, subject to the provisions of subclause 23(a) of the *Primary Industries Levies and Charges Collection Act 1991* (the Collection Act). The term 'reasonable' was not used as it was considered that the wording of the subclause was clear and there was sufficient control over how an authorised person could exercise their powers.

It is not intended that such a power would be used unreasonably. It can only be exercised by an authorised person who is appointed by the Secretary of the Department of Agriculture, Fisheries and Forestry and who is appointed or engaged under the *Public Service Act 1999* (the Public Service Act). The person must have suitable qualifications and experience to properly exercise the powers of an authorised person and comply with any directions of the Secretary.

Any person employed under the Public Service Act is required to uphold the APS Values and comply with the APS Code of Conduct in order to protect the integrity of the APS and engender public confidence in public administration in both an official and private capacity. The APS Values state that services must be delivered fairly, effectively, impartially and courteously to the Australian public. This ensures that powers are not exercised in a way that is arbitrary or unreasonable.

Strict liability—subclause 15(1)

I thank the committee for its comments. The intention was to draft provisions that were similar to those applying to other agriculture industries, subject to the provisions of the Collection Act, which is the case.

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered when drafting was undertaken on the matter of strict liability. The strict liability provisions ensure that the Commonwealth's horse disease response levy collection requirements are adhered to.

Abrogation of the privilege against self-incrimination—subclause 15(4)

I note that the committee makes no comment on this subclause.

Wide delegation—subclause 20(1)

I thank the committee for its comments. The intention was to draft provisions that were similar to those applying to other agriculture industries, subject to the provisions of the *Primary Industries Levies and Charges Collection Act 1991,* which is the case.

Horse Disease Response Levy (Consequential Amendments) Bill 2008

I note that the committee makes no comment on this Bill.

Should you require further information about these Bills please contact Mr Ross Adams, Animal and Plant Health Policy, on 02 6272 3302.

I trust this information is of assistance.

Yours sincerely

Tony Burke

THE HON MARTIN FERGUSON AM MP

MINISTER FOR RESOURCES AND ENERGY
MINISTER FOR TOURISM

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Senator the Hon Christopher Ellison
Chair of the Committee
Standing Committee for the Scrutiny of Bills
Department of the Senate
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CANBERRA ACT 2600

Dear Senator Ellison

I refer to comments contained within the Scrutiny of Bills Alert Digest No. 6 of 2008, relating to the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008*, and associated Bills, and provide the following response to the concerns.

The Committee noted a number of concerns in relation to the commencement provisions, strict liability and the potential for taxation by regulation. The material in Attachment A expands upon the information contained within the Explanatory Memorandum.

Yours sincerely

Martin Ferguson

Enc

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Attachment A

Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008

Uncertain Commencement

The complexity in the commencement table provisions contained within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* was largely a result of the amendments being introduced prior to the commencement of the *Offshore Petroleum Act 2006* and the *Australian Energy Market Amendment (Gas Legislation) Act 2007.*

As both Acts commenced on 1 July 2008, an opportunity now exists to simplify the commencement table. It is therefore proposed that a parliamentary amendment be moved to replace the existing commencement table with a simplified version reflecting that the Acts mentioned above have commenced.

Strict Liability - Schedule 1, item 169

Strict liability offences of failure to comply with directions – Generally-applicable comments

Item 169 of Schedule 1 creates a number of offences of strict liability. These offences consist of failure by the holder of a greenhouse gas title to comply with a direction given by the responsible Commonwealth Minister under a preceding provision of the Bill. The directions in each case will be directions to the title-holder to take, or to refrain from taking, action of a particular kind. The purpose of giving the direction in each case is to deal with the risk that the greenhouse gas title-holder's operations could have a significant adverse impact on one or more of: operations of existing or future petroleum title-holders, resources of the seabed (including potentially commercial petroleum), the environment, human health or safety or other users of the sea.

Greenhouse gas title-holders are engaging in a high-investment, high-return commercial activity where compliance with regulatory requirements could be viewed by the title-holder as involving unnecessary, excessive and avoidable costs. Operations will take place at remote locations under conditions that make first-hand monitoring by project inspectors a practical impossibility. Regulatory staff will in practice be dependent on reporting by the title-holder in order to ascertain whether there has been compliance. The imposition of strict liability will therefore be important to the integrity of the regulatory regime. Moreover, given the very high cost of carrying out any operations offshore, it is important that the penalty for non-compliance be high enough to be a real disincentive to cost-cutting behaviour by licensees.

Proposed subsections 249AW(2) and 249BZA(2)

Proposed sections 249AV and 249BZ provide for the responsible Commonwealth Minister to give a direction to a greenhouse gas assessment permittee or a greenhouse gas holding lessee, respectively, for the purpose of eliminating, mitigating or managing the risk that operations under the permit or lease could have a significant adverse impact on operations under an existing or future petroleum title. Proposed sections 249AW and 249BZA make it an offence to fail to comply with a direction and subsections 249AW(2) and 249BZA(2) make it an offence of strict liability.

The general considerations set out above are applicable to both offences. The following further comments are made in relation to these offences.

Proposed sections 249AV and 249BZ, in their application to greenhouse gas assessment permittees and holding lessees, constitute one of the means by which the Bill enables the responsible Commonwealth Minister to balance the competing interests of greenhouse gas title-holders and existing and future petroleum title-holders. Greenhouse gas operations and petroleum operations utilise the same kinds of geological formations, often in the same geological basin, and there is therefore the potential for greenhouse gas and petroleum title-holders' activities to impact on one another, either directly or indirectly.

Given the technical complexity of offshore drilling operations and also the regulator's dependence on the title-holder for the provision of operational and monitoring data, any offence provision that requires proof of any level of fault on the part of the title-holder is likely to be difficult or even impossible to enforce. Lack of effective enforcement will leave present and future petroleum title-holders vulnerable to having the value of their resource affected. It will also substantially hinder the responsible Commonwealth Minister in performing his or her core role of balancing the competing interests of greenhouse gas and petroleum interests, and the community interest in the orderly exploitation of both kinds of community resource. Strict liability is therefore important to the effectiveness of the regulatory regime.

In relation to the proposed penalty of 100 penalty units, the very high level of expenditure that is routinely incurred in offshore exploration activities makes the normal upper limit of 60 penalty units for strict liability offences inadequate to operate as a meaningful deterrent. The proposed 100 penalty units is seen as necessary for that purpose.

The imposition of strict liability offences is therefore considered to be justified in these circumstances, as well as the higher than normal level of penalties for such offences.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

Proposed subsections 249CY(2), 249CZB(2) and 249CZD(2)

Proposed section 249CX provides for the responsible Commonwealth Minister to give a greenhouse gas injection licensee a direction for the purpose of eliminating, mitigating or managing the risk that operations carried out under the licence could have a significant adverse impact on a geological formation that contains, or is likely to contain, a petroleum pool or otherwise compromise the exploitation of any petroleum that occurs as a natural resource.

Proposed sections 249CZ and 249CZA provide for the responsible Commonwealth Minister to give a greenhouse gas injection licensee a direction in order to deal with a 'serious situation'. Section 249CZ defines 'serious situation' in terms of leakage of greenhouse gas, unpredicted behaviour of injected greenhouse gas, adverse impact on the geotechnical integrity of a geological formation or inherent unsuitability of the storage formation. Directions under section 249CZA may require the injection licensee to carry on operations in a particular manner,

to cease or suspend operations or to carry out specified activities for the purpose of eliminating, mitigating, managing or remediating the 'serious situation'.

Proposed section 249CZC provides for the responsible Commonwealth Minister to give a direction for the purpose of eliminating the risk that greenhouse gas operations under the injection licence could have a significant adverse impact on a commercial discovery of petroleum in an area where the injection licence area overlaps a pre-commencement petroleum title area. Where elimination of the risk is not practicable, the responsible Commonwealth Minister must give a direction for the purpose of mitigating, managing or remediating the risk.

Proposed sections 249CY, 249CZB and 249CZD make it an offence to fail to comply with the direction and subsection (2) in each case makes the offence one of strict liability.

The general considerations set out above are applicable to all three offences. The following further comments are made in relation to these offences.

Greenhouse gas operations and petroleum operations utilise the same kinds of geological formations, often in the same geological basin, and there is therefore the potential for greenhouse gas and petroleum title-holders' activities to impact on one another, either directly or indirectly. Proposed sections 249CX and 249CZA, in their application to greenhouse gas injection licensees, enable the responsible Commonwealth Minister to balance the competing interests of greenhouse gas injection licensees and the interests of the community in the protection of seabed petroleum resources. Section 249CZA also gives the responsible Commonwealth Minister the necessary powers to protect the environment, geological formations and other seabed resources from unpredicted adverse effects of greenhouse gas migration. Section 249CZC enables the responsible Commonwealth Minister to protect the rights of pre-commencement petroleum title-holders.

Given the technical complexity of offshore greenhouse gas injection and storage operations and also the regulator's dependence on the title-holder for the provision of operational and monitoring data, any offence provision that requires proof of any level of fault on the part of the title-holder is likely to be difficult or even impossible to enforce. Strict liability is therefore important to the effectiveness of the regulatory regime.

In relation to the proposed penalty of 100 penalty units, the very high level of expenditure that is routinely incurred in offshore resources activities makes the normal upper limit of 60 penalty units for strict liability offences inadequate to operate as a meaningful deterrent. The proposed 100 penalty units is seen as necessary for that purpose.

The imposition of strict liability offences is therefore considered to be justified in these circumstances, as well as the higher than normal level of penalties for such offences.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

Proposed section 249CZE

Proposed subsection 249CZE(3) provides that, where injection operations in an injection licence area have ceased, the licensee must make an application for a site closing certificate. Proposed subsection 249CZE(8) also provides for the responsible Commonwealth Minister to direct an injection licensee to make an application for a site closing certificate. Failure to make an application is in each case an offence of strict liability, under subsections (7) and (11) respectively.

These requirements to apply for a site closing certificate are not merely administrative processes. They are critical steps in the regulatory supervision of the offshore injection and storage regime. Their purpose is to ensure that an injection licensee does not abandon an operations site before the responsible Commonwealth Minister is able to ensure that the licensee has taken all the remedial and precautionary measures necessary to ensure that injected greenhouse gas does not, over time, cause damage to other resources of the seabed, the environment, human health and safety and other users of the sea and seabed.

The general considerations set out above apply to both offences. The following further comments are made in relation to these offences.

The application for a site closing certificate and the reports and other documents that accompany it will be the responsible Commonwealth Minister's major source of information about the cessation of injection operations and about the remedial and precautionary work program that needs to be carried out by the licensee in the site-closing (decommissioning) period. The work carried out in this period will be for the medium and long term protection of resources, the environment and other interests. At this stage of the project, the injection licensee stands to gain no further commercial benefit from carrying out the site-closing work program. Strict liability is therefore considered necessary in order to ensure the integrity of the regulatory regime.

In relation to the proposed penalty of 100 penalty units, the very high level of expenditure that is routinely incurred in offshore resources activities makes the normal upper limit of 60 penalty units for strict liability offences inadequate to operate as a meaningful deterrent. The proposed 100 penalty units is seen as necessary for that purpose.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

Strict Liability - Schedule 1, item 191

Proposed subsection 298-290(4)

The pattern of fault-based liability and strict liability in proposed sections 298-288, 298-289 and 298-290 follows that in existing sections 288, 289 and 290 of the *Offshore Petroleum Act 2006*.

Strict Liability - Schedule 1, item 200

Proposed section 316-307

Proposed section 316-305 confers a general power on the responsible Commonwealth Minister to give a direction to a greenhouse gas title-holder. Proposed section 316-307 makes it an offence to fail to comply with a direction and subsection 316-307(2) makes the offence one of strict liability. Strict liability has been imposed for the following reasons.

Greenhouse gas title-holders are engaging in a high-investment, high-return commercial activity where compliance with regulatory requirements could be viewed by the title-holder as involving unnecessary, excessive and avoidable costs. Moreover, operations will take place at remote locations under conditions that make first-hand monitoring by project inspectors a practical impossibility. Regulatory staff will in practice be dependent on reporting by the title-holder in order to ascertain whether there has been compliance. The imposition of strict liability will therefore be necessary in order to ensure the integrity of the regulatory regime.

In relation to the proposed penalty of 100 penalty units, the very high level of expenditure that is routinely incurred in offshore resources activities makes the normal upper limit of 60 penalty units for strict liability offences inadequate to operate as a meaningful deterrent. The proposed 100 penalty units is seen as necessary for that purpose.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

Strict Liability - Schedule 1, item 238

Proposed section 335-329

Proposed section 335-329 provides for the establishment of safety zones around greenhouse gas wells, structures and equipment and prohibits the entry of categories of vessels into the safety zones. These safety zones are, to an extent, intended for the protection of injection infrastructure. They are, however, also in large part intended for the protection of members of the workforce that may be on board any structure.

The circumstances in which an infringement may occur are very varied. They can range from an incursion by a vessel whose crew are oblivious to the existence of the structure to a foreign fishing vessel being deliberately brought in close to the structure, or even tied-up to it, in order for the crew to fish. The vessels used in incursions may be non-compliant in a number of respects and may not have adequate maps or navigational equipment. The strict liability offence in subsection 335-329(10) is therefore necessary to ensure the effectiveness of the prohibition in all circumstances.

The matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in framing these offences. Reference was not made to the Committee's *Sixth Report of 2002* in framing the offences. I am now satisfied, however, that

the decisions to make the offences ones of strict liability and to impose the higher maximum penalties were consistent with the principles set out in the Committee's Report.

Legislative Instruments

Schedule 1

The provisions of the Bill referred to below provide in each case that an instrument or direction made or promulgated under the relevant section 'is not a legislative instrument'.

Proposed subsections 177B(3) and 181A(7)

These provisions are merely declaratory, and are included for the avoidance of doubt.

Proposed subsection 249AL(9)

Proposed section 249 is in the same terms, in relevant respects, as the equivalent (petroleum) provision in section 84 of the *Offshore Petroleum Act 2006*. The Australian Government Solicitor advised in 2005 in relation to the drafting of section 84 that bid assessment criteria made public under the precursor provision in the *Petroleum (Submerged Lands) Act 1967* (which also was in relevantly the same terms) were not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, but that the matter was not free from doubt. On that basis, subsection 84(9) was included in the Offshore Petroleum Act to put the matter beyond doubt. On the same basis, proposed subsection 249AL(9) has been included in the present Bill to put the matter beyond doubt.

Proposed subsections 249AUBA(4), 249AV(6), 249BZ(6), 249CXA(8), 249CZA(10), 249CZC(10), 261(8), 275(8) and 316-305(10)

Proposed subsections 249AUBA(4), 249AV(6), 249BZ(6), 249CXA(8), 249CZA(10), 249CZC(10), 261(8), 275(8) and 316-305(10) are merely declaratory, and are included for the avoidance of doubt.

Proposed subsection 335-329(11)

As per the Explanatory Memorandum to the *Offshore Petroleum Act 2006*, a notice under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Proposed subsection 406-407(4)

Proposed subsection 406-407(4) is merely declaratory, and is included for the avoidance of doubt.

Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008

Uncertain commencement

Schedules 1 to 3, proposed subsection 2(1)

The Table in subclause 2(1) of the Bill provides for Schedules 1, 2 and 3 to commence at the same time as specified provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*. Now that the *Offshore Petroleum Act 2006* has commenced, it is possible to say that Schedules 1, 2 and 3 of the Bill will commence on the day after the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* receives Royal Assent. A parliamentary amendment will be moved to replace the existing commencement table within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* with a simplified version.

Setting the amount of a fee by regulation

Schedule 1, item 5

Proposed subsection 4A(3) of the *Offshore Petroleum and Greenhouse Gas Storage (Annual Fees) Act 2006* ('Annual Fees Act') provides for the amount of the annual fee for greenhouse gas titles to be set by regulations. The Committee has raised the issue that legislation which provides for the rate of a fee to be set by regulation creates a risk that the fee may, in fact, become a tax. The Committee comments that it is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Australian Government Solicitor has advised that the constitutional basis for the Annual Fees Act not being an Act that imposes taxation is that it imposes charges for the right to exploit a natural resource (i.e. the pore space below Commonwealth waters), which is in the nature of a fee for a privilege. An Act that imposes a fee for a privilege is not a taxing Act. The 'non-tax' status of the annual fees therefore does not depend on the fees recovering no more than the cost of administration of the licensing scheme.

The distinction between a fee for a privilege and a cost-recovery fee (fee for service) needs to be maintained for the purposes of this Act. This is because, while the annual fees for offshore titles are in fact aimed at no more than cost recovery, the kinds of administrative costs that can be recovered through a fee for service, within the constitutional meaning of that term, do not include all of the actual costs of administering offshore titles and regulating the operations of title-holders. If a legislative requirement were included in the Annual Fees Act that the level of fees must not exceed the costs of administration, some costs could not be recovered from title-holders and would have to be funded from other sources.

It is therefore not proposed to include such a requirement in the Annual Fees Act.

Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008

Uncertain commencement

Schedules 1 to 3

The Table in subclause 2(1) of the Bill provides for Schedules 1, 2 and 3 to commence at the same time as specified provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*. Now that the *Offshore Petroleum Act 2006* has commenced, it is possible to say that Schedules 1, 2 and 3 of the Bill will commence on the day after the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* receives Royal Assent. A parliamentary amendment will be moved to replace the existing commencement table within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* with a simplified version.

Setting a tax by regulation

The Committee has asked whether the policy review foreshadowed in 2005 has been undertaken and whether consideration was given to setting an upper limit in the Act for the prescribed amounts.

The review of policy issues raised during the re-write of the *Petroleum (Submerged Lands) Act 1967* is continuing. Forty-eight policy issues were raised by stakeholders during the re-write and the review has dealt with 30 issues. As a result, a number of proposed amendments to the *Offshore Petroleum Act 2006* are expected to be introduced into the Parliament in the Spring Session. It is envisaged that 10 of the remaining issues will be addressed later in 2008 and the remaining 8 in the first half of 2009.

The proposal to limit increases in the prescribed amounts to no more than the CPI was considered inappropriate as costs incurred in regulating the petroleum sector frequently bear no relation to movements in the CPI (for example, the cost of obtaining petroleum industry expertise has increased significantly over recent years due to the booming resources sector). Rather than setting a limit to the prescribed amounts, it would be preferable to keep the amounts under regular review to ensure that the total fees (both annual fees and registration fees) recover the actual costs incurred in regulating petroleum activities in the offshore area.

Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008

Uncertain commencement

The Table in subclause 2(1) of the Bill provides for Schedules 1 and 2 to commence at the same time as specified provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*. Now that the *Offshore Petroleum Act 2006* has commenced, it is possible to say that Schedules 1 and 2 of the Bill will commence on the day after the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* receives Royal Assent. A parliamentary amendment will be moved to replace the existing commencement table within the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008* with a simplified version.