

Senate Standing Committee
for the
Scrutiny of Bills

Alert Digest No. 8 of 2014

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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.

TABLE OF CONTENTS

Commentary on bills

- Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 1
- Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 [No. 2] 3
- Clean Energy Finance Corporation (Abolition) Bill 2014 4
- Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [No. 2] 5
- Climate Change Authority (Abolition) Bill 2013 [No. 2] 9
- Customs Tariff Amendment (Carbon Tax Repeal) Bill 2013 [No. 2] 10
- Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2014 11
- Excise Tariff Amendment (Carbon Tax Repeal) Bill 2013 [No. 2] 12
- Family Assistance Legislation Amendment (Child Care Measures) Bill (No. 2) 2014 13
- Meteorology Amendment (Online Advertising) Bill 2014 14
- Migration Amendment (Protection and Other Measures) Bill 2014 15
- Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 [No. 2] 24
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) (Transitional Provisions) Bill 2013 [No. 2] 25
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Carbon Tax Repeal) Bill 2013 [No. 2] 26
- Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Carbon Tax Repeal) Bill 2013 27
- Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014 28

Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (No. 1), (No. 3) and (No. 5)) Bill 2014	36
Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (No. 2), (No. 4) and (No. 6)) Bill 2014	37
Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (Parliamentary Departments)) Bill 2014	38
True-up Shortfall Levy (Excise)(Carbon Tax Repeal) Bill 2013 [No. 2]	39
True-up Shortfall Levy (General)(Carbon Tax Repeal) Bill 2013 [No. 2]	40
Commentary on amendments to bills	41
- Appropriation Bill (No. 6) 2013-2014	
- Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014	
- Family Assistance Legislation Amendment (Child Care Measures) Bill 2014	
- Infrastructure Australia Amendment Bill 2013	
- Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014	
- Regulatory Powers (Standard Provisions) Bill 2014	
- Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014	
- Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014	
Scrutiny of standing appropriations	43

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.

Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014

Introduced into the Senate on 24 June 2014

By: Senator Siewert

Background

This bill seeks to amend the *Aboriginal and Torres Strait Islander Act 2005* to:

- clarify the purpose of the Aboriginal and Torres Strait Islander Land Account;
- provide for excess returns from Land Account investments to be equally shared between the Account and the Indigenous Land Corporation (ILC);
- provide that the minister may have regard to advice provided by the ILC about its financial requirements;
- provide for parliamentary review of any proposed changes to the ILC and the Land Account;
- provide for the establishment of a Nomination Committee to make recommendations about appointments to the ILC Board;
- require the ILC Board to establish a Risk and Audit Management Committee;
- limit the tenure and reappointments of directors; require the chair and directors to disclose all pecuniary interests; and
- require the ILC Board to determine a code of conduct.

Delegation of legislative power—Legislative Instruments Act requirements

Item 21, proposed subsection 192SA(5)

Proposed subsection 192SA(5) provides that a determination of a ‘code of conduct for Indigenous Land Corporation officers’ under subsection 192SA(1) is not a legislative instrument. Such determinations will therefore be exempt from the operation of the disallowance and sunset provisions of the

Legislative Instruments Act 2003 (the LI Act). Given that the code will operate to impose general obligations on Indigenous Land Corporation officers, such a determination would appear to fall within the definition of legislative instrument contained in the LI Act. As the explanatory memorandum does not justify what appears to be a substantive exemption from the requirements of the LI Act, **the committee seeks the Senator's advice as to the justification for this exemption.**

Pending the Senator'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.

Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014

Portfolio: Treasury

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill seeks to amend 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 seeks to amend 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 Finance Corporation (Abolition) Bill 2014

Introduced into the House of Representatives on 23 June 2014

Portfolio: Treasury

This bill is substantially similar to a bill introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill seeks to repeal the *Clean Energy Finance Corporation Act 2012*. The bill also seeks to transfer 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 Legislation (Carbon Tax Repeal) Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014

Portfolio: Environment

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee commented on the bill in *Alert Digest No. 8 of 2013*. The Minister's response to the committee's comments was published in its *First Report of 2014*.

Background

This bill is part of a package of bills that seeks to repeal the legislation that establishes 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

In relation to the carbon tax repeal, proposed section 60D of the *Competition and Consumer Act 2010* 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 places 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 previously sought the Minister's advice as to the justification for the proposed approach.

In response the Minister noted that such a provision is not unprecedented as Section 151AN of the *Competition and Consumer Act 2010* makes similar provision in relation to the issuing of competition notices given under section 151AL (located within Part XJB). The Minister also justified the reversal of onus on the grounds that 'this is an instance where the relevant evidence is peculiarly within the knowledge of the defendant, it would be significantly more difficult and costly for the Commission to prove than for the defendant'.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *First Report of 2014*, p. 4). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of 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.

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 and there is no amendment to its commencement provisions then many provisions will commence retrospectively. The committee has a long-standing objection to retrospective provisions if they will, or might, have an adverse effect on any person and expects that the retrospective commencement, or the retrospective effect, of any provision will be fully justified in material accompanying the bill.

When the committee commented on this in response to the bill's previous introduction the Minister took the opportunity to provide additional information to the committee (see the *First Report of 2014*). The Minister suggested that the proposed approach is important 'for reasons of administrative convenience and clarity' so that the relevant date aligns with the end of a financial year. The Minister also noted that vast numbers of the amendments relieve liable entities of obligations, and that any trespass will not be undue.

The committee thanked the Minister for this information, but noted that retrospective commencement would result in a practical dilemma for stakeholders and executive decision-makers as to whether to fulfil obligations under the existing law or disregard them in light of the government's announced commitment to repeal them.

In the circumstances the committee drew its concerns to the attention of Senators and left the matter to the consideration of the Senate as a whole, and it does so again on this occasion.

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 [No. 2]

Introduced into the House of Representatives on 23 June 2014

Portfolio: Environment

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill seeks to repeal 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.

Customs Tariff Amendment (Carbon Tax Repeal) Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014
Portfolio: Immigration and Border Protection

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill seeks to amend 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.

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2014

Introduced into the House of Representatives on 23 June 2014

By: Mr Bandt

Background

This bill seeks to amend the *Defence Act 1903* to ensure that, as far as is constitutionally and practically possible, Australian Defence Force personnel are not sent overseas to engage in warlike actions without the approval of both Houses of Parliament.

The committee has no comment on this bill.

Excise Tariff Amendment (Carbon Tax Repeal) Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014

Portfolio: Treasury

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

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

The committee has no comment on this bill.

Family Assistance Legislation Amendment (Child Care Measures) Bill (No. 2) 2014

Introduced into the House of Representatives on 25 June 2014

Portfolio: Education

Background

This bill seeks to amend the *A New Tax System (Family Assistance) Act 1999* to maintain the Child Care Benefit income thresholds at the amounts applicable as at 30 June 2014 for three income years, starting from 1 July 2014, with the first indexation of these amounts recommencing on 1 July 2017.

The committee has no comment on this bill.

Meteorology Amendment (Online Advertising) Bill 2014

Introduced into the House of Representatives on 25 June 2014

Portfolio: Environment

Background

This bill seeks to amend the *Meteorology Act 1955* to provide certainty in relation to the Director of Meteorology's powers to include advertising on, in or in connection with the Bureau of Meteorology's services.

Retrospective validation of administrative action Item 3

This item provides that 'any act or thing done in connection with the inclusion of advertising on any of the Bureau's services before the commencement of this item is, and is taken always to have been, as valid as that act or thing would have been if the act or thing had been done after the commencement of this item'. The explanatory memorandum merely repeats the legal effect of this provision. While the committee usually expects that the retrospective commencement, or effect, of any provision will be accompanied by a comprehensive justification, given the nature of the actions validated by this provision (namely the inclusion of advertising 'on, in or in connection with any of' the Bureau's services), it is improbable that this provision is likely to have any adverse consequences on the rights, liberties or interests of affected individuals.

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

Migration Amendment (Protection and Other Measures) Bill 2014

Introduced into the House of Representatives on 25 June 2014

Portfolio: Immigration and Border Protection

Background

This bill seeks to amend the *Migration Act 1958* to:

- clarify that it is an asylum seeker's responsibility to specify the particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claim;
- provide for the Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to the credibility of claims or evidence that are raised by a protection visa applicant at the review stage for the first time, if the applicant has no reasonable explanation to justify why those claims and evidence were not raised before a primary decision was made;
- create grounds to refuse a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so, including when an applicant provides bogus documents to establish their identity or either destroys or discards such evidence, or has caused that evidence to be destroyed or discarded;
- clarify when an applicant who applies for a protection visa, where a criterion for the grant of a visa is that they are a member of the same family unit of a person who engages Australia's protection obligations, is to make their application for a protection visa;
- define the risk threshold for assessing Australia's protection obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT);
- simplify the legal framework relating to unauthorised maritime arrivals and transitory persons who can make a valid application for a visa;

- amend the processing and administrative duties of the Migration Review Tribunal including:
 - a Principal Member being able to issue guidance decisions and practice directions;
 - enabling Tribunals to make an oral statement of reasons where there is an oral decision without the need for a written statement of reasons; and
 - Tribunals will be able to dismiss an application where an applicant fails to appear before the Tribunal after being invited to do so, then being able to reinstate the application where an applicant applies for reinstatement within a specified period of time; and
- make a technical amendment to put beyond doubt when a review of a decision that has been made in respect of an application under the Migration Act is ‘finally determined’.

Adequacy of merits review rights
Schedule 1, item 14, proposed section 423A

The proposed new section provides that, if an applicant raises a claim or presents evidence relevant to a protection visa not previously placed before the original decision-maker in relation to an application for review of an Refugee Review Tribunal reviewable decision, then the tribunal is required to draw an unfavourable inference about the credibility of the claim or evidence. However, this unfavourable inference is only to be drawn ‘if the Tribunal is satisfied that the applicant does not have a reasonable explanation why the claim was not raised, or the evidence was not presented, before the primary decision was made’. The explanatory memorandum states that the purpose of this amendment ‘is to ensure that protection visa applicants are forthcoming with all of their claims and evidence as soon as possible’ (at p. 14).

Merits review tribunals are, in general, given the task of making the ‘correct or preferable’ decision. In performing this function it has long been accepted that the critical question for a merits review tribunal is not whether the decision which the original decision-maker was the correct or preferable decision one *on the material before the original decision-maker*. Rather, the question for a merits review tribunal is what the correct or preferable decision should be *on the material before the tribunal*. This explains why the courts

have concluded that a proper exercise of the function of merits review will, as a general rule, involve ‘contemporaneous review’ whereby applicants are entitled to introduce new facts to support their applications at the time of the tribunal hearing (see *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286).

Thus, limiting merits review tribunals to facts and claims presented in an original application is a significant departure from their typical and distinctive function. Although the courts have recognised that it may be that contemporaneous review is inappropriate given the nature of a particular decision-making power, it is not immediately apparent why the nature of decisions concerning protection visas would justify a departure from the normal approach to merits review, which derives from the overriding function of making the correct or preferable decision. Arguably, the importance of ensuring compliance with Australia’s international obligations in relation to refugees indicates that departure from contemporaneous review in the context of merits review of decisions to refuse protection visas should be well justified in the explanatory memorandum.

The committee also notes that the appropriateness of the proposed amendment is difficult to evaluate given that the circumstances which may support the Tribunal being satisfied that there is a ‘reasonable explanation’ for the failure to raise a claim or present evidence to the original decision-maker remain unspecified in the legislation. **The committee therefore seeks the Minister’s advice as to the justification for departing from the general approach to the role played by merits review.**

In addition to the general response sought above, the committee also seeks the Minister’s advice on the following specific issues:

- 1. The extent of any practical problem created for the Refugee Review Tribunal in dealing with claims raised and evidence presented during a review application which were not raised earlier by applicants;**
- 2. Why any such problem could not be dealt with by a provision which *allows* rather than *requires* an adverse inference to be drawn. Such an approach would appear to be less likely to result in outcomes which depart from the general function of merits review to reach the correct and preferable decision by enabling the Tribunal to consider the appropriateness of its factual inferences in the individual circumstances of particular cases.**

- 3. Whether it is possible to give greater legislative guidance as to the meaning of ‘reasonable explanation’. In this respect the committee notes that the explanatory memorandum does little to clarify what circumstances might legitimately lead the Tribunal to be satisfied that a reasonable explanation has been provided.**

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it 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.

Procedural fairness—Fair hearing

Schedule 1, item 1, proposed section 5AAA

Schedule 1, item 14, proposed section 423A

Proposed new section 5AAA provides that a non-citizen making protection claims has the responsibility to ‘specify all particulars of his or her claim’ and ‘to provide sufficient evidence to establish the claim’ (proposed subsection 5AAA(2)). Proposed new section 423A provides that, if an applicant raises a claim or presents evidence relevant to a protection visa not previously placed before the original decision-maker in relation to an application for review of an RRT-reviewable decision, then the Tribunal is to draw an unfavourable inference about the credibility of the claim or evidence.

If the function of merits review in the RRT remains to decide applications according to the correct or preferable decision, then an applicant's access to a fair hearing may be compromised to the extent they are unaware that they bear this onus to bring forward all claims and evidence relevant to their case. It is apparent that levels of English language and legal literacy amongst some persons within the class of applicants may raise particular problems in this regard. This problem may be amplified in relation to children or other persons that may be considered to be vulnerable.

The Statement of Compatibility with Human Rights notes that non-citizens claiming protection in Australia ‘including unaccompanied minors or vulnerable people’ may make private arrangements to be represented by a Registered Migration Agent. It is further noted that (1) those applicants who have arrived ‘lawfully’ and are ‘disadvantaged and face financial hardship may be eligible for assistance with their primary application under the

Immigration Advice and Application Assistance Scheme’, and (2) the ‘Government will provide a small amount of additional support to illegal arrivals who are considered vulnerable, including unaccompanied minors’ (though the details are yet to be determined) (at p. 4).

Based on this information it is difficult to determine whether the assistance provided to visa applicants will, in particular cases, result in fairness despite preventing an applicant from raising new evidence or claims during a RRT hearing. The committee is concerned that the proposed approach could mean that a fair hearing may be compromised in individual cases. **However, in light of the above justificatory material the committee draws the matter of whether proposed sections 5AAA and 423A may compromise a fair hearing for an applicant for a protection visa to the attention of Senators, and leaves the appropriateness of this approach to the Senate as a whole.**

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.

Further, there is no legislative obligation on the Minister to inform prospective applicants of the consequences of failure to raise evidence and claims at the first instance. The Statement of Compatibility with Human Rights states that ‘Departmental policy and procedures for decision makers’ will require decision-makers to ensure that non-citizens are made aware of the consequences of the amendments, including the ‘consequences of not providing all claims and information at the earliest opportunity’. However the committee is concerned that such procedures and policy would lack the force of law. In particular, non-compliance by the department would not change or alter the obligation placed on the RRT by section 423A to draw adverse inferences as to the credibility of the claim. Whether or not a fair hearing was ensured may depend on the RRT’s application of the vague criterion of a ‘reasonable explanation’ for a failure to raise a claim or present evidence in the circumstances. **Given the importance of clear notice about the consequences of section 5AAA and section 423A to the provision of a fair hearing, the committee seeks the Minister’s advice as to whether this could be dealt with in the legislation rather than policy.**

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 insufficiently

defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Retrospective commencement—application of amendments
Schedule 2, Part 2, item 8

This is an application provision which provides that the new (heightened) risk threshold will apply to new assessments, and also to assessments made as a result of an application for a visa or as part of an administrative process which commenced prior to the commencement of this Part. Although it may be considered that the commencement of the provision is not, technically speaking, retrospective—it applies the new law to antecedent fact—there is a question of fairness as to whether applications or administrative processes which have already been commenced should be dealt with by reference to the law as it existed at the time of the application or when the administrative processes were commenced. Neither the explanatory memorandum nor the Statement of Compatibility addresses this issue. **The committee therefore seeks the Minister's advice as to the justification for this approach.**

Pending the Minister's reply, 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.

Undefined scope of administrative power
Delegation of legislative power
Schedule 4, Part 1, item 7, proposed section 353B
Schedule 4, Part 1, item 22, proposed section 420B

Proposed subsection 353B(1) provides that the Principal Member of the Migration Review Tribunal (MRT) may, in writing, direct that a decision (a 'guidance decision') of the MRT specified in the direction is to be complied with by the MRT in reaching a decision on review of cases involving similar facts and circumstances. Proposed subsection 420B provides the same powers in relation to the Refugee Review Tribunal (RRT).

Proposed subsections 353B(2) and 420B(2) provide that 'in reaching a decision on a review of a decision of that kind, the Tribunal must comply with the guidance decision unless the tribunal is satisfied that the facts or

circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision’.

It is not immediately apparent what it means to ‘comply’ with a ‘decision’, as opposed to a rule or standard. It may not be clear which of the facts or reasons accepted in a guidance decision have binding force and are considered to have general application. This may create uncertainty as to how the rights of applicants to the MRT are affected by a direction that a guidance decision is to be complied with.

The explanatory memorandum (at pp 36 and 48) states that a ‘guidance decision’ will relate to ‘identifiable common issues in matters before the MRT and RRT, and Members of the MRT and RRT would be expected to follow them unless the facts or circumstances in the current matter before them could be distinguished’. The purpose of the provision is thus said to ‘promote consistency in decision-making...in relation to common issues and/or the same or similar facts or circumstances’. It may be accepted that consistency in decision-making is a legitimate objective for merits review tribunals. However, it remains the case that this proposed section does little to indicate what aspects of a ‘guidance decision’ are considered binding (unless distinguishable) and the sense in which the decision has binding force.

One possible way of understanding this provision is that it enables the Principal Member to create something like a judicially created precedent. A guidance decision plays a determinative role in establishing an applicant’s rights (because the application of the law to facts in the guidance decision *must* be complied with). For this reason, the power to issue a guidance decision may take on the character of an exercise of judicial power. The creation of binding legal precedent is typically thought to be an exercise of judicial rather than administrative power.

If, however, the power to issue a guidance decision is not characterised as an exercise of judicial power (judicial powers cannot, in general, be conferred on administrators for constitutional reasons), questions arise about whether a guidance decision constitutes an exercise of legislative power as it appears to determine how the law should be applied in a general category of cases. If this interpretation is accurate, then it would seem that this power falls within the definition of a legislative instrument in the *Legislative Instruments Act 2003* (the LI Act). Section 5 of the LI Act provides that an instrument will be taken to be of a legislative character if: (a) it determines the law or alters the content

of the law, rather than applying the law in a particular case; and (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

In light of the above comments the committee seeks the Minister's advice as to whether the proposed sections are to be characterised as:

- a) an exercise in judicial power and, if so, whether it is appropriate to confer them on an administrator; or**
- b) legislative in character and subject to disallowance under the *Legislative Instruments Act 2003*.**

In addition, in light of the Minister's response to the above, the committee requests the Minister's further advice as to what aspects (facts or reasons) of a 'guidance decision' will be binding and how a decision-maker will be able to identify them.

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to constitute an inappropriate review of decisions, in breach of principle 1(a)(iii) of the committee's terms of reference. The provisions may also delegate Parliament's powers inappropriately in breach of principle 1(a)(iv) of the committee's terms of reference.

Procedural Fairness

Broad discretionary power

Schedule 4, item 11, proposed subsection 362(1A)

Schedule 4, item 26, proposed subsection 424A(1A)

The effect of these items is to enable the MRT to dismiss an application where an applicant fails to appear before the Tribunal after being invited to do so. Proposed subsection 362(1C) requires the Tribunal to, on application for reinstatement in accordance with subsection (1B), reinstate the application if it considers it appropriate to do so. Proposed subsection 424A(1A) confers the same powers in relation to the RRT.

In circumstances where there are legitimate reasons why an applicant fails to appear before the Tribunal, the exercise of the power under proposed subsection 362(1A) to dismiss an application may result in procedural unfairness by depriving an applicant of a fair opportunity to present their case.

Although proposed subsection 362(1C) provides for the reinstatement of cases so decided, it does not specify the circumstances in which it is appropriate to do so or provide any guidance as to how the Tribunal is to make this determination. **Given the importance of the exercise of this power to ensure that a fair hearing is provided, the committee seeks the Minister's advice as to the appropriateness of the overall 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 insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014

Portfolio: Treasury

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill seeks to repeal 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.

Ozone Protection and Synthetic Greenhouse Gas (Import Levy) (Transitional Provisions) Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014
Portfolio: Environment

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill seeks to provide 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 (Import Levy) Amendment (Carbon Tax Repeal) Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014
Portfolio: Environment

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill is part of a package of seven bills. The bill seeks to amend 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 (Manufacture Levy) Amendment (Carbon Tax Repeal) Bill 2013

Introduced into the House of Representatives on 23 June 2014
Portfolio: Environment

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill is part of a package of seven bills. The bill seeks to amend 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.

Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014

Introduced into the House of Representatives on 24 June 2014

Passed both Houses 26 June 2014

Portfolio: Finance

Background

This bill is part of a package of four bills. The bill seeks to amend approximately 250 Acts across the Commonwealth to support the implementation of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and its related rules and instruments.

As a result of the implementation of the PGPA Act this bill will:

- replace references to the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997* with the equivalent provisions in the PGPA Act;
- simplify enabling legislation where provisions of the PGPA Act cover a matter previously dealt with in enabling legislation; and
- amend enabling legislation to clarify which matters (and to what extent) are covered by the PGPA Act and which matters (and to what extent) are covered by the enabling legislation, such as in the case of planning and reporting, or disclosure of interest arrangements where an entity may have additional obligations over and above those imposed through the PGPA Act.

Delegation of legislative power—incorporation by reference Schedule 1, item 24

Section 20A of the PGPA Act provides that an accountable authority of a Commonwealth entity may, by written instrument, give instructions to an official of the entity about any matter relating to the finance law (these instructions are known as 'accountable authority instructions').

Section 101 of the PGPA Act establishes a general rule-making power. Item 24 of this bill proposes to add subsection 101(4) which provides that:

...the rules may provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in instructions given under section 20A of this Act as in force or existing from time to time.

The committee routinely draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

The committee also notes that 'accountable authority instructions' issued under section 20A of the PGPA Act are not legislative instruments and are therefore not subject to the publication and disallowance requirements outlined in the *Legislative Instruments Act 2003*.

The explanatory memorandum justifies the insertion of subsection 101(4) by noting, at page 17, that it:

...will support the operation of the PGPA rules that will support the implementation of the PGPA Act in such a way as to allow accountable authorities to take into account the nature of the entities, the level and scope of the risks inherent in the activities they undertake and the controls that need to be maintained.

Given that 'accountable authority instructions' may be incorporated into the rules, although the bill has already been passed by the Parliament, as is its usual practice, the committee still seeks the Minister's advice as to whether such instructions will be publicly available and readily accessible and how any person affected by material incorporated by reference will become aware of any changes made to its content.

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

General comment Schedule 2

In relation to schedule 2 of the bill the explanatory memorandum (at p. 18) explains that:

The Bill would, if enacted, retain a few elements of the *Financial Management and Accountability Act 1997* (FMA Act) to ensure the continuation of a number of Government arrangements, programmes and spending activities. The retained provisions from the FMA Act would be renamed to the *Financial Framework (Supplementary Powers) Act 1997* (FFSP Act)...

One of the provisions to be retained—section 32B of the FMA Act—sought to establish legislative authority for the government to make, vary and administer arrangements and grants specified in the FMA Regulations and arrangements and grants for the purposes of programs specified in the FMA Regulations. Division 3B (including section 32B) was inserted by the *Financial Framework Legislation Amendment Act (No. 3) 2012* (FFLA Act (No. 3) 2012) in response to the High Court's decision in *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No. 1)*). In that case (sometimes described as the School Chaplains' Case) the High Court held that, in most circumstances, the Commonwealth executive does not have the power to enter into contracts and to spend public money without statutory authority.

The explanatory memorandum refers to the enactment of section 32B and states that it:

...is considered appropriate and prudent to retain this legislative authority mechanism and the related Regulations, including Schedules 1AA and 1AB, with some minor amendments, for continuity and consistency, noting the second challenge currently before the High Court.

In light of the High Court's decision in *Williams v Commonwealth (No. 2)* [2014] HCA 23 (which affirmed the decision in *Williams (No. 1)*), and as the current bill retains section 32B (and other elements of Division 3B of the FMA Act) with only minor modifications, the committee takes this opportunity to refer to aspects of its previous scrutiny concerns in relation to the FFLA Act (No. 3) 2012 that are also relevant to this bill: two matters that relate directly to this bill are outlined in detail below and two matters that are relevant, but are not directly affected by this bill are:

- schedule 1, item 1 of the FFLA Act (No. 3) 2012, which excluded specified decisions from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*; and
- schedule 1, item 9 of the FFLA Act (No. 3) 2012, which was a transitional provision that purported to retrospectively validate existing arrangements that were in force immediately before the commencement of section 32B.

For further detail, the committee's full comments in relation to the FFLA Act (No. 3) 2012 are outlined in *Alert Digest No. 7 of 2012*, pp 3–6, and *11th Report of 2012*, pp 373–380.

Delegation of legislative power Schedule 2, items 10–15

These items make minor modifications to section 32B but the provision, as provided for in the FFLA Act (No. 3) 2012, is largely retained.

In the committee's *Alert Digest No. 7 of 2012* the committee commented on paragraph 32B(1)(b). The committee noted that this provision enables the regulations to specify the arrangements which will be authorised by the new statutory source of authority to make, vary or administer an arrangement or grant (under section 32B). Determining which arrangements and grants will attract this source of statutory authority through regulations (rather than primary legislation) was said to be 'necessary so that the Government can continue these activities in the national interest'.

The committee has consistently expressed its preference that important matters be included in primary legislation whenever this is appropriate, and for the explanatory memorandum to outline a clear justification when the use of delegated legislation is proposed. In light of this, and the High Court's reasoning in *Williams (No. 1)* (sometimes described as the School Chaplains' Case), the committee stated that it expected a more detailed justification in the explanatory memorandum of the question of whether it is appropriate to delegate to the executive (through the use of regulations) how its powers to contract and to spend are to be expanded. Although the bill had already been passed by the Parliament, as is its usual practice the committee still sought the former Finance Minister's advice as to the justification of this delegation of legislative power.

The former Finance Minister's response was reported in the committee's *11th Report of 2012* (pp 376–377). The former Minister stated that:

I understand the issue here is why is legislative authority for Government spending activities provided by delegated legislation rather than primary legislation.

Every year the Australian Government spends over \$300 billion. Over 75 per cent of this spending is made using special appropriations, that is spending authorised by legislation other than the annual appropriation Acts. However, given the range, frequency and, at times, urgency of Government spending, delegated legislation was favoured over primary legislation, providing a more practical method for authorising spending, while ensuring that the regulations that authorise spending activities are tabled in Parliament and are subject to scrutiny and disallowance by the Parliament on a case by case basis.

The initial list of over 450 spending activities was added to Schedule 1AA of the FMA Regulations by primary legislation, the FFLA Act (No.3), and not by delegated legislation. Parliament considered and approved this list of spending activities. Parliament also agreed that, once the initial list of spending activities was prescribed by the FFLA Act (No.3), regulations could be made to add, remove or amend spending activities.

In view of the important scrutiny concerns in relation to this provision, particularly in light of the High Court's recent decision affirming *Williams (No. 1)*, although the bill has already been passed by the Parliament, as is its usual practice, the committee still seeks the current Minister's advice as to whether any consideration has been given to amending this provision with a view to ensuring that important matters are included in primary legislation and to ensuring the opportunity for sufficient Parliamentary oversight of these types of arrangements and grants. The committee notes that if new spending activities are not to be authorised by primary legislation it would be possible to provide for scrutiny in a number of ways, for example by:

- **requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or**
- **incorporating a disallowance process such as requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*);**

and the committee also seeks the Minister's advice about these, or other possible options.

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.

Insufficiently defined administrative power

Delegation of legislative power

Schedule 2, item 18

This item repeal sections 32D in the FMA Act and replaces it with a new provision in which a Minister or accountable authority of a non-corporate Commonwealth entity may delegate powers under section 32B or 32C to an official of any non-corporate Commonwealth entity. This new section consolidates the section 32D delegation powers of a Minister with the delegation powers of the Chief Executive previously found in section 53 of the FMA Act.

This item would also continue the sub-delegation of powers under section 32D to an official by an accountable authority of a non-corporate Commonwealth entity through a new section 32DA, which was previously located in section 53 of the FMA Act.

The explanatory memorandum (at p. 20) notes that the effect of this item 'would be to preserve and continue the delegation and sub-delegation powers in relation to sections 32B and 32C of the FMA Act within the FFSP Act'.

The committee commented on the delegation of power in section 32D (which is replicated by the amended provisions) in its *Alert Digest No. 7 of 2012*. The committee noted that it has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. Although the bill had already been passed by the

Parliament, as is its usual practice the committee the committee sought the former Finance Minister's advice as to the justification for the proposed approach.

The former Finance Minister's response was reported in the committee's *11th Report of 2012* (p. 378). The former Minister stated that:

I understand the issue here is why the new spending power in the FMA Act can be delegated to a relatively large class of persons without more detail about their qualifications or attributes.

The delegation of power in section 32D is consistent with the delegation of other powers in the FMA Act to officials. A broad delegation is necessary to enable agencies and officials to make, vary and administer arrangements in an efficient, effective, economical and ethical manner depending on agency specific requirements.

The powers in the FMA Act are not delegated to a large class of persons with little or no specificity as to their qualifications or attributes. Officials delegated powers under the FMA Act must act in accordance with the requirements of the FMA Act and any directions or instructions from their Chief Executive. This includes the obligation to spend money efficiently, effectively, economically and ethically in a way that is not inconsistent with the policies of the Commonwealth, as well as requirements such as the Commonwealth Procurement Rules or Commonwealth Grant Guidelines (as applicable). Agency spending decisions are subject to external audit by the Australian National Audit Office and audited financial statements must be included in Agency annual reports and tabled in Parliament.

In relation to the current bill, the explanatory memorandum (at p. 20) simply restates the effect of the provision. **The committee notes that it would have been useful for the explanatory memorandum to include an explanation of this broad delegation of administrative power. However, as the bill has already been passed by the Parliament the committee draws this issue to the attention of Senators, but makes no further comment.**

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) and as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

**Delegation of legislative power—Henry VIII
Schedule 14, item 6**

This item permits rules of a transitional nature to be made. In particular sub-item (3) permits the rules to modify the bill and the PGPA Act. The explanatory memorandum contains a detailed justification (at pp 109–110) which, among other things, notes that transitional rules modifying primary legislation will only be allowed in relation to the first reporting period after 1 July 2014.

In light of this explanation, and the complexity of the transition from the FMA and CAC Acts to the PGPA Act, the committee makes no further comment on this provision.

Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (No. 1), (No. 3) and (No. 5)) Bill 2014

Introduced into the House of Representatives on 24 June 2014

Passed both Houses 26 June 2014

Portfolio: Finance

Background

This bill is part of a package of four bills. This bill seeks to amend several Acts appropriating money out of the CRF for the ordinary annual services of the Government and related purposes to support the transition to the *Public Governance, Performance and Accountability Act 2013*.

The committee has no comment on this bill.

Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (No. 2), (No. 4) and (No. 6)) Bill 2014

Introduced into the House of Representatives on 24 June 2014

Passed both Houses 26 June 2014

Portfolio: Finance

Background

This bill is part of a package of four bills. This bill seeks to amend several Acts appropriating money out of the CRF for certain expenditure and related purposes to support the transition to the *Public Governance, Performance and Accountability Act 2013*.

The committee has no comment on this bill.

Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (Parliamentary Departments)) Bill 2014

Introduced into the House of Representatives on 24 June 2014

Passed both Houses 26 June 2014

Portfolio: Finance

Background

This bill is part of a package of four bills. This bill seeks to amend several Acts appropriating money out of the CRF for certain expenditure relating to the Parliamentary Departments and other related purposes to support the transition to the *Public Governance, Performance and Accountability Act 2013*.

The committee has no comment on this bill.

True-up Shortfall Levy (Excise)(Carbon Tax Repeal) Bill 2013 [No. 2]

Introduced into the House of Representatives on 23 June 2014

Portfolio: Environment

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill seeks to impose 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 [No. 2]

Introduced into the House of Representatives on 23 June 2014

Portfolio: Environment

An identical bill was introduced into the House of Representatives on 13 November 2013 and the committee made no comment on the bill in *Alert Digest No. 8 of 2013*.

Background

This bill seeks to impose the levy to recover 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.

COMMENTARY ON AMENDMENTS TO BILLS

Appropriation Bill (No. 6) 2013-2014

[Digest 7/14 – no comment]

On 23 June 2014 the House of Representatives agreed to two Government amendments, the Parliamentary Secretary to the Minister for Finance (Mr McCormack) presented a supplementary explanatory memorandum and the bill was read a third time.

On 24 June 2014 the Parliamentary Secretary to the Minister for Agriculture (Senator Colbeck) tabled a revised explanatory memorandum in the Senate. The committee has no comment on the amendments or additional material.

Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

[Digest 5/14 – response in Report 6/14]

On 23 June 2014 the Parliamentary Secretary to the Minister for the Environment (Senator Birmingham) tabled a replacement explanatory memorandum in the Senate.

On 26 June 2014 the Senate agreed to one Government amendment, the Parliamentary Secretary to the Minister for Education (Senator Ryan) tabled a supplementary explanatory memorandum and the bill was read a third time. The committee has no comment on the amendment or additional material.

Family Assistance Legislation Amendment (Child Care Measures) Bill 2014

[Digest 6/14 – no comment]

On 23 June 2014 the Senate agreed to one Opposition amendment and the bill was read a third time. On the same day the House of Representatives agreed to the Senate amendment and the bill was passed. The committee has no comment on this amendment.

Infrastructure Australia Amendment Bill 2013

[Digest 8/13 – no comment]

On the 23 June 2014 the Senate agreed to five Government, 20 Opposition and four Australian Greens amendments and the Minister for Defence

(Senator Johnston) tabled a supplementary explanatory memorandum. The bill was then read a third time.

On the 26 June 2014 the House of Representatives agreed to the Senate amendments and the bill was passed. The committee has no comment on these amendments or the other additional material.

Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014

[Digest 8/14 – awaiting response]

On 26 June 2014 the Senate agreed to one Opposition amendment and on the same day the House of Representatives agreed to the Senate amendment and the bill was passed. The committee has no comment on the amendment.

Regulatory Powers (Standard Provisions) Bill 2014

[Digest 4/14 – no response required]

On 23 June 2014 the Minister for Justice (Mr Keenan) presented a replacement explanatory memorandum in the House of Representatives and the bill was read a third time. The committee has no comment on the additional material.

Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014

[Digest 7/14 – awaiting response]

On 23 June 2013 the Assistant Minister for Defence (Mr Robert) presented a correction to the explanatory memorandum in the House of Representatives. The committee has no comment on the additional material.

Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014

[Digest 7/14 – awaiting response]

On 23 June 2013 the Assistant Minister for Defence (Mr Robert) presented a correction to the explanatory memorandum in the House of Representatives. The committee has no comment on the additional material.

SCRUTINY OF STANDING APPROPRIATIONS

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

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

Further details of the committee's approach to scrutiny of standing appropriations are set out in the committee's *Fourteenth Report of 2005*. The following is a list of bills containing standing appropriations that have been introduced since the committee's last Alert Digest.

Bills introduced with standing appropriation clauses since the previous Alert Digest

Nil

Other relevant appropriation clauses in bills

Nil