

Senate Standing Committee
for the
Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

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Senator Cory Bernardi
Senator the Hon Kate Lundy
Senator the Hon Ian Macdonald
Senator Rachel Siewert

Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the
Committee under its terms of reference is invited to do so.

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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the
Committee under its terms of reference is invited to do so.

Australian Capital Territory Water Management Legislation Amendment Bill 2013

Introduced into the Senate on 13 November 2013

Portfolio: Environment

Background

This bill amends the following:

- the *Australian Capital Territory (Planning and Land Management) Act 1988* providing for the abstraction of water on National Land to be managed by the ACT Government under the *Water Resources Act 2007* (ACT) (the ACT Water Resources Act) instead of the Commonwealth Government;
- the *Canberra Water Supply (Googong Dam) Act 1974* ensuring that the ACT Executive has the necessary powers to fully manage the surface waters of the under the ACT Water Resources Act; and
- the *Water Act 2007* to provide that the water resources of the Googong Dam Area are required to be included in a water resource plan area for which the ACT has responsibility.

The committee has no comment on this bill.

Australian Civilian Corps Amendment Bill 2013

Introduced into the House of Representatives on 20 November 2013

Portfolio: Foreign Affairs and Trade

Background

This bill amends the *Australian Civilian Corps Act 2011* (the Act) to:

- transfer the powers and functions of the Director-General of AusAID under the Act to the Secretary of Department of Foreign Affairs and Trade (DFAT); and
- substitutes other references to AusAID and the Director-General of AusAID with DFAT and the Secretary of DFAT, respectively.

The bill also makes consequential amendments to the Australian Civilian Corps Regulations 2011, the Director-General's Australian Civilian Corps Directions 2011 and the Prime Minister's Australian Civilian Corps Directions 2012.

The committee has no comment on this bill.

Australian Research Council Amendment Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Education

Background

This bill amends the *Australian Research Council Act 2001* to apply indexation against appropriations for existing schemes and add a figure for the last year of the forward budget estimates (for the financial year starting on 1 July 2016).

The committee has no comment on this bill.

Clean Energy Finance Corporation (Abolition) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Treasury

Background

This bill repeals the *Clean Energy Finance Corporation Act 2012*. The bill also transfers the Clean Energy Finance Corporation's existing contractual assets and liabilities to the Commonwealth to hold and manage.

The committee has no comment on this bill.

Clean Energy (Income Tax Rates and Other Amendments) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Treasury

Background

This bill amends the *Clean Energy (Income Tax Rates Amendments) Act 2011* to repeal the personal income tax cuts legislated to commence on 1 July 2015.

The bill also amends the *Clean Energy (Tax Laws Amendments) Act 2011* to repeal associated amendments to the low-income tax offset legislated to commence on 1 July 2015

The committee has no comment on this bill.

Clean Energy Legislation (Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Environment

Background

This bill is part of a package of bills to repeal the legislation that establishes the carbon pricing by the end of the 2013-14 financial year. The bill repeals the following Acts:

- Clean Energy Act 2011 (CE Act);
- Clean Energy (Charges—Customs) Act 2011;
- Clean Energy (Charges—Excise) Act 2011;
- Clean Energy (Unit Issue Charge—Auctions) Act 2011;
- Clean Energy (Unit Issue Charge—Fixed Charge) Act 2011; and
- Clean Energy (Unit Shortfall Charge—General) Act 2011.

The bill also:

- makes consequential amendments to other legislation referring to the CE Act and the carbon pricing mechanism;
- provides for the collection of all carbon tax liabilities for 2012-13 and 2013-14 financial years;
- introduces new powers for the ACCC to take action to ensure price reductions relating to the carbon tax repeal are passed on to consumers; and
- makes arrangements for the finalisation and cessation of industry assistance through the Jobs & Competitiveness Program, the Energy Security Fund and the Steel Transformation Plan.

**Trespass on personal rights and liberties—onus of proof
Schedule 2, item 3, proposed subsection 60D(3) of the Competition
and Consumer Act 2010**

Proposed section 60D of the *Competition and Consumer Act* empowers the ACCC to issue a written notice to a corporation if it is considered that the corporation has engaged in price exploitation, the definition of which relates to unreasonably high prices being charged (see proposed section 60C). Proposed subsection 60D(3) provides that such a notice will be prima facie evidence in any proceedings that the price charged for the supply was unreasonably high, and that the unreasonably high price was not attributable to matters to be taken into account under proposed section 60C which are relevant to a conclusion of price exploitation.

The effect of this provision appears to place an onus on the supplier to prove that prices were not unreasonably high in any relevant court proceedings (see explanatory memorandum at page 55). The *Guide to Framing Commonwealth Offences, Infringement notices and Enforcement Powers* (at page 53) cautions against the use of presumptions of fact that are taken to exist unless proven otherwise, and the practice of the committee is that such presumptions be kept to a minimum and that a justification be provided in the explanatory memorandum. Although the effect of proposed subsection 60D(3) is noted in the explanatory memorandum, the reasons why the approach is considered necessary and reasonable are not elaborated. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Possible retrospective commencement

The explanatory memorandum notes, at page 6, that '2013-14 will be the last financial year that the carbon tax will apply, even if the Parliament does not pass the Carbon Tax Repeal Bills until after 1 July 2014'.

If the bill is passed after 1 July 2014 without amendment to its commencement then some provisions will have a retrospective effect. The

committee notes that it has a long-standing objection to retrospective provisions if they will, or might, have an adverse effect on any person.

The committee expects that if the bill is likely to, or will, have a retrospective effect that this will be fully justified in material accompanying the bill, including in a supplementary explanatory memorandum if one is required. The committee draws its view to the attention of the Minister and the Senate.

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.

Climate Change Authority (Abolition) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Environment

Background

This bill repeals the *Climate Change Authority Act 2011* and makes transitional and other arrangements for the abolition of the Climate Change Authority and the Land Sector Carbon and Biodiversity Board.

The committee has no comment on this bill.

Commonwealth Electoral Amendment (Above the Line Voting) Bill 2013

Introduced into the Senate on 13 November 2013

By: Senator Xenophon

Background

This bill amends the *Commonwealth Electoral Act 1918* to establish an optional preferential system above and below the line.

The committee has no comment on this bill.

Commonwealth Inscribed Stock Amendment Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Treasury

Background

This bill amends the *Commonwealth Inscribed Stock Act 1911* to increase the legislative debt limit from \$300 billion to \$500 billion.

The committee has no comment on this bill.

Customs Amendment (Anti-Dumping Commission Transfer) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Industry

Background

This bill amends the *Customs Act 1901* to separate the Anti-Dumping Commission, comprising the Commissioner for the Anti-Dumping Commission (the Commissioner) and Commission staff members, from the Australian Customs and Border Protection Service.

The committee has no comment on this bill.

Customs Tariff Amendment (Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Immigration and Border Protection

Background

This bill amends the *Customs Tariff Act 1995* to remove the equivalent carbon price imposed through excise equivalent customs duty on aviation fuel.

The committee has no comment on this bill.

Environment Legislation Amendment Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Environment

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* and the *Great Barrier Reef Marine Park Act 1975* to:

- provide legal certainty for decisions that require the Minister to have regard to approved conservation advice for relevant threatened species or ecological communities; and
- provide additional protection for turtles and dugong.

Retrospective validation

Schedule 1, item 2

This item provides that decisions and other instruments that (prior to the commencement of the proposed amendments) would have been invalid due to a failure to consider a matter required by the legislation to be considered (namely, approved conservation advice) are to be taken as valid and effective, as if the legal requirement had been complied with.

Item 1 of Schedule 2 makes an amendment that has the same effect with prospective operation, that is, it provides that failure to have regard to approved conservation advice does not render a decision invalid (even though the Minister has a statutory obligation to consider the matter). Items 1 and 2 are said to address the implications arising from the Tarkine case, in which the Federal Court invalidated a decision to approve a development plan to operate a mine in Tasmania on the basis that the Minister failed to comply with a statutory obligation to consider approved conservation advice in relation to the Tasmanian Devil.

Although the High Court has accepted that in at least some circumstances Parliament can specify the remedial consequences of breach of a statutory provision, the committee has raised concerns about this being done with retrospective effect. The retrospective validation of administrative decisions may have a detrimental effect on a person's rights or liberties. In this case, the

detrimental effect may be on the right of an ‘aggrieved person’ to bring proceedings under the *ADJR Act* to enforce the requirements of the *EPBC Act*. The practical effect of item 2 of Schedule 1 is that a decision which was invalid when made cannot be challenged by such an aggrieved person under the *ADJR Act*.

The explanatory memorandum justifies the approach on the basis that it will ‘provide certainty for past and future decisions and instruments made or entered into by the Minister’ (at page 2) and ‘will benefit proponents by providing certainty for existing decisions and the projects that rely on those decisions’ (at page 7).

Although certainty for proponents is of relevance, the committee considers that a fuller justification for the approach should be sought in light of the retrospective operation. It is not clear that the impact of the Federal Court decision in the *Tarkine* case is that many other decisions under the *EPBC Act* are also invalid. Other decisions under that Act would only be invalid if it could be established on the facts of each case that the Minister had failed to comply with his or her statutory obligation to consider any approved conservation advice. Here it is noted that challenges under the *ADJR Act* (like the *Tarkine* case) must, in general, be brought within 28 days of the provision of a statement of reasons for the decision. **The committee therefore seeks the Minister's further advice as to the extent of uncertainty for proponents and why this is thought sufficient to justify retrospectively validating decisions that are contrary to statutory obligations imposed by the Parliament. The committee also seeks the Minister's advice as to whether the amendment may affect any proceedings which have yet to be determined.**

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

Trespass on personal rights and liberties—penalties and strict liability

Schedule 2

This schedule makes a number of amendments to the *EPBC Act* and the *GBRMP Act*, the effect of which is to triple criminal financial penalties and

civil penalties for a range of offences relating to the killing, illegal trade and transportation of dugong and turtle populations. The amendments also apply strict liability to the physical elements of the offences, ‘for example, in respect of the EPBC Act, that the animal to which the offence relates is a member of a listed threatened species’ (statement of compatibility, page 4). As is noted in the statement of compatibility, however, strict liability still allows a defence of honest and reasonable mistake to be raised. The statement of compatibility further argues that the application of strict liability is a proportionate limitation to the right to the presumption of innocence because of the high public interest in protecting and conserving marine turtle and dugong populations’. The increase in penalties is thought necessary to ensure strong deterrence. These general arguments are elaborated in relation to the particular amendments in the explanatory memorandum, where it is also noted that the committee’s views on strict liability and the *Guide* have been considered.

In light of the justification provided in the statement of compatibility and explanatory memorandum the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Excise Tariff Amendment (Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Treasury

Background

This bill amends provisions to remove the equivalent carbon price imposed through excise duty on aviation fuel.

The committee has no comment on this bill.

Grape and Wine Legislation Amendment (Australian Grape and Wine Authority) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Agriculture

Background

This bill is part of a package of three bills. The bill amends the *Wine Australia Corporation Act 1980* to implement the merger of the Grape and Wine Research and Development Corporation (GWRDC) and the Wine Australia Corporation (Wine Australia) to create a new wine statutory authority: the Australian Grape and Wine Authority (the Authority).

The bill also provides for the transfer of assets and liabilities from the GWRDC and Wine Australia to the Authority.

Trespass on personal rights and liberties—reversal of onus Schedule 2, subitem 26(3)

This subitem provides a defence to a civil penalty provision for contravention of a final reporting requirement by a director of the Australian Grape and Wine Authority. The defence is available if the contravention consists of an ‘omission from the financial statements’ that ‘was immaterial and did not affect the giving of a true and fair view of the matters required by the Finance Minister’s Orders to be included in the statements’. The defendant must prove the relevant particulars to rely on the defence.

The explanatory memorandum does not indicate why it is appropriate to reverse the onus of proof in relation to these matters, nor why a legal rather than an evidential burden of proof is appropriate. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

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

Higher Education Support Amendment (Savings and Other Measures) Bill 2013

Introduced into the House of Representatives on 21 November 2013

Portfolio: Education

Background

This bill amends the *Higher Education Support Act 2003* to:

- remove the HECS-HELP up-front payment discount;
- remove the HELP voluntary repayment bonus;
- amend HESA to apply an efficiency dividend of 2 per cent in 2014 and 1.25 per cent in 2015 to Commonwealth contribution amounts under the Commonwealth Grant Scheme;
- make a minor amendment to HESA to reflect the change of the name of the University of Ballarat to the Federation University Australia.

The committee has no comment on this bill.

Import Processing Charges Amendment Bill 2013

Introduced into the House of Representatives on 21 November 2013

Portfolio: Immigration and Border Protection

Background

This bill amends the *Import Processing Charges Act 2001* to:

- increase import processing charges that will be levied on air, sea and post consignments with a value of \$10,000 or more from 1 January 2014; and
- introduce a two tiered charging arrangement with increased charges to apply for air, sea and post import consignments with a value of \$10,000 or more.

The committee has no comment on this bill.

Indigenous Education (Targeted Assistance) Amendment Bill (No. 2) 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Indigenous Affairs

Background

This bill amends the *Indigenous Education (Targeted Assistance) Act 2000* to enable the Minister to enter into contracts with service providers from 1 January 2014.

The committee has no comment on this bill.

Infrastructure Australia Amendment Bill 2013

Introduced into the House of Representatives on 20 November 2013

Portfolio: Infrastructure and Regional Development

Background

This bill amends the *Infrastructure Australia Act 2008* to re-establish Infrastructure Australia as a separate entity under the *Commonwealth Authorities and Companies Act 1997*, providing for an independent governing entity that is both legally and financially separate from the Commonwealth.

The committee has no comment on this bill.

Minerals Resource Rent Tax Repeal and Other Measures Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Treasury

Background

This bill repeals the Minerals Resource Rent Tax (MRRT) by repealing the following Acts:

- *Minerals Resource Rent Tax Act 2012*;
- *Minerals Resource Rent Tax (Imposition—Customs) Act 2012*;
- *Minerals Resource Rent Tax (Imposition—Excise) Act 2012*; and
- *Minerals Resource Rent Tax (Imposition—General) Act 2012*.

The bill also makes consequential amendments to the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.

The committee has no comment on this bill.

National Health Amendment (Simplified Price Disclosure) Bill 2013

Introduced into the House of Representatives on 21 November 2013

Portfolio: Health

Background

This bill amends the *National Health Act 1953* to streamline the operation of the current Pharmaceutical Benefits Scheme price disclosure.

The committee has no comment on this bill.

National Integrity Commissioner Bill 2013

Introduced into the Senate on 13 November 2013

By: Senator Milne

Background

This bill is substantially similar to a bill that was introduced into the House of Representatives by Mr Bandt on 28 May 2012. This *Digest* includes the committee's previous comments to the extent that they are applicable to this bill.

This bill seeks to establish a National Integrity Commission, bringing together and co-locating the independent oversight functions for:

- the investigation and prevention of misconduct and corruption in all Commonwealth departments, agencies, federal parliamentarians and their staff;
- the investigation and prevention of corruption in the Australian Federal Police and the Australian Crimes Commission; and
- independent advice to Ministers and parliamentarians on conduct, ethics and matters of proprietary.

Possible undue trespass on personal rights and liberties

Natural justice - right to a fair hearing

Clause 31

Clause 31 of this bill provides that the National Integrity Commissioner must not disclose findings or opinions critical of an agency or a person in a report, unless an opportunity to be heard has been afforded. This requirement, to be afforded procedural fairness, is an express statement of what would otherwise be an implicit legal requirement (read into the legislation as a matter of statutory interpretation or as a common law requirement). However, subclause 31(2) states that a hearing is not required if the Commissioner is satisfied that a person (a) may have committed a criminal offence, contravened a civil penalty provision, could be subject to disciplinary proceedings or whose conduct could be grounds for the termination of their employment, and (b) that affording the statutory procedural fairness requirements may either

compromise the investigation of a corruption issue or an action taken as a result of such an investigation. In effect, in particular circumstances the statute attempts to exclude an obligation to give a person a fair hearing prior to the completion of a report. Subclause 33(3) specifically provides that a report may recommend that a person's employment be terminated.

This raises a question of whether this provision unduly trespasses on a personal right, given that a fair opportunity to be heard is thought to be a fundamental common law right (see eg, *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 [14-15]).

Unfortunately, the explanatory memorandum does not adequately justify the exclusion of a fair hearing, but merely repeats the terms of the bill (at page 7). Although the Commission *may* decide to exclude from its report 'sensitive information' where it is desirable in the circumstances (subclause 33(4)), there is no requirement to do so in relation to critical findings or opinions which are contained in the report in relation to persons who have not been afforded a fair hearing. Although sensitive information which is excluded from the report must be included in a supplementary report (which sets out the information and the reasons for excluding it), only the primary report must be tabled in Parliament (see clause 157). Both the report and any supplementary report must be given to the Prime Minister, however, the Prime Minister is only under an obligation to table the report (at least in cases where a public hearing has been held).

Given the capacity of findings and opinions mentioned in subclause 31(2) to adversely affect a person's reputation (see *Ainsworth v Criminal Justice Commission (Qld)* (1992) 175 CLR 564) and the characterisation of the right to be heard as a fundamental common law right, the bill may, without further clarification, give rise to considerable interpretive difficulties in the courts. For example, it may be that a court could imply a right to be heard prior to the Prime Minister tabling a report in Parliament in relation to any critical findings or opinions that had not been disclosed pursuant to subclause 31(2) and which was not excluded from the report as 'sensitive' information.

The committee accepts that the need to preserve the efficacy of any continuing or future investigations in relation to corruption is clearly a legitimate public interest, but remains concerned as to whether there are sufficient protections in place to protect an individual who is not afforded a right to be heard. **The committee therefore requests the Senator's advice as to the justification**

for the approach, whether additional protections can be included for an individual who is not afforded a right to be heard and whether consideration can be given to clarifying the intended operation of these provisions.

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

Possible undue trespass on personal rights and liberties

Right to representation

Subclause 31(7)

Paragraph (b) of subclause 31(7) provides that a person who has a right to be heard 'may, with the National Integrity Commissioner's approval, be represented by another person'. Given the nature of the interests and rights at stake and the potential complexity of the issues which may be raised, there may be circumstances where a fair hearing will be compromised if a person is refused permission to be represented. **The committee therefore requests the Senator's advice as to the justification for the approach.**

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

Abrogation of legal professional privilege

Strict liability

Penalty

Clauses 46 to 48, and clauses 64 to 66

Subclause 43(5) of the bill states that for the purposes of sections 45 to 48, the powers to request or require a person to produce information/documents includes the power to request or require the production of materials that are subject to legal professional privilege. Although sections 46 and 47 indicate a person may refuse or fail to provide information on the ground of legal professional privilege, there are a number of limitations and the National Integrity Commissioner may, after considering materials over which privilege has been claimed, determine whether to accept or reject the claim. In relation

to the production of a document or thing, a person may refuse a request if ‘a court has found the document or thing...to be subject to legal professional privilege’. If the Commissioner accepts the claim of privilege they must ‘disregard’ the material. However, it is unclear what exactly this might mean. Clause 48 makes it an offence for a person to fail to comply with a request under clause 43 to produce documents or give information and the Commissioner has decided to reject a claim that the information or document is subject to legal professional privilege. The offence is punishable by a fine of \$1000 or 6 months imprisonment. The offences are strict liability offences (subclause 48(3)). However, they are subject to a reasonable excuse defence (subclause 48(4)).

Similar issues arise in relation to clauses 64, 65 and 66.

The committee has long taken the view that legal professional privilege is a fundamental principle of the common law, and will closely examine legislation which removes or diminishes this right. Unfortunately, the explanatory memorandum (at pages 9, 10 and 21), is silent on the issues of the extent to which the legislation is intended to modify the applicable common law principles, the justification for these modifications, and whether the penalties for offences relating to claims for legal professional privilege are justified. In relation to the offence provisions, it is noted that no explanation of the need for strict liability is provided (a matter which is of continuing concern to the committee), nor is it explained why it is appropriate to use a reasonable excuse defence (*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, at page 28, cautions against the use of such provisions as introducing uncertainty into the law). The absence of a detailed treatment of these issues in the explanatory memorandum undermines the capacity of the committee to adequately consider these clauses in the bill. **The committee therefore requests the Senator's advice as to the justification for the approach taken in relation to these matters.**

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

Privilege against self-incrimination

Clauses 49 and 67

Clause 49 of the bill provides that the privilege against self-incrimination is abrogated in relation to requests to ‘a person’ for information, documents or things under clause 43. Failure to comply with such a request is an offence under clause 45, punishable by 2 years imprisonment. The privilege is not completely abrogated as it is subject to a ‘use immunity’ which means that self-incriminatory disclosures cannot be used against the person who makes the disclosure in criminal proceedings or other proceedings for the imposition or recovery of a penalty. However, this use immunity only applies if a person, prior to producing information or documents or things, claims that doing so may tend to incriminate or expose them to a penalty. The use immunity is stated as operating only as a ‘direct’ use immunity (i.e. applying in relation to court proceedings) and does not amount to a ‘derivative’ use immunity, which would prevent the use of the compelled information in the gathering of other evidence against the person. It is also the case that the use immunity will not be available in relation to a list of five proceedings (see paragraphs (c) to (g) of subclause 49(4)). The explanatory memorandum gives a general justification for the abrogation of the privilege as follows:

It is necessary to abrogate the privilege against self-incrimination to ensure that the National Integrity Commissioner can be given access to information, documents and things relevant to an investigation into a corruption issue. The inclusion of a use immunity in all but five limited cases provides a safeguard to persons that are required to answer questions or produce documents or information or things...that compliance with that request cannot be used against them in criminal proceedings or proceedings for the imposition or recover of a penalty...

The committee has accepted that the privilege against self-incrimination is not absolute and the question of whether the competing interests are appropriately weighed will often be a matter best left to the Senate as a whole. However, the interest of having the Government properly informed will more likely be accepted as prevailing over the right of the individual to remain silent if it there is a clear justification offered. Unfortunately, the explanatory memorandum does not:

- (1) Indicate why the use immunity is only available to persons who make a prior claim that compliance with s 43 may tend to incriminate or expose them to a penalty. This is of concern as

the application of the use immunity may depend on a person's access to legal advice.

- (2) Explain why a derivative use immunity is not appropriate. In the past the Committee has expressed concerns about the absence of derivative use immunity, notwithstanding the inclusion of a direct use immunity.
- (3) Explain why each of the exceptions to the general use immunity is justified.

The committee therefore requests the Senator's advice on these questions to better assess whether these clauses unduly trespasses on personal rights and liberties.

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

Possible undue trespass on personal rights and liberties

Clause 71

Clause 71 gives an 'authorised officer' the authority to execute an arrest warrant (subclause 71(1)) and, if the officer believes on reasonable grounds that a person is on any premises, to break and enter into those premises (subclause 71(2)). 'Authorised officers' may also apply for search warrants (including ordinary and frisk searches of the person) and carry out such searches (see clauses 78-87). 'Authorised officer' is defined in clause 110 to be a person who has been authorised by the National Integrity Commissioner to be such an officer and is either a staff member of the National integrity Commission whom the Commissioner considers has suitable qualifications or experience, or a member of the Australian Federal Police.

Although it is possible to identify circumstances in which an appropriate person may not be a current member of the AFP (for example, if they were a former member or a member of a State or Territory police force) it gives rise to concern that 'police powers' such as the powers of arrest and the power to conduct personal searches may be conducted by persons other than sworn police officers. At page 31 the explanatory memorandum notes that it is important that these powers be exercised by persons with the appropriate

skills and character, but does not offer reasons as to why persons other than police officers may be required to exercise these powers, nor does it or the bill provide specificity about what constitutes 'suitable qualifications or experience'. **The committee therefore requests the Senator's advice about whether this power could be limited to police officers or more legislative guidance could be provided to about appropriate qualifications and experience for these officers.**

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

No explanation for new search warrant powers

Clause 78

Clause 78 authorises applications for warrants to search premises and persons. The committee takes the view that any new powers to search persons require strong justification (and this view is outlined on page 107 of the *Guide*.) The committee can understand that there may be reasons in which search warrants are considered justified, but expects that the reasons for proposed approach would be addressed in detail in the explanatory memorandum (see p 25).

If the bill proceeds to further stages of debate, the committee **seeks further advice** on this issue to better assess whether this clause of the bill unduly trespasses on personal rights and liberties.

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

Offshore Petroleum and Greenhouse Gas Storage Amendment (Cash Bidding) Bill 2013

Introduced into the House of Representatives on 20 November 2013

Portfolio: Industry

Background

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to provide a model for allocating cash bid exploration permits in the offshore petroleum regulatory regime.

The committee has no comment on this bill.

Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2013

Introduced into the House of Representatives on 20 November 2013

Portfolio: Industry

Background

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* to provide for the annual titles administration levy to be collected by the National Offshore Petroleum Titles Administrator in relation to cash bid petroleum exploration permits in the offshore regulatory regime.

The committee has no comment on this bill.

Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Environment

Background

This bill is part of a package of seven bills. The bill amends the *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* to repeal provisions imposing an equivalent carbon price through levies imposed on the import and manufacture of synthetic greenhouse gas after 1 July 2014.

The committee has no comment on this bill.

Ozone Protection and Synthetic Greenhouse Gas (Import Levy) (Transitional Provisions) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Environment

Background

This bill provides for an exemption from the equivalent carbon price for the import of bulk synthetic greenhouse gases between 1 April and 30 June 2014 if certain conditions are met.

The committee has no comment on this bill.

Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Environment

Background

This bill is part of a package of seven bills. The bill amends the *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995* to repeal provisions imposing an equivalent carbon price through levies imposed on the import and manufacture of synthetic greenhouse gas after 1 July 2014.

The committee has no comment on this bill.

Parliamentary Proceedings Broadcasting Amendment Bill 2013

Introduced into the Senate on 13 November 2013

By: Senator Xenophon

Background

This bill amends the *Parliamentary Proceedings Broadcasting Act 1946* to prevent the Joint Committee on the Broadcasting of Parliamentary Proceedings from making a condition prohibiting the use of Parliamentary footage for the purposes of satire or ridicule.

The committee has no comment on this bill.

Primary Industries (Customs) Charges Amendment (Australian Grape and Wine Authority) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Agriculture

Background

This bill is part of a package of three bills. The bill amends the *Primary Industries (Customs) Charges Act 1999* to implement the merger of the Grape and Wine Research and Development Corporation (GWRDC) and the Wine Australia Corporation (Wine Australia) to create a new wine statutory authority: the Australian Grape and Wine Authority (the Authority).

The bill also repeals provisions for Wine Australia to make recommendations to the Minister about the levy rate.

The committee has no comment on this bill.

Primary Industries (Customs) Charges Amendment Bill 2013

Introduced into the House of Representatives on 20 November 2013

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill amends the *Primary Industries (Customs) Charges Act 1999* to remove product specific maximum rates for Research & Development charges and marketing charges.

The bill also includes several technical amendments to remove redundant provisions.

Delegation of legislative powers—levy to be set by regulation Various

The *Primary Industries (Customs) Charges Act 1999* authorises the imposition of primary industry charges. The charges are generally imposed at the request of an industry and allow the relevant primary producers to manage their own investment in R&D and marketing. The Act sets maximum rates, and provides for the operative rates to be set through regulations.

The primary purpose of this bill is to remove the specific maximum rates for R&D and marketing charges.

In general, the committee expresses concern about legislation which enables a rate of a levy or charge to be set by regulation. The risk to be avoided is that the levy may be arbitrary, and in effect become a tax. For this reason, the committee looks for limits on the exercise of such powers—a common example being to prescribe for a maximum figure or a formula for determining the level of a levy or charge.

The explanatory memorandum contains a comprehensive explanation for the proposed changes, including the removal of maximum charge figures (at pages 2 and 3). The key aspects of this justification are:

- (1) that the current system for changing charges is cumbersome, especially when amendments to primary legislation are required, and

- (2) the proposed amendments contain a number of safeguards against arbitrary rate rises. In particular, rates cannot be raised above the rate recommended by the relevant industry body and such bodies are required to consult with their member producers who pay the charge. Thus, although maximum charges are removed, other safeguards are put in place.

In light of the detailed justification for the approach the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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.

Primary Industries (Excise) Levies Amendment Bill 2013

Introduced into the House of Representatives on 20 November 2013

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill amends the *Primary Industries (Excise) Levies Act 1999* to remove product specific maximum levy rates for research & development levies and marketing levies.

The bill also includes several technical amendments to remove redundant provisions.

The same issues arise as were discussed in reference to the *Primary Industries (Customs) Charges Amendment Bill 2013* (above). **In light of the detailed justification for the approach the committee again leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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.

Primary Industries (Excise) Levies Amendment (Australian Grape and Wine Authority) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Agriculture

Background

This bill is part of a package of three bills. The bill amends the *Primary Industries (Excise) Levies Act 1999* to implement the merger of the Grape and Wine Research and Development Corporation (GWRDC) and the Wine Australia Corporation (Wine Australia) to create a new wine statutory authority: the Australian Grape and Wine Authority (the Authority).

The bill also repeals provisions for Wine Australia to make recommendations to the Minister about the levy rate.

The committee has no comment on this bill.

Rural Research and Development Legislation Amendment Bill 2013

Introduced into the House of Representatives on 20 November 2013

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill amends ten Acts in the agriculture portfolio to:

- allow statutory research and development corporations (RDCs) to undertake marketing at the request of industry;
- enable government matching funding for voluntary contributions to all RDCs to encourage the private sector to invest in rural research and development (R&D);
- make statutory RDC director selection processes more efficient;
- introduce funding agreements for statutory RDCs to drive performance improvements and increase transparency in the delivery of R&D services;
- allow individual fisheries industry levies to be collected and matched subject to a cap based on the gross value of production of that industry;
- make minor amendments to improve consistency in governance between RDCs and simplify governance arrangements.

This bill was introduced in the previous Parliament and was considered by the committee. The committee raised the following concern:

Delegation of legislative power Schedule 3, item 2

This item makes amendments to the *Primary Industries and Energy Research and Development Act 1989* to allow the Commonwealth to enter into an agreement with a statutory rural research and development corporation. Proposed subsection 33(4) provides that such an agreement ‘must specify the

terms and conditions on which money is paid to the R&D Corporation by the Commonwealth will be spent'. The explanatory memorandum (at page 4) indicates that this provides a mechanism for the RDCs and the Commonwealth to agree to a range of governance and performance related matters and that these matters can be modified over time, without legislative change, so as to reflect changing government and industry requirements and provide greater consistency in the Commonwealth's relationship with all RDCs (at page 4). Subsection 33(5) provides that funding agreements must be published on the R&C Corporation's website.

On the basis of this concern, the committee sought further advice as to the appropriateness of these important matters of governance and accountability being left to delegated legislation. The new explanatory memorandum (again at page 4) provides considerably more detail about funding agreements. In particular, it is noted that such agreements have been in place since the early 2000s, explained that the envisaged conditions are similar to those applicable to industry-owned RDCs, and a list of general conditions included in such agreements is provided. The explanatory memorandum continues:

As each RDC is uniquely shaped by the industry it serves, a degree of detail and tailored conditions are necessary in each funding agreement. It is therefore appropriate to include these sorts of conditions in funding agreements, rather than in legislation. All of the requirements in the funding agreements will be consistent with the PIERD Act and other relevant legislation. The amendments to the PIERD Act require the funding agreement to be published on the RDCs website to provide transparency to levy payers.

In light of the more detailed justification of the approach, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Social Services and Other Legislation Amendment Bill 2013

Introduced into the House of Representatives on 20 November 2013

Portfolio: Social Services

Background

This bill amends various Acts to implement a number of measures including:

Encouraging responsible gambling

- repealing the position and functions of the National Gambling Regulator, along with those provisions relating to the supervisory and gaming machine regulation levies, the automatic teller machine withdrawal limit, dynamic warning provisions, the trial on mandatory pre-commitment, and matters for Productivity Commission review;
- amending the pre-commitment and gaming machine capability;

Continuing income management as part of Cape York Welfare

- enabling a two-year continuation of income management as part of the continuation of Cape York Welfare Reform;

Family Tax Benefit and eligibility rules

- from 1 January 2014, the family tax benefit Part A will be paid to families only up to the end of the calendar year in which a teenager is completing school;

Period of Australian working life residence

- requiring age pensioners, and other pensioners with unlimited portability, to have been Australian residents for 35 years during their working life to receive their full means-tested pension if they choose to retire overseas or travel overseas for longer than 26 weeks from 1 January 2014.

Interest charge

- allowing interest charges to be applied to certain debts incurred by recipients of austudy payment, fares allowance, youth allowance for full-time students and apprentices, and ABSTUDY living allowance;

Student start-loans

- replacing the current student start-up scholarship with an income-contingent loan (the student start-up loan) from 1 January 2014;

Paid parental leave

- removing the requirement for employers to provide Government-funded parental leave pay to their eligible long-term employees;

Pension bonus scheme

- ending late registrations for the closed pension bonus scheme from 1 March 2014;

Indexation

- extending the indexation pauses on certain higher income limits for a further three years until 30 June 2017;
- setting the annual child care rebate limit at \$7,500 for three income years starting from 1 July 2014;

Changes to the rules for receiving payments overseas

- reducing the length of time that families can be temporarily overseas and continue to receive family and parental payments from three years to 56 weeks from 1 July 2014;

Extending the deeming rules to account-based income streams

- aligning the income test treatment of account-based superannuation income streams for products assessed from 1 January 2015 with the deemed income rules applying to other financial assets; and

Other amendments

- amending administration of debt recovery under the Student Financial Supplement Scheme, clarifying provisions relating to the time period for lodging tax returns for family assistance purposes, and ensuring that funding under the National Disability Insurance Scheme paid into a person's account cannot be garnisheed for debt recovery purposes.

Delegation of legislative powers—important matters dealt with by regulation**Schedule 5, item 6, proposed section 1229D**

This item provides for an interest charge to apply to a person and a debt if the debt has not been wholly paid. It relates to youth allowance, Austudy payment, fares allowance or any other social security payment that is prescribed by the Minister in a legislative instrument.

Allowing for interest to be charged on social security debts will have significant implications for some persons and the appropriateness of doing so may well be thought dependent upon the payment to which the debt relates.

The explanatory memorandum notes that the power to prescribe other social security payments in a legislative instrument will provide flexibility to extend the interest charge and that any such extension of the rules must be through a legislative instrument, and as such, subject to Parliamentary scrutiny and disallowance.

The committee expects that important matters will usually be provided for in primary legislation. Therefore, although the power does give flexibility to the Minister to extend the requirement to pay interest, it is not clear why this flexibility is needed and appropriate given that the sort of matters to which it should apply appears to involve a significant question of policy. **The committee therefore seeks the Minister's further advice as to why such flexibility is required and why the proposed approach is considered appropriate.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Tax Laws Amendment (Research and Development) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* to deny access to the research and development tax incentive for companies with aggregated assessable income of \$20 billion or more for an income year.

Trespass on personal rights and liberties—retrospective application Schedule 1, item 3

The main amendments in this bill have the consequence that an entity is prevented from claiming the R&D tax incentive if its assessable income for an income year, when aggregated with the assessable income of entities it is connected or affiliated with, is \$20 billion or more. Item 3 provides that the amendments made by Schedule 1 apply in relation to an R&D entity's assessments for income years commencing on or after 1 July 2013. Indeed, the explanatory memorandum notes that '[i]f there were a significant delay in receiving the Royal Assent, it is possible that the measure could apply to an income year that has finished'.

The explanatory memorandum offers the following in justification of the approach at page 11:

Even if the amendments do apply retrospectively, taxpayers would not be misled because the measure was exposed for public comment from 7 May 2013 and was originally introduced into Parliament on 28 June 2013, before any affected year began. This Bill merely reintroduces the measure, which lapsed when Parliament was prorogued before the 2013 federal election.

Senate Resolution No. 40 relates to the introduction of a bill to amend taxation law within 6 months after a government announcement of that proposal. However, the resolution does not contemplate the current circumstance in which a bill that lapsed upon Parliament being prorogued could be passed by a newly constituted parliament (whether within, or outside, the 6 month timeframe).

Unfortunately, the explanatory memorandum does not directly address whether taxpayers may be adversely affected by the retrospective application of this measure.

While it is not clear why taxpayers should be expected to arrange their affairs based on an assumption that legislation that lapses upon Parliament being prorogued will be passed by a newly constituted parliament, the committee accepts that the proposal was first introduced in June 2013 and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.

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

Telecommunications Legislation Amendment (Consumer Protection) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Communications

Background

This bill amends the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to:

- provide greater clarity about the Telecommunication Industry Ombudsman's (TIO) role and expected standards of operation by requiring the TIC scheme to comply with standards determined by the Minister; and
- require periodic public reviews of the TIO scheme conducted by a person or body independent of the TIO and the telecommunications industry.

The bill amends the *Telecommunications Act 1997* to:

- enable industry codes to be varied;
- extend the application of the reimbursement scheme for developing consumer-related industry codes to also apply to varying consumer-related industry codes; and
- require code developers to conduct transparent and accountable code development processes by publishing on their websites:
 - draft codes and draft variations; and
 - any submissions received from industry participants and members of the public about the draft code or draft variation.

The bill also amends the *Do Not Call Register Act 2006* to clarify the meaning of 'cause' in relation to the party responsible for making telemarketing calls and sending marketing faxes where third parties are carrying out the marketing activities.

Delegation of legislative power

Schedule 1; item 31, proposed subsection 128(9)

This proposed amendment confers on the Minister a discretionary power to, by legislative instrument, determine standards with which the Telecommunications Industry Ombudsman scheme must comply. It is mandatory for each telecommunications carrier and eligible carrier service provider to enter into a scheme providing for the Telecommunications Industry Ombudsman.

The purpose of this amendment is to respond to the *Reform of the Telecommunications Industry Ombudsman* report (4 May 2013), which recommended that legislative ‘amendments be made to provide greater regulatory clarity around the TIO’s role and its expected standards of operation’. More particularly, as the explanatory memorandum states, ‘the report recommended that a set of framework principles should be legislatively established for the operation of the TIO scheme, based on the *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (originally released by the Minister for Customs and Consumer Affairs in August 1997)’ (at page 15).

What is less clear, however, is why the recommended standards cannot be included in the primary legislation. Proposed subsection 128(10) sets out matters to which the Minister must have regard—matters which ‘are derived from the *Benchmarks for Industry-based Customer Dispute Resolution Schemes*’—when exercising the power to determine standards and proposed subsection 128(11) requires that the Minister must consult the TIO and the ACMA. In justification of the delegation of the significant power to make regulatory standards to the Minister, the explanatory memorandum explains:

The intent of this amendment is to enable the Minister to establish a set of framework principles to underpin the TIO’s operations that are both consistent with best practice for other external dispute resolution schemes and relevant to the telecommunications industry. The Minister may update the standards from time to time to take into account developments in best practice for external dispute resolution schemes.

On the other hand, it may be observed that the model benchmarks were developed some time ago and that standards regulating investigations undertaken by public sector ombudsman are contained within the primary legislation. It is also the case that although there is a requirement on the

Minister to consult the regulator (ACMA) and the TIO, there is no requirement to consult any relevant consumer bodies or the public. In these circumstances it is not clear why at least the core standards cannot be included in the primary legislation, possibly with a Ministerial power to determine further standards if the need arises.

The committee therefore seeks further information as to why these standards should not be included in the primary legislation.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

Introduced into the House of Representatives on 14 November 2013

Portfolio: Communications

Background

This bill provides for the following amendments to:

- clarify consistency between the regime and the United Nations Convention on the Law of the Sea (UNCLOS);
- enable domestic submarine cables to be brought within the scope of the regime by regulation;
- provide a structured consultation process between the Australian Communications and Media Authority (ACMA) and the Attorney-General's Department on submarine cable installation permit applications;
- streamline the submarine cable installation permit process by removing the requirement to obtain multiple permits, tightening permit application processing timeframes and reducing unnecessary duplication with the *Environment Protection and Biodiversity Act 1999*; and
- enhance the operation of Schedule 3A by ensuring the protection zone declaration, revocation and variation processes are administratively more efficient.

Exclusion of judicial review rights

Schedule 1, item 1

This item has the effect that decisions made by the Attorney-General under clause 57A and 72A of Schedule 3A to the *Telecommunications Act 1997* are listed in Schedule 1 of the ADJR Act with the consequence that they cannot be reviewed under that Act. The basis of excluding these decisions from ADJR Act review is that the Attorney-General considers that granting a permit would be 'prejudicial to security'. In its recent report on *Federal Judicial Review in Australia*, Report No 50 (2012), the Administrative Review Council accepts that some decisions that may be based on considerations of

national security may justifiably be excluded from the application of the ADJR Act. As the explanatory memorandum points out, there are a number of decisions listed.

The statement of compatibility and explanatory memorandum note that despite the exclusion of review under the ADJR Act, review would still be available under section 39B of the Judiciary Act (which gives the Federal Court jurisdiction in the same terms as that given to the High Court of Australia under section 75(v) of the Constitution). Despite the availability of review under these alternative sources of jurisdiction ‘expedited review under the ADJR Act’ would not be available. The statement of compatibility also notes that ‘in a case where the Australian Security Intelligence Organisation (ASIO) provides an adverse or qualified security assessment to the Attorney-General to enable him or her to consider whether to direct the ACMA not to issue a permit, that person would have a right to merits review by the AAT, in accordance with Division 4 of Part IV of the *Australian Security Intelligence Organisation Act 1979*’ (at 15).

In these circumstances, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Exclusion of merits review rights

Items 85 to 88

These items have the effect of excluding the availability of reconsideration by the ACMA (internal review) and merits review by the AAT, where one of the grounds for the ACMA decision refusing a permit includes security or where it concerns a security related permit condition. The justification for the approach points to ‘the inherent importance and sensitivity of security’ concerns in the context of the legislation and the fact that a person would continue to have a right to seek judicial review (see the explanatory memorandum at page 57). The statement of compatibility states that the exclusion of administrative review of these decisions is ‘considered necessary for protecting Australia’s national security interests’.

However, it is not clear why *internal* review would compromise national security interests and neither the statement of compatibility nor explanatory memorandum explain in any detail how precisely *merits review* procedures will in all (or some cases) compromise such interests or consider whether the exclusion of review rights is justified in all cases.

The committee therefore seeks the Minister's advice as the justification for the proposed approach.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Trespass on personal rights and liberties—reversal of onus and strict liability

Various

The amendments proposed in the bill may result in existing penalties being extended to new circumstances. As explained in the statement of compatibility, the bill would 'therefore result in specified provisions of Schedule 3A reversing the evidential burden for offences in connection with undertaking a restricted or prohibited activity within a protection zone that has been declared around domestic submarine cables' (at page 16). The statement of compatibility deals with this issue helpfully, comprehensively addressing the relevant considerations and issues set out in the *Guide to Framing Commonwealth Offences*.

The strict liability issues discussed in the statement of compatibility at pages 18 to 20 are also comprehensively addressed.

In light of the detailed justification provided for these items the committee leaves the question of whether the proposed provisions are appropriate to the Senate as a whole.

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

True-up Shortfall Levy (Excise)(Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Environment

Background

This bill imposes the levy to recover over-allocations to the extent that they are a duty of excise.

The committee has no comment on this bill.

True-up Shortfall Levy (General)(Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 13 November 2013

Portfolio: Environment

Background

This bill imposes the levy which recovers the value of over-allocated free carbon units received under the Jobs and Competitiveness Program for the 2013-14 financial year.

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment Bill 2013

Introduced into the House of Representatives on 12 November 2013
Portfolio: Prime Minister

Background

This bill changes the title of the *War Precautions Act Repeal Act 1920* to the 'Protection of Word 'Anzac' Act 1920'.

The committee has no comment on this bill.

Commentary on amendments to bills

Commonwealth Inscribed Stock Amendment Bill 2013

[Digest 8/13 – no comment]

On 14 November 2013 the Senate agreed to one Opposition amendment and the bill was read a third time. Later that day the House of Representatives disagreed with the Senate amendment. The committee has no comment on this amendment.

Ozone Protection and Synthetic Greenhouse Gas (Import Levy)(Transitional Provisions) Bill 2013

[Digest 8/13 – no comment]

On 21 November 2013 the Minister for the Environment (Mr Hunt) tabled a replacement explanatory memorandum to the bill in the House of Representatives. The committee has no comment on this amendment.

Scrutiny of Standing Appropriations

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the Committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

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

Building and Construction Industry (Improving Productivity) Bill 2013

Clean Energy Finance Corporation (Abolition) Bill 2013

Clean Energy Legislation (Carbon Tax Repeal) Bill 2013

Fair Work (Registered Organisations) Amendment Bill 2013

Infrastructure Australia Amendment Bill 2013

Rural Research and Development Legislation Amendment Bill 2013

Social Services and Other Legislation Amendment Bill 2013

Other relevant appropriation clauses in bills

Nil