

**Senate Standing Committee**  
**for the**  
**Scrutiny of Bills**

**Alert Digest No. 6 of 2014**

**18 June 2014**

**ISSN 1329-668X**



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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.



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- **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.

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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**

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Any Senator who wishes to draw matters to the attention of the  
Committee under its terms of reference is invited to do so.



## Asset Recycling Fund Bill 2014

Introduced into the House of Representatives on 29 May 2014  
Portfolio: Finance

### Background

This bill seeks to establish the Asset Recycling Fund which, if passed, will commence on 1 July 2014 to:

- enable grants of financial assistance to be made to the states and territories for expenditure incurred under the National Partnership Agreements on Asset Recycling and Land Transport Infrastructure Projects;
- make infrastructure national partnership grants; and
- enable the making of infrastructure payments.

### Delegation of legislative power

#### Clause 59

Clause 59 of this bill provides that the Finance Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general instrument-making powers authorised the Governor-General to make regulations, and as such, any instruments made under such powers were required to be drafted by OPC and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this clause.

The committee notes the proposed use of 'rules' rather than 'regulations' in this clause is consistent with the Office of Parliamentary Counsel's recent Drafting Direction 3.8, which states that:

OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulation) unless there is a good reason not to do so.

However, in the committee's *Fifth Report of 2014* the committee noted that it is concerned about implications for the level of executive scrutiny to which

subordinate instruments are subject, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process.

The committee also notes the concerns that the Senate Standing Committee on Regulations and Ordinances has raised regarding the prescribing of matters by 'legislative rules', including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power. The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability of Parliament (and the public in general) to understand and effectively scrutinise such instruments. (see *Delegated Legislation Monitor No. 5 of 2014*, pp 1–5). The committee notes that the Regulations and Ordinances Committee has sought further advice about this and other matters relating to the issue.

**Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:**

- **whether general rule-making powers, such as clause 59, would permit a rule-maker to make the following types of provisions:**
  - **offence provisions**
  - **powers of arrest or detention**
  - **entry provisions**
  - **search provisions**
  - **seizure provisions**
  - **provisions which make textual modifications to Acts**
  - **provisions where the operation of an Act is modified**
  - **civil penalty provisions**
  - **provisions which impose (or set or amend the rate) of taxes**
  - **provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation; and**

- **whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).**

The committee notes that it has raised the same issues in relation to substantively similar provisions in the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Trade Support Loans Bills 2014.

*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 and it may be considered to raise issues in relation to sufficiently subjecting the exercise of legislative power to parliamentary scrutiny (principle 1(a)(v) of the committee's terms of reference).*

## **Asset Recycling Fund (Consequential Amendments) Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Finance

### **Background**

This bill seeks to amend the *COAG Reform Fund Act 2008*, the *Future Fund Act 2006*, *Nation-building Funds Act 2008* and the *DisabilityCare Australia Fund Act 2013*.

The bill also seeks to make various consequential amendments arising from the establishment of the Asset Recycling Fund (ARF) from 1 July 2014 including:

- enabling grants to the States and Territories through the COAG Reform Fund;
- extending the Future Fund Board's duties to manage the ARF; and
- permitting amounts to be transferred between the ARF and Future Fund to allow for proper apportioning of common expenses incurred by the Future Fund Board in managing the funds.

*The committee has no comment on this bill.*

## **Australian Citizenship Amendment (Intercountry Adoption) Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Immigration and Border Protection

### **Background**

This bill seeks to amend the *Australian Citizenship Act 2007* to allow for acquisition of Australian citizenship by a person adopted outside Australia by an Australian citizen in accordance with a bilateral arrangement between Australia and another country who are not parties to the Hague Convention on Protection and Cooperation in respect of Intercountry Adoption.

*The committee has no comment on this bill.*

## **Australian Education Amendment (School Funding Guarantee) Bill 2014**

Introduced into the House of Representatives on 26 May 2014

By: Mr Shorten

### **Background**

The bill seeks to amend the *Australian Education Act 2013* to require the Minister to be satisfied that a state or territory will not reduce or has not reduced its education budget before school funding is provided to the states and territories.

*The committee has no comment on this bill.*

## **Australian National Preventive Health Agency (Abolition) Bill 2014**

Introduced into the House of Representatives on 15 May 2014

Portfolio: Health

### **Background**

This bill seeks to repeal the *Australian National Preventive Health Agency Act 2010* with the purpose of abolishing the Australian National Preventive Health Agency established under the Act.

*The committee has no comment on this bill.*

## **Australian Workforce and Productivity Agency Repeal Bill 2014**

Introduced into the House of Representatives on 4 June 2014

Portfolio: Industry

### **Background**

This bill seeks to provide for the repeal of the *Australian Workforce and Productivity Agency Act 2008* and the abolition of the Australian Workforce and Productivity Agency.

*The committee has no comment on this bill.*

## **Business Services Wage Assessment Tool Payment Scheme Bill 2014**

Introduced into the House of Representatives on 5 June 2014

Portfolio: Social Services

### **Background**

This bill responds to the Federal Court's decision in *Nojin v Commonwealth of Australia* [2012] FCAFC 192 by seeking to establish a payment scheme for supported employees with intellectual impairment in Australian Disability Enterprises who previously had their wages assessed under the Business Services Wage Assessment Tool.

### **Merits Review**

#### **Part 3, Division 5**

This Division of the bill sets out a scheme for external merits review. The external reviewer is able to affirm the determination under review or to set it aside and substitute a new determination (subclause 28(1)).

Subclause 27(1) provides that the Secretary may, on receipt of an application for external review, appoint an 'external reviewer' to review the determination. Subclause 27(2) provides that a person may be appointed as an external reviewer only if (a) the person has been (but is no longer) a Justice of the High Court or a judge of another federal court or of a court of a State or Territory' or (b) 'the person is a legal practitioner who has been enrolled for at least 10 years'. The explanatory memorandum indicates that the 'Secretary anticipates that those legal practitioners appointed as external reviewers will be senior members of the bar or of the profession, who have experience with undertaking reviews with similar schemes' (at p. 21).

It is unclear why it is necessary to appoint external reviewers on an ad hoc basis when the Administrative Appeals Tribunal (AAT) may be given jurisdiction to deal with applications for review of decisions made under this bill. The AAT is a generalist external review body that has established a reputation for independence and high standards in the conduct of merits review in numerous statutory contexts. It is noted that whereas under subclause 28(2) it is provided that an 'external reviewer must, in conducting the review, comply with any requirements prescribed by the rules', the AAT

has well established decision-making practices and procedures. It is also noted that the independence of the AAT is not only secured by the involvement of judges and members of the legal profession but through statutorily guaranteed terms of appointment. In contrast, ‘external reviewers’ are appointed by the Secretary to review decisions made by the Secretary. Such persons are ‘to be paid the remuneration and allowances determined in writing by the Secretary in accordance with the rules (if any)’ (subclause 27(4)).

Under the scheme for ‘external review’ envisaged by the bill, the Secretary is thus responsible for (1) the making of the decisions under review, (2) the appointment of the external reviewers, and (3) the remuneration and allowances enjoyed by external reviewers. **The committee therefore seeks the Minister's advice as to why it has been concluded that this system of review has been preferred to conferring jurisdiction to review on the AAT, given its well-established reputation for the effective exercise of independent, external merits review functions in a wide variety of statutory contexts.**

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

## **Delegation of legislative power—important matters in rules Clause 56**

Clause 56 provides that the rules may prescribe (a) requirements with which the Secretary must comply relating to the appointment of nominees or the cancellation or suspension of the appointment of nominees, and (b) criteria the Secretary is to apply, or matters to which the Secretary is to have regard, in appointing nominees or cancelling or suspending the appointment of nominees.

These matters are of considerable importance to participants in this scheme given the important role played by nominees and the vulnerability of some participants in the scheme based on either physical or intellectual impairment. As there is no explanation in the explanatory memorandum addressing the need for these matters to be prescribed in the rules rather than addressed in the primary legislation, **the committee seeks the Minister's advice as to the justification for having these matters addressed in the rules rather than in the primary legislation.**

*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.*

## **Merits Review**

### **Part 4, Division 4**

This Division provides for the internal review of certain decisions about the appointment of nominees. Clause 58 provides for a review to be initiated by the Secretary, while Clause 59 provides for a review to be commenced on application from a person whose interests are affected by a decision on an appointment, or the suspension or cancellation of an appointment.

Given the significance of these powers, it is not clear why it is not also appropriate to include provision for external merits review to an independent tribunal such as the Administrative Appeals Tribunal. As the explanatory memorandum does not address this matter, **the committee seeks advice from the Minister as to why an external merits review is not available.**

*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 of proof**

### **Subclause 73(2)**

Subclause 73(1) provides that it is an offence if a person refuses or fails to comply with a requirement (under clauses 69, 70 and 71) to give information or produce a document. The penalty for this offence is 30 penalty units, which appears to be line with Commonwealth penalties for similar offences (see *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, Annexure A).

Subclause 73(2) provides for a 'reasonable excuse' defence to this offence, and the *Note* to the subclause explains that a defendant bears an evidential burden of proof in relation to establishing such an excuse. The *Guide to*

*Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at 52) correctly notes that the reasonable excuse defence is ‘open-ended’ and that it may be difficult for defendants to rely upon it ‘because it is unclear what needs to be established’. The open-ended nature of the defence also means that it is difficult for the committee to determine whether the reversal of onus entailed by a defence is appropriate. More specifically, it is difficult to determine whether the matters on which the defendant must adduce evidence are ‘peculiarly within the knowledge of the defendant’ and ‘would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter’ (*A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p. 50). The explanatory memorandum (at p. 41) simply states the effect of the subclause, but does not explain why this approach has been adopted. **The committee therefore seeks the Minister's advice as to the justification for reversing the onus of proof without providing further detail as to what would constitute a reasonable excuse defence.**

*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.*

## **Trespass on personal rights and liberties—privacy**

### **Delegation of legislative power**

#### **Clause 81**

Paragraph 81(1)(a) gives the Secretary the power to disclose protected information if the Secretary certifies that it is necessary in the public interest to do so. In such circumstances the Secretary can disclose the information ‘to such persons and for such purposes as the Secretary determines’. Paragraph 81(1)(b) gives the Secretary the power to disclose protected information to (i) the Secretary of a Department of State of the Commonwealth or the head of a Commonwealth authority, (ii) to a person who has the express or implied consent of the person to whom the information relates to collect it, (iii) to the Chief Executive of Centrelink for the purposes of a Centrelink program, and (iv) to the Chief Executive of Medicare for the purposes of a Medicare program.

Subclause 81(2) provides that in certifying for the purposes of paragraph 81(1)(a) or disclosing information for the purposes of subparagraph

81(1)(b)(i), the Secretary must act in accordance with any rules made for these purposes under clause 82. Although the rules may constrain the Secretary's powers to disclose protected information under subclause 81(1), including the authority to certify whether or not it is 'in the public interest to do so' in paragraph 81(1)(a), it is unclear to the committee without having seen the rules what the criteria are for determining what the public interest requires. Further, the authority under subparagraph 81(b)(i) to disclose information to the head of a Department of State or and Agency 'for the purposes of that Department or authority' is framed very broadly.

**In these circumstances, and in the absence of a comprehensive justification in the explanatory memorandum, the committee seeks the Minister's advice as to why the clause 81 disclosure powers are considered necessary and, also, whether consideration has been given to including the constraining powers to be provided by the rules in clause 82 in the primary legislation rather than in the rules.**

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

## **Delegation of administrative powers**

### **Clause 100**

Clause 100 provides that the Secretary may delegate any or all of the powers or functions of the Secretary under this Act to 'an officer'. The explanatory memorandum (at p. 49) states that this power is necessary as the payment scheme may have up to 15 000 applicants, and that a 'scheme of this size and duration will require a suitable number of departmental officers at varying levels to undertake the administration of the scheme'. The explanatory memorandum continues by stating that the 'officers undertaking the work will be led by an experienced team of Senior Executive Service Officers. It is anticipated that decision-making will take place at the Executive level.'

Although the necessity of the power of delegation may be accepted, the question may be asked whether this broad power of delegation is appropriate in relation to all of the powers and functions of the Secretary. For example, it

is not clear why delegation of the powers to undertake internal review and to appoint external reviewers should not be limited to senior decision-makers. A further example of a power that might be appropriately limited to senior decision-makers may be the Secretary's power to approve forms for the purposes of the rules (clause 101). **The committee seeks the Minister's advice as to whether consideration has been given to expressly limiting the exercise of some of the powers and functions of the Secretary to senior executive officers, including those referred to above.**

*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.*

## **Delegation of legislative power**

### **Clause 102**

Clause 102 of this bill provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general instrument-making powers authorised the Governor-General to make regulations, and as such, any instruments made under such powers were required to be drafted by OPC and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this clause.

The committee notes the proposed use of 'rules' rather than 'regulations' in this clause is consistent with the Office of Parliamentary Counsel's recent Drafting Direction 3.8, which states that:

OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulation) unless there is a good reason not to do so.

However, in the committee's *Fifth Report of 2014* the committee noted that it is concerned about implications for the level of executive scrutiny to which subordinate instruments are subject, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process. The committee also notes the

concerns that the Senate Standing Committee on Regulations and Ordinances has raised regarding the prescribing of matters by 'legislative rules', including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power.

The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability of Parliament (and the public in general) to understand and effectively scrutinise such instruments. (see *Delegated Legislation Monitor No. 5 of 2014*, pp 1–5). The committee notes that the Regulations and Ordinances Committee has sought further advice about this and other matters relating to the issue.

**Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:**

- **whether general rule-making powers, such as clause 102, would permit a rule-maker to make the following types of provisions:**
  - **offence provisions**
  - **powers of arrest or detention**
  - **entry provisions**
  - **search provisions**
  - **seizure provisions**
  - **provisions which make textual modifications to Acts**
  - **provisions where the operation of an Act is modified**
  - **civil penalty provisions**
  - **provisions which impose (or set or amend the rate) of taxes**
  - **provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation; and**
- **whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).**

The committee notes that it has raised the same issues in relation to substantively similar provisions in the Asset Recycling Fund Bill 2014 and the Trade Support Loans Bill 2014.

*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 and it may be considered to raise issues in relation to sufficiently subjecting the exercise of legislative power to parliamentary scrutiny (principle 1(a)(v) of the committee's terms of reference).*

## **Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014**

Introduced into the House of Representatives on 5 June 2014

Portfolio: Social Services

### **Background**

This bill seeks to amend the *Income Tax Assessment Act 1936*; the *Social Security Act 1991*; the *Social Security (Administration) Act 1999* and the *Veterans' Entitlements Act 1986* to make consequential amendments in light of the new Business Services Wage Assessment Tool Payment Scheme.

*The committee has no comment on this bill.*

## **Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014**

Introduced into the House of Representatives on 15 May 2014

Portfolio: Treasury

### **Background**

This bill seeks to amend the *Corporations Act 2001* relating to issuers of corporate bonds and to provide company directors with more certainty of their liability in relation to disclosure material.

### **Delegation of legislative power**

#### **Schedule 1, item 8, proposed subsection 283AA(4)**

This item proposes to introduce a regulation making power which would enable a specified offer of debentures, or a specified class of offers of debentures, to be exempted from ‘the requirement for a trust deed and trustee’ (explanatory memorandum, at p. 10). The explanatory memorandum states that ‘this regulation making power has been inserted to ensure that regulations can be made to remove an offer of simple corporate bonds depository interests from Chapter 2L and provided appropriate consumer protections remain in place’ (at p. 11).

However, it is not clear how it will be ensured that appropriate consumer protections will remain in place. **The committee therefore seeks the Parliamentary Secretary’s advice on how this objective will be achieved in the context of the regulation-making power.**

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

## **Customs Tariff Amendment (Product Stewardship for Oil) Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Immigration and Border Protection

### **Background**

This bill seeks to amend the *Customs Tariff Act 1995* to increase the excise-equivalent customs duty on new and recycled petroleum-based oils and greases and their synthetic equivalents from 5.449 cents to 8.5 cents per litre or kilogram from 1 July 2014.

*The committee has no comment on this bill.*

## Energy Efficiency Opportunities (Repeal) Bill 2014

Introduced into the House of Representatives on 15 May 2014

Portfolio: Industry

### Background

This bill seeks to terminate the Energy Efficiency Opportunities Program on 29 June 2014 by repealing the *Energy Efficiency Opportunities Act 2006*.

### Retrospective application

#### Legislation by press release

The statement of compatibility with human rights (in the explanatory memorandum at p. 2) states that:

[In] the event the Bill, once enacted, receives Royal Assent after 29 June 2014, the Act will be repealed retrospectively. The purpose of providing a fixed day on which the Act will be repealed is to provide clarity to companies and stakeholders that obligations under the program will cease on 29 June 2014, notwithstanding any delays in the passage of the Bill.

However the statement of compatibility continues that although, in these circumstances, the bill would commence retrospectively:

...it would not disadvantage any person because the repeal of the Act is beneficial in nature as it removes the obligation to undertake compliance activities after 29 June 2014.

It may be accepted that the possible retrospective commencement of the bill will not have an adverse effect on those currently required to undertake compliance activities under the *Energy Efficiency Opportunities Act 2006*. Nevertheless, the general practice of 'legislation by press release', whereby the executive government announces measures planned to be enacted into law with the expectation that those measures may be treated as law prior to their formal enactment, raises further issues of interest to the committee under its terms of reference.

Legislation by press release may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, as the practice is liable to create uncertainty in the minds of officials

and regulated entities. Further, by (in practical effect) attempting to implement proposed legislative changes prior to their enactment into law, the Parliament is deprived of its normal role in scrutinising legislation before it is enacted and implemented.

The committee notes that the justification for the approach in this instance refers merely to the purpose of providing clarity to companies and stakeholders. This justification is general and may be overly-broad, as it could apply to many instances in which the government intends to change regulatory obligations, but envisages that there may be delays in the passage of legislation. For this reason **the committee seeks a more detailed justification from the Minister for the possible retrospective commencement of this bill.**

*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 and may also 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.*

## **Environment Protection and Biodiversity Conservation Amendment (Alpine Grazing) Bill 2014**

Introduced into the Senate on 13 May 2014

By: Senator Di Natale

A similar bill was introduced into the House of Representatives on 28 February 2011 by Mr Bandt. The committee commented on the previous bill in its *Alert Digest No. 3 of 2011* as the bill was introduced without an explanatory memorandum. The committee notes that an explanatory memorandum was provided with this bill.

### **Background**

This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* to deem that the minister has:

- received from the Victorian government a referral of its proposal to trial cattle grazing in the Alpine National Park; and
- decided that the trial of alpine grazing is unacceptable.

*The committee has no comment on this bill.*

## **Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014**

Introduced into the House of Representatives on 14 May 2014

Portfolio: Environment

### **Background**

This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) relating to bilateral agreements including:

- allowing States and Territories to be accredited for approval decisions on large coal mining and coal seam gas developments that are likely to have a significant impact on a water resource;
- ensuring that all States and Territories are able to be declared under the EPBC Act for the purposes of requesting advice from the Independent Expert Scientific Committee;
- clarifying that proponents do not need to make referrals to the Commonwealth for actions that are covered by an approved bilateral agreement;
- ensuring there is an efficient process to enable the Commonwealth to complete the approval process where an approved bilateral agreement is suspended or cancelled, or ceases to apply to a particular action;
- ensuring that State or Territory processes that meet the appropriate EPBC Act standards can be accredited for bilateral agreements, recognising the different technical approaches taken by different States and Territories to give legal effect to those processes;
- providing for an efficient process so that the relevant bilateral agreement continues to apply to an accredited State or Territory management arrangement or authorisation process, where there are minor amendments to that arrangement or process; and
- a number of minor miscellaneous amendments.

**Insufficiently defined administrative powers  
Schedule 2, item 9, proposed subsections 87(7) and 87(8)**

Subsection 87(7) provides that, in circumstances in which a State or Territory has partially completed an assessment of the relevant impacts of an action and the Commonwealth Minister decides to complete one of the assessment approaches provided for in Part 8 of the EPBC Act, the Minister must make a determination on:

- (a) which steps of the State or Territory assessment process are to be used for the purposes of assessing the action, and
- (b) the remaining steps to be carried out under the assessment approach chosen to complete the assessment under Part 8.

The explanatory memorandum (at p. 15) states that such a determination will make it clear what steps are taken to have been completed by the States and Territories for the purposes of Part 8 of the EPBC Act and what steps remain to be completed by the Commonwealth under Part 8 in circumstances where State or Territory processes may not align with the approaches to assessment set out in Part 8. This provision appears to give the Minister considerable discretion as to what assessment steps are required in particular cases. As the power is not confined by reference to guiding principles or relevant considerations **the committee seeks the Minister's advice as to whether consideration was given to ways in which the exercise of this power may be appropriately controlled given that subsection 87(8) provides that a determination made by the Minister is not a legislative instrument and is therefore not disallowable.**

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

# **Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014**

Introduced into the House of Representatives on 14 May 2014

Portfolio: Environment

## **Background**

This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) to allow for cost recovery for environmental impact assessments, including strategic assessments, under the EPBC Act.

### **Insufficiently defined administrative power—determining fees by an administrative determination**

#### **Parliamentary scrutiny of legislative power**

#### **Schedule 1, item 13, proposed section 170CA**

Section 170CA provides that the Minister may determine the fees to be charged, including the way in which a fee is to be worked out (see proposed subsection 170CA(3)). 170CA(4) explicitly states that such a determination is not a legislative instrument, which means that it is not subject to Parliamentary scrutiny in the form of the disallowance process.

The explanatory memorandum (at p. 5) explains the approach to cost recovery as follows:

It is anticipated that the fees for these types of assessments will be determined on a case-by-case basis, rather than specified in the Regulations. The fees the Minister will determine appropriate for these assessment approaches will be dependent on the specifics of each individual project being assessed and related departmental resources necessary to undertake the assessment. The Minister cannot determine the fees and fix them in Regulations in advance, as for other assessment methods, due the wide variations in the actual resources required to conduct these assessments. Strategic assessments may also provide a general public benefit, and cost recovery therefore may not be appropriate in some cases.

Before making a determination, subsection 170CA(2) will require the Minister to consult with the person proposing to take the action, the designated proponent, or the person responsible for the policy, plan or program for strategic assessments (as the case requires), about the level of fee

to be charged. This will provide the person proposing to take the action with greater certainty of costs prior to commencing the assessment, so that they can make amendments to their proposed action, or policy, plan or program, to avoid or mitigate the significance of the action's impact on matters of national environmental significance and potentially reduce the cost of their assessment. Fees will be based on the level of departmental resourcing required to conduct the assessment of the action or the strategic assessment of the plan, policy or program.

Although this information is useful, and it may be accepted that flexibility in decision-making about fees is required, it is not clear why it is not possible to establish a formula, based on cost recovery principles, which would impose parameters on the level of fees.

Further, it is a matter of concern that the power is not subject to any limits other than an obligation to consult the proponent of the policy, plan or program being assessed. The committee considers that it may be possible to subject this discretionary power to other statutory accountability measures which would improve parliamentary scrutiny and add transparency to the decision-making process.

**The committee therefore seeks the Minister's further advice as to:**

- a) whether a formula can be established that imposes parameters (including an upper limit) on the level of fees; and**
- b) if it is not possible to establish a formula, whether consideration has been given to other statutory accountability mechanisms, such as requiring the Minister to consider relevant matters in setting the fees or reporting requirements which may enhance the rigour, transparency and accountability of the process.**

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

## **Merits review Schedule 1, item 15, proposed part 19A**

The provisions proposed by this item operate as an internal merits review mechanism for those whose rights and interests are affected in relation to the aspects of the imposition of fees which involve some exercise of discretion. The internal review mechanism will apply to the calculation of fees by a person to whom a power or function is delegated under section 515 of the EPBC Act. A fee determined by the Minister will not be subject to reconsideration under the provision. The explanatory memorandum (at pp 6-7) indicates that if a standard or set fee is imposed as an automatic consequence of a particular event (e.g. the making of an application), internal merits review will not be available.

The explanatory memorandum also explains that the amendments do not provide for external merits review of the internal merits review provided by the Secretary. The justification for this is that the methods for calculating fees specified in the Regulations will ‘include clear criteria for assigning a level of complexity to the project’ and these ‘criteria will be defined, and will be objective rather than discretionary criteria’ (at p. 7).

The committee considers that a decision-maker applying a rule or making determinations about objective criteria (as opposed to exercising discretion) does not necessarily render external merits review inappropriate. Merits review is conceptualised as enabling the tribunal to make the *correct* or *preferable* decision. Even where administrative decision-makers are not exercising discretionary powers there may be reasons why they make errors as to the correct decision when applying objective criteria, a formula or a rule—even if the correct application of such requirements means there is only one legally correct decision that can be made. In such circumstances, merits review can provide a relatively low cost mechanism for such decisions to be corrected.

**Noting the considerations outlined above (which are applicable to both external and internal merits review), the committee seeks further advice as to (a) why internal review should not be available in relation to the imposition of a standard or set fee, and (b) why external merits review of the internal review provided by the Secretary is not considered appropriate. In addition, the committee requests further information as to the nature of the criteria that will be used to calculate fees, including**

**whether the criteria will include mandatory considerations that a decision-maker must take into account.**

*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.*

**Inappropriate exercise of legislative power—determining fees by regulation**

**Schedule 1, item 16, proposed subsection 520(4A)**

The explanatory memorandum explains the approach that will be taken to the setting of fees in the regulations, including that a complexity matrix will be used to enable fees for assessments to be determined on a case-by-case basis. Other matters to be dealt with by regulation include the basis on which fees may be waived.

The committee consistently draws attention to legislation that provides for the rate of a levy or fee to be set in (subordinate) legislative instruments because, in general, it is considered that Parliament should be responsible for setting the rate of any tax. Thus, while the committee accepts that the line between a tax and a fee is sometimes difficult to draw, in instances where it is considered a fee the committee expects that there will be a limit on the exercise of this power, for example, by setting a maximum rate in the legislation or including a formula by which the levy is to be calculated.

As all of the key matters relating to the determination of fees are to be dealt with in delegated legislation and the committee's principles require it to consider whether delegations of legislative power are appropriate, **the committee seeks the Minister's advice as to the justification for dealing with such matters in delegated legislation rather than in the primary legislation.**

*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.*

## **Retrospective commencement**

### **Schedule 1, item 20**

This item enables fees to be charged for a referral of a proposal to take action under the EPBC Act that was received by the Minister on or after 14 May 2014. This retrospective commencement of the relevant provisions is justified in the explanatory memorandum on the basis that, '14 May 2014 is the day on which the department confirmed publicly that cost recovery would proceed for environmental assessments under the EPBC Act' (at p. 10). It is also noted that the issue has been the subject of extensive consultations, and the introduction of cost recovery has been flagged on the Department's website since May 2012. Finally, the retrospective commencement is said to ensure that there will be 'no incentive' to bring forward applications prior to the commencement of the cost recovery system.

The committee notes that concerns about retrospective commencement may be considered to be heightened given that the key details of the fee regime are not included in the primary legislation. In these circumstances, Senators have less capacity to consider the appropriateness of setting the commencement date of the proposed changes prior to the date bill is formally enacted into law. **However, in light of the explanation provided in the explanatory memorandum the committee draws the matter to the attention of Senators, and leaves the appropriateness of this approach 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 (Product Stewardship for Oil) Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Immigration and Border Protection

### **Background**

This bill seeks to amend the *Excise Tariff Act 1921* to increase the excise on new and recycled petroleum-based oils, greases and their synthetic equivalents from 5.449 cents to 8.5 cents per litre or kilogram from 1 July 2014.

*The committee has no comment on this bill.*

## **Family Assistance Legislation Amendment (Child Care Measures) Bill 2014**

Introduced into the House of Representatives on 5 June 2014

Portfolio: Education

### **Background**

This bill seeks to amend the *A New Tax System (Family Assistance) Act 1999* and the *Family Assistance Legislation Amendment (Child Care Budget Measures) Act 2011* to:

- maintain the Child Care Rebate limit at \$7500 for three years, commencing from 1 July 2014; and
- maintain the Child Care Benefit income thresholds at the amounts applicable as at 30 June 2014 for three income years.

*The committee has no comment on this bill.*

## **Family Trust Distribution Tax (Primary Liability) Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Fringe Benefits Tax 1986* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Fringe Benefits Tax Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Fringe Benefits Tax Act 1986* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Health Workforce Australia (Abolition) Bill 2014**

Introduced into the House of Representatives on 15 May 2014

Portfolio: Health

### **Background**

This bill seeks to disestablish Health Workforce Australia (HWA) and transfer the functions and programmes of HWA to the Commonwealth Department of Health.

*The committee has no comment on this bill.*

## **Income Tax (Bearer Debentures) Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Income Tax (Bearer Debentures) Act 1971* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Income Tax (First Home Saver Accounts Misuse Tax) Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014  
Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Income Tax (First Home Saver Accounts Misuse Tax) Act 2008* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Income Tax (TFN Withholding Tax (ESS)) Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Income Tax (TFN Withholding Tax (ESS)) Act 2009* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Income Tax Rates Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Income Tax Rates Act 1986* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Migration Amendment (Ending the Nation's Shame) Bill 2014**

Introduced into the House of Representatives on 26 May 2014

By: Mr Wilkie

### **Background**

This bill seeks to amend the *Migration Act 1958* to afford specific rights to non-citizens who travel to, or who are brought to, Australia which are currently denied under existing legislation.

*The committee has no comment on this bill.*

## **Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Industry

### **Background**

This bill seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* (the Regulatory Levies Act) to:

- provide for the environment plan levy to be imposed on the submission of an environment plan by an applicant for a petroleum access authority, petroleum special prospecting authority, pipeline licence, greenhouse gas special authority or greenhouse gas search authority; and
- ensure that the annual titles administration levy is imposed for a year of the term of a title, even if the title does not remain in force for the full year.

*The committee has no comment on this bill.*

## **Offshore Petroleum and Greenhouse Gas Storage (Regulatory Powers and Other Measures) Amendment Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Industry

### **Background**

This bill seeks to make technical amendments to various Acts to enable the proper commencement of pending amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) relating to regulatory powers and enforcement measures.

The amendments in the bill would amend the commencement provisions in the *Offshore Storage Amendment (Compliance Measures) Act 2013* to link to the commencement of the proposed *Regulatory Powers (Standard Provisions) Act 2014*.

The bill also seeks to make other technical amendments to the OPGGS Act including:

- removing the ability for the regulator to apply an infringement notice for a breach of the requirement to ensure that there is an operator's representative present at a facility at all times when one or more individuals are present at the facility;
- inserting a regulation-making power to provide for refund and remittal of annual titles administration levy in certain circumstances;
- amending section 343, relating to applications for a greenhouse gas holding lease by the holder of a petroleum retention lease, for consistency with similar provisions;
- removing the requirement to provide a copy of the application with an application for approval of a transfer, application for approval of a dealing, and provisional application for approval of a dealing; and
- correcting a missing subsection number and outdated references to 'the Safety Authority'.

*The committee has no comment on this bill.*

## **Public Governance, Performance and Accountability Amendment Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Finance

### **Background**

This bill seeks to amend the *Public Governance, Performance and Accountability Act 2013* to:

- provide certainty over the use and management of public resources and the capacity of an accountable authority to issue instructions on resource management and governance matters within entities;
- include a requirement that Commonwealth entities must provide annual reports to their Minister by the 15<sup>th</sup> day of the fourth month after the end of the reporting period;
- clarify the nature of various legislative instruments, including the introduction of a new Part to the PGPA Act (Part 4-1A) to deal with other instruments that are not subject to disallowance, but are subject to appropriate scrutiny as they relate to procurement and grant activities and arrangements covering intelligence or security agencies and listed law enforcement agencies; and
- make technical amendments to clarify the operation of the Act.

### **Insufficiently subject legislative power to scrutiny**

#### **Schedule 1, item 43, proposed new subsection 57(2)**

#### **Schedule 1, item 44, proposed new subsection 58(9)**

These items would add new subsections, 57(2) and 58(9) to recognise that an authorisation under paragraph 57(1)(b) or under subsection 58(6) (relating to borrowing by a corporate Commonwealth entity) is a legislative instrument, but the subsections ensure that section 42 of the *Legislative Instruments Act 2003* (relating to disallowance) does not apply. The explanatory memorandum (at pp 14–15) argues in relation to subsection 57(2) that the exemption from the normal disallowance regime is necessary as ‘such activities are integral to

the effective operation of Executive Government and subjecting the authorisations to disallowance would undermine commercial certainty for both the corporate Commonwealth entities and the parties with whom they would engage.’ In relation to subsection 58(9) the explanatory memorandum argues that ‘The activities covered under these investment provisions are integral to the internal operations of the Executive Government and, while the authorisations will be properly disclosed, any possibility of disallowance would constrain the ability of the Commonwealth and other parties to enter into arrangements with commercial certainty’ (p 15).

**In light the explanation provided in the explanatory memorandum 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.*

### **Broad discretionary power**

#### **Schedule 1, item 48, proposed new section 63**

#### **Schedule 1, item 52, proposed new subsection 65(2)**

The proposed replacement section 63 will ‘more clearly confer two distinct powers—a power to waive an amount owing to the Commonwealth, and a power to modify payment terms attaching to such amounts’ (explanatory memorandum, p. 14). Proposed subsection 63(1) gives the Finance Minister the power to authorise the waiving of an amount owing or to modify the terms and conditions on which an amount owing is to be paid. Proposed subsection 63(5) provides that an authorisation of a waiver or modification is not a legislative instrument.

Item 52 proposes a substitute subsection 65(2) that will provide for ‘the authorisation of any payment to be in accordance with any requirements prescribed by the rules’ (explanatory memorandum p. 15). A further two new subsections are proposed: 65(3) will allow the Finance Minister to attach terms and conditions to an act of grace payment; and 65(4) provides that an authorisation of a waiver or modification is not a legislative instrument.

The explanatory memorandum argues in relation to both items that these provisions are not substantive exemptions from the *Legislative Instruments Act 2003* as any authorisation is ‘of an administrative rather than a legislative nature’. While that may be accepted, the committee is concerned that the bill does not contain express requirements that would guide or limit the exercise of the Minister’s significant powers to waive or modify amounts owed to the Commonwealth. It is noted that proposed subsection 63(2) provides that the Minister’s authorisation of ‘a waiver or modification must be in accordance with any requirements prescribed by the rules’. However, there is no requirement that the rules provide for such requirements, nor does the explanatory memorandum indicate the nature of limits envisaged pursuant to the rules. **The committee therefore seeks the Minister's advice as to whether consideration has been given to whether the bill could require the rules to include limits or guidance on the exercise of this broad discretionary power.**

*Pending the Minister's reply, 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.*

### **Delegation of legislative power—Henry VIII clause Schedule 1, item 70, proposed section 104**

This item substitutes section 104 to permit rules to be made 'to modify the application of not only the PGPA Act, but also to modify the PGPA rules or an instrument made under proposed sections 105B or 105C, to the [Commonwealth Superannuation Corporation]' (explanatory memorandum p. 19).

Such 'Henry VIII' clauses enable delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government. It is the practice of the committee to comment on them when the rationale for their use is not clear. As there is no explanation as to the appropriateness of allowing the rules (delegated legislation) to modify the operation of the *Public Governance, Performance and Accountability Act 2013* (primary legislation)

in this regard, **the committee 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 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.*

### **Parliamentary scrutiny of legislative power**

#### **Schedule 1, item 72, proposed subsections 105B(2) and 105C(2)**

Proposed subsection 105B(1) provides that the Finance Minister may, by written instrument, make provision about procurement by the Commonwealth, corporate Commonwealth entities prescribed by the rules, or wholly-owned Commonwealth companies prescribed by the rules. Proposed subsection 105B(2) provides that although such an instrument is a legislative instrument section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to it.

The explanatory memorandum justifies this approach as follows: (1) it is consistent with current practice under the FMA regulations; and (2) it is important that such instruments are exempt from section 42 of the LI Act 'because they are significantly based on Australia's obligations under the Free Trade Agreement with the United States' (at p. 20).

A similar issue arises in relation to proposed section 105C(2), which provides that a legislative instrument under subsection 105C(1) (to make provision about Commonwealth grants) is not subject to the disallowance provision of the LI Act. In relation to this provision the justification is (1) that the current practice under the FMA regulations does not enable such instruments to be disallowed by the Parliament; and (2) that grant arrangements are 'integral to the internal operations of governments' and the 'possibility of disallowance would undermine commercial certainty in arrangements key to the government's delivery of programs and services'.

Instruments relating to procurement and also to non-statutory grants raise important questions of policy in relation to matters that involve significant amounts of Commonwealth expenditure. The above explanations for exempting such instruments from the usual capacity of Parliament to disallow instruments under the LI Act are noted, but they are insufficiently detailed to

enable the committee to properly consider the appropriateness of the approach. In particular, the committee would benefit from specific examples of the sorts of problems which might arise were section 42 of the LI Act to apply. It is unclear why the Parliament would exercise its powers without regard to the issues identified or whether modified disallowance procedures may be able to address the concerns identified. **The committee therefore seeks the Minister's further advice as to the justification for preventing Parliament from having the opportunity to disallow instruments that potentially expend significant amounts of Commonwealth funds. The committee also requests the provision of specific examples of potential problems if these instruments were subject to disallowance provisions and information as to whether modified disallowance procedures could address any concerns.**

*Pending the Minister's reply, 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.*

### **Delegation of legislative power—Parliamentary scrutiny Schedule 1, item 72, proposed subsections 105D(3) and (6)**

Proposed section 105D sets out a scheme pursuant to which the PGPA Act, rules and instruments in relation to designated activities of intelligence or security agencies or listed law enforcement agencies can be modified.

Proposed subsection 105D(3) enables the Finance Minister to determine (by written instrument), modifications to a number of specified provisions of the PGPA Act, any other provisions of the PGPA prescribed by the rules, the rules themselves, and instruments made in relation to procurement and grants (pursuant to section 105B or 105C).

Proposed subsection 105D(6) provides that instruments made which also determine which activities are caught by these provisions and which also modify the operation of the legislation, rules and instruments are not subject to the standard requirements of LI Act.

The explanatory memorandum justifies the approach by noting that the determinations 'would be unsuitable for publication on the Federal Register of Legislative Instruments as they would contain information relating to national

security that would be unsuitable for public dissemination’ and as existing ‘accountability measures which are in place for these entities will continue to provide oversight in relation to designated activities’ (at p. 21). The explanatory memorandum also notes that proposed subsection 105D(5) would require that determinations made for the purposes of this section must be reviewed at least once every three years or if the activities of the entity change significantly.

The proposed powers enable the Minister to modify the application of an Act of Parliament (and rules, for which Parliament remains responsible) without any parliamentary oversight. **The committee notes the explanation provided, but the explanatory memorandum is insufficiently detailed for the committee to properly assess the appropriateness of the proposed approach. The committee therefore seeks the Minister's further advice as to:**

- a) **the necessity of this approach;**
- b) **why particularly the various requirements of the LI Act are considered inappropriate; and**
- c) **why publication of the instruments on FRLI is likely to compromise national security.**

*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. It may also 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.*

## Recognition of Foreign Marriages Bill 2014

Introduced into the Senate on 15 May 2014

By: Senator Hanson-Young

A similar bill was introduced into the Senate on 16 May 2013 by Senator Hanson-Young. The committee considered the bill in *Alert Digest No. 6 of 2013* and made no comment.

### Background

This bill seeks to amend the *Marriage Act 1961* to ensure that marriages that are validly entered into in foreign countries can be recognised under the laws of Australia.

*The committee has no comment on this bill.*

## **Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014**

Introduced into the House of Representatives on 4 June 2014

Portfolio: Industry

### **Background**

This bill seeks to amend the *Social Security (Administration) Act 1999* to provide that:

- jobseekers who incur an eight week non-payment penalty for refusing suitable work will no longer be able to have the penalty waived; and
- jobseekers who persistently fail to comply with participation obligations will only be able to have the penalty waived once while in receipt of an activity tested income support payment.

*The committee has no comment on this bill.*

**Superannuation (Departing Australia  
Superannuation Payments Tax) Amendment  
(Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

**Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Superannuation (Excess Non-concessional Contributions Tax) Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Superannuation (Excess Untaxed Roll-over Amounts Tax) Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014  
Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Superannuation (Excess Untaxed Roll-over Amounts Tax) Act 2007* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Treasury

### **Background**

This bill seeks to amend various taxation laws.

Schedule 1 seeks to amend the *Medicare Levy Act 1986* to increase the Medicare levy low-income threshold for families and the dependent child-student component of the threshold for 2013-14 income year and later income years.

Schedule 2 seeks to amend the *Income Tax Assessment Act 1936* to ensure outcomes are preserved in relation to tax assessments where:

- taxpayers have reasonably and in good faith anticipated the impact of identified announcements made by a previous government that the tax law would be amended with retrospective effect; and
- the current Government has now decided that the announced proposal to change the law will not proceed.

Schedule 3 seeks to amend the *Income Tax Assessment Act 1997* to introduce an integrity rule to limit the ability of taxpayers to obtain a tax benefit from 'dividend washing'.

### **Retrospective commencement**

#### **Schedule 2**

Schedule 2 proposes to amend the *Income Tax Assessment Act 1936* to address the circumstance in which the present government has decided not to proceed with a number of changes to the tax law that were announced by the previous government. The announcements of the previous government that changes would be implemented indicated that, when enacted into law, the changes would take effect retrospectively (from the date the proposal was announced).

Schedule 2 of the bill proposes to amend the tax legislation to ensure ‘outcomes are preserved in relation to tax assessments where: taxpayers have reasonably and in good faith anticipated the impact of identified announcements [in self-assessments of their taxation liability] made by a previous government that the tax law would be amended with retrospective effect; and the current government has now decided that the announced proposal to change the law will not proceed’ (explanatory memorandum, p. 3). The necessary amendments will themselves have retrospective impact, though as noted in the explanatory memorandum, this can ‘only benefit taxpayers’ (at p. 4). **In these circumstances the committee has no comment on the detailed provisions proposed in Schedule 2 of the bill.**

However, in the committee's view this illustrates some of the practical difficulties that arise with the practice of ‘legislation by press release’, a practice that the committee has long sought to limit. In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive.

In citing issues around this previously, the committee has been prepared to accept that some amendments may have some retrospective effect when the legislation is introduced, if this has been limited to publication of a draft bill within six calendar months after the date of that announcement. This is a practice the committee would hope to see followed by the executive in the future. Proposed legislation introduced outside the six month timeframe is at particular risk of the Senate amending the commencement date to the date of introduction of the bill (see, for example, Senate Resolution 44). **The committee draws this matter to the attention of Senators in order to highlight difficulties that can arise with the practice of ministerial announcements being treated as de facto legislative amendment.**

*In the circumstances, the committee has no further comment on these provisions.*

## **Retrospective commencement Schedule 3**

Schedule 3 of the bill will introduce an integrity rule into the tax legislation to limit the ability of taxpayers to obtain a tax benefit from the practice of

‘dividend washing’. The previous government announced the proposal on 14 May 2013, when it indicated that the measure would apply from 1 July 2013. The legislation supporting this measure did not proceed at that time, however, the current government announced that it would continue with the measure on 6 November 2013 and this schedule seeks to implement it.

The bill seeks to apply the amendments with retrospective effect from 1 July 2013. The explanatory memorandum argues that this is ‘necessary to prevent taxpayers from seeking to benefit from distribution washing after its existence was made publicly available by the Government’s announcement’. The explanatory memorandum also indicates that the practice of dividend washing would be likely to be subject to the general anti-avoidance rule in section 177E of the ITAA, though it was considered preferable to enact a specific rule which would automatically apply to dividend washing as part of the normal process of assessment (given that the practice appears to be widespread) (at p. 57).

Finally, it is noted that as ‘distribution washing requires highly specific activities...that will generally not have a commercial rationale without the availability of the associated tax benefits’, it is ‘unlikely taxpayers would be inadvertently affected by the measure or affected in a way that they would not expect from the announcement’ (at p. 58).

While it is only a little over six months since the government announced that it would proceed with this proposal, it has taken over a year for this proposal, first announced in May 2013, to be introduced into the Parliament. As noted above in relation to Schedule 2 to this bill, the committee expects that all proposals announced to commence with retrospective effect should be introduced into the Parliament within 6 months of the announcement. Where this result is not achieved, the committee suggests that the appropriateness of further delay should be the subject of a detailed justification in the explanatory memorandum **However, in light of the circumstances in this instance the committee leaves the question of whether the proposal 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.*

## Retrospective commencement Schedule 3, Part 2, item 9

Part 2 of Schedule 3 makes technical amendments to update a number of cross-references to ‘offsets throughout Division 207 of the ITAA 1997’ (explanatory memorandum, p. 57). The explanatory memorandum states that the sections being amended are ‘clearly intended to convey...that the Subdivision removes the taxpayer’s entitlement to an offset’ and that the amendment removes any ambiguity about this intention (at p. 58). According to the explanatory memorandum, the law has been applied by the Commissioner and taxpayers in accordance with the intended policy but the amendments will ‘eliminate any doubt and provide certainty’.

Item 9 is an application provision which applies these amendments retrospectively from 1 July 2003, the date when the current misdescribed cross-references were introduced. The justification given for this backdating of the amendments is to ensure that ‘the ambiguity does not give rise to doubt about the previously settled applications of the law’ and, as such, ‘is not in substance retrospective as it merely confirms the existing interpretation and operation of the law’ (p. 58).

The committee does not accept the position that amendments will not in substance be retrospective merely because they are in line with the approach that government officials have been taking to the application of the law. Although the practice of government officials applying the law, and the expectations of affected persons, is relevant to the justification for retrospective commencement of amendments, the committee continues to expect explanatory memoranda to address the identification and fairness of any adverse impact that any retrospective application of amendments may have. **The committee therefore seeks the Minister’s advice as to the any potential detrimental impact of the proposed approach on any person who has complied with a reasonable alternative interpretation of the law.**

*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.*

## **Tax and Superannuation Laws Amendment (2014 Measures No. 3) Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Treasury

### **Background**

This bill seeks to amend the capital allowances provisions in the *Income Tax Assessment Act 1997* to limit immediate deductibility of expenditure on mining rights and mining information.

### **Retrospective commencement Schedule 1, Part 2, item 1**

The amendments will apply with retrospective effect from 14 May 2013, which was the date the previous government announced its intention to limit immediate deductibility of expenditure on mining rights and mining information. The current government announced it would proceed with this measure on 6 November 2013. The explanatory memorandum argues that the retrospective commencement date is necessary ‘to ensure that [the] measure does not distort commercial activity’ (at p. 16). It is also the case that the amendments in this bill do not apply to mining rights or mining information which a person begins to hold after the commencement date and time if the person did so by virtue of an arrangement that was entered into before the announcement of the measure.

While it is only a little over six months since the government announced that it would proceed with this proposal, it has taken over a year for this proposal to be introduced into the Parliament. As noted in the commentary above in relation to Schedule 2 of the Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014, the committee expects that all ministerial announcements with which persons are expected to comply in advance of legislative change should be introduced into the Parliament within 6 months of the announcement. Where this result is not achieved, the committee suggests that the appropriateness of further delay should be the subject of a detailed justification in the explanatory memorandum. **However, in light of the circumstances in this instance the committee leaves the question of whether the proposal 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.*

## **Tax Laws Amendment (Implementation of the FATCA Agreement Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Treasury

### **Background**

This bill seeks to amend Schedule 1 to the *Taxation Administration Act 1953* to require Australian financial institutions to collect information about their customers that are likely to be taxpayers in the United States of America (US) and to provide that information to the Commissioner of Taxation (Commissioner) who will, in turn, provide that information to the US Internal Revenue Service.

These amendments give effect to the Australian Government's commitments as set out in the *Agreement between the Government of Australia and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA* [Foreign Account Tax Compliance Act], which was signed in Canberra on 28 April 2014.

### **Trespass unduly on personal rights and liberties—Privacy Schedule 1**

As recognised in the explanatory material, the collection and disclosure of information by a Reporting Australian Financial Institution will have implications for the privacy of affected customers (at p. 11). The personal information that must be collected under the FATCA Agreement is said, in the statement of compatibility, to be 'relatively narrow for determining a person's potential tax obligations' (a person's name, address, US Tax Identification Number, the account number, the income credited to the account and the account balance) (at p. 27). Information must only be reported in relation to accounts that exceed certain minimum thresholds, for example 'the FATCA Agreement provides that accounts containing a balance less than USD \$50000 as at June 2014 are not required to be reviewed, identified or reported' (statement of compatibility p. 28).

The statement of compatibility points out safeguards that apply to protect taxpayer privacy. The information passed on to US authorities is subject 'to strict treaty confidentiality rules which are consistent with Australia's

domestic tax secrecy rules, and other safeguards contained in Article 25 of the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. The statement of compatibility explains that these rules mean that, in general, ‘the information can only be used for tax administration purposes and may only be disclosed to persons...concerned with the assessment, collection, administration or enforcement of, or with litigation with respect to, the taxes covered by the treaty’ (p. 29). Finally, it is also noted that persons can also make complaints about the handling of their personal information by Australian government agencies and private sector organisations covered by the *Privacy Act 1988* and that the Information Commissioner has investigative and enforcement powers to redress non-compliance with the Australian Privacy Principles (p. 29).

Under the *Privacy Act 1988* the use of personal information for a purpose other than that for which it was originally collected is prohibited unless the information is used for a related purpose and the individual would reasonably expect the information’s disclosure for that related purpose, or if the use of disclosure is required or authorised by law. This bill authorises the collection and disclosure of information for FATCA purposes. However, under Australian Privacy Principle 5, Australian financial institutions would nonetheless be required to inform individuals as to the purposes for which their information is being collected, to whom it may be disclosed, the legal basis of the collection of particular information and the main consequences (if any) for the individual if all or part of the information is not provided. (see regulation impact statement, p.45).

**In light of the above factors, the committee leaves the appropriateness of the limits on taxpayer privacy 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.*

## **Tax Laws Amendment (Interest on Non-Resident Trust Distributions) (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Income Tax Assessment Act 1936* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Tax Laws Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the law relating to taxation to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Tax Laws Amendment (Untainting Tax) (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Income Tax Assessment Act 1997* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 1) Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014  
Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Taxation (Trustee Beneficiary Non-disclosure Tax) Act (No. 1) 2007* to introduce a three-year progressive budget levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 2) Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014  
Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Taxation (Trustee Beneficiary Non-disclosure Tax) Act (No. 2) 2007* to introduce a three-year progressive budget repair levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## **Textile, Clothing and Footwear Investment and Innovation Programs Amendment Bill 2014**

Introduced into the House of Representatives on 29 May 2014

Portfolio: Industry

### **Background**

This bill amends the *Textile, Clothing and Footwear Investment and Innovation Programs Act 1999* to provide for the closure of the Clothing and Household Textile Building Innovative Capability Scheme and the Textiles, Clothing and Footwear Small Business Program on 30 June 2014.

*The committee has no comment on this bill.*

## Trade Support Loans Bill 2014

Introduced into the House of Representatives on 4 June 2014

Portfolio: Industry

### Background

This bill seeks to establish the Trade Support Loans Programme to provide concessional, income-contingent loans of up to \$20 000 over four years to certain apprentices which will be repayable when the individual's income reaches the Higher Education Loan Program repayment threshold.

### Delegation of legislative power

#### Clause 8

Subclause 8(1) sets out the qualification requirements a person must meet to qualify for a trade support loan (TSL). Paragraph 8(1)(d) provides that further conditions for qualification may be prescribed by the rules. Subclauses 8(2) and 8(3) provide that the rules may prescribe a level at which a qualifying apprenticeship is to be undertaken and the circumstances in which a person is or is not taken to be undertaking a qualifying apprenticeship.

Although good reasons may well be available for using rules to deal with such further matters relevant to qualification for a TSL, it is noted that the explanatory memorandum merely repeats the effect of these provisions without explaining the reasons why a person's entitlement to a TSL cannot be dealt with comprehensively in the primary legislation. **The committee therefore seeks the Minister's advice as to why the further conditions for qualification for a TSL could not be included in the primary legislation rather than being left to the rules.**

*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.*

### **Trespass on personal rights or liberties—penalty Clauses 63 and 73**

Subclause 63(1) provides that it is an offence if a person refuses or fails to comply with a requirement (under clauses 59, 60 or 61) to give information or produce a document. The penalty for this offence is 12 months imprisonment. A similar issue arises in relation to clause 73, although the penalty for the offence of failing to inform the Secretary of a change of circumstances which may affect the qualification for a TSL is 6 months imprisonment.

The custodial penalties appear high given that a number of Commonwealth offences for withholding information set the penalty at 20–30 penalty units (see *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, Annexure A). **The committee therefore seeks the Minister's advice as to the justification for the imposition of custodial penalties of 12 months and 6 months respectively for these offences.**

*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.*

### **Trespass on personal rights or liberties—onus of proof Clauses 63 and 73**

Subclause 63(2) provides for a 'reasonable excuse' defence to the offence under subclause 63(1), and the Note to the subclause explains that a defendant bears an evidential burden of proof in relation to establishing such an excuse. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at p. 52) correctly notes that the reasonable excuse defence is 'open-ended' and that it may be difficult for defendants to rely upon it 'because it is unclear what needs to be established'. The open-ended nature of the defence also means that it is difficult for the committee to determine whether the reversal of onus entailed by a defence is appropriate. More specifically, it is difficult to determine whether the matters on which the defendant must adduce evidence are 'peculiarly within the knowledge of the defendant' and 'would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter' (*A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p. 50).

A similar issue arises in clause 73 of the bill. This clause provides that it is an offence if a person fails to comply with a notice under clause 71. Subclause 73(2) provides for a 'reasonable excuse' defence to the offence.

As the explanatory memorandum in both cases does no more than repeat the effect of the subclause, **the committee seeks the Minister's advice as to the justification for reversing the onus of proof without providing further detail on what constitutes a reasonable excuse defence.**

*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.*

### **Delegation of administrative powers Subclause 101(1)**

This clause provides that the Secretary may delegate, in writing, all or any of the powers and functions of the Secretary under this Act to 'an officer'. Clause 5 defines officer to include any person engaged (as an employee or otherwise) by an Agency (within the meaning of the *Public Service Act 1999*), another authority of the Commonwealth, and 'a person or organisation that performs services for the Commonwealth'.

As the explanatory memorandum notes (at p. 33), this would enable some of the functions of the Secretary to be delegated 'to contracted service providers who may provide a range of other services such as receiving and processing applications for trade support loans as well as other Australian Apprenticeship initiatives'. According to the explanatory memorandum, this is 'appropriate as these functions are of an administrative nature and require a certain level of expertise in understanding the Trade Support Loan Programme'. It is further added that 'administrative guidelines will be developed which will provide advice about circumstances under which these delegations will be made'.

However, not all of the various forms of accountability that apply to public servants or statutory office holders necessarily apply to non-government decision-makers who are empowered to exercise statutory, administrative powers. **The committee therefore seeks further information as to which of the statutory functions of the Secretary may be delegated to**

**non-government decision-makers and a more detailed justification of the appropriateness of this approach.**

**The committee also seeks the Minister's advice as to whether it is possible to limit the delegation to non-government decision-makers to instances of powers or functions where necessity for doing so has been established.**

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

## **Standing appropriation**

### **Clause 104**

Clause 104 provides for a standing appropriation out of the Consolidated Revenue Fund. 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.

The committee is not generally questioning the ability for payments to be made, only whether the use of a standing appropriation is an appropriate mechanism. In scrutinising standing appropriations, the committee looks to the explanatory memorandum for an explanation of the reason for the proposed approach. In addition, the committee considers whether the bill:

- places a limitation on the amount of funds that may be so appropriated; and
- includes a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

As there is no justification for the standing appropriation provided in the explanatory memorandum, **the committee seeks the Minister's advice as to the justification for the standing appropriation.**

*Pending the Minister's reply, 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.*

## **Delegation of legislative power**

### **Clause 105**

Subclause 105(1) provides that the Minister may, by legislative instrument, establish and maintain the TSL priority list. Pursuant to clause 8(2)(a)(ii) only those persons undertaking apprenticeships will qualify for a TSL. There is a detailed explanation of the power to incorporate into the TSL priority list material contained in another instrument as it exists from time to time (at p. 34). In light of this explanation the committee has no further comment on this issue.

*The committee has no further comment on this provision.*

## **Delegation of legislative power**

### **Clause 106**

Clause 106 of this bill provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Act, or matters that it would be necessary or convenient to prescribe for the purposes of the Act. Previously, such general instrument-making powers authorised the Governor-General to make regulations, and as such, any instruments made under such powers were required to be drafted by OPC and approved by the Federal Executive Council. However, these requirements will not apply to rules made under this clause.

The committee notes the proposed use of 'rules' rather than 'regulations' in this clause is consistent with the Office of Parliamentary Counsel's recent Drafting Direction 3.8, which states that:

*OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulation) unless there is a good reason not to do so.*

However, in the committee's *Fifth Report of 2014* the committee noted that it is concerned about implications for the level of executive scrutiny to which subordinate instruments are subject, particularly as they usually come into effect before the parliamentary scrutiny process (disallowance) is undertaken. In this regard, the committee noted that any move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process.

The committee also notes the concerns that the Senate Standing Committee on Regulations and Ordinances has raised regarding the prescribing of matters by 'legislative rules', including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power. The Regulations and Ordinances Committee also observed that the approach may negatively impact on the standard to which important legislative instruments are drafted, with potential consequential impact on the ability of Parliament (and the public in general) to understand and effectively scrutinise such instruments. (see *Delegated Legislation Monitor No. 5 of 2014*, pp 1–5). The committee notes that the Regulations and Ordinances Committee has sought further advice about this and other matters relating to the issue.

**Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:**

- **whether general rule-making powers, such as clause 106, would permit a rule-maker to make the following types of provisions:**
  - **offence provisions**
  - **powers of arrest or detention**
  - **entry provisions**
  - **search provisions**
  - **seizure provisions**
  - **provisions which make textual modifications to Acts**
  - **provisions where the operation of an Act is modified**
  - **civil penalty provisions**
  - **provisions which impose (or set or amend the rate) of taxes**

- **provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation; and**
- **whether there are any processes or procedures in place which provide for OPC to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately be drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).**

The committee notes that it has raised the same issues in relation to substantively similar provisions in the Asset Recycling Fund Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme Bill 2014.

*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 and it may be considered to raise issues in relation to sufficiently subjecting the exercise of legislative power to parliamentary scrutiny (principle 1(a)(v) of the committee's terms of reference).*

## **Trade Support Loans (Consequential Amendments) Bill 2014**

Introduced into the House of Representatives on 4 June 2014

Portfolio: Industry

### **Background**

This bill seeks to amend five Acts consequential on the establishment of the Trade Support Loans Programme.

*The committee has no comment on this bill.*

## **Trust Recoupment Tax Amendment (Temporary Budget Repair Levy) Bill 2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of 15 bills. The bill seeks to amend the *Trust Recoupment Tax Act 1985* to introduce a three-year progressive budget repair levy in the primary form of additional income tax commencing in the 2014-15 financial year.

*The committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Energy Efficiency Opportunities (Repeal) Bill 2014**

*[Digest 6/14 – awaiting response]*

On the 3 June 2014 a correction to the explanatory memorandum was presented by the Parliamentary Secretary to the Minister for Industry (Mr Baldwin) in the House of Representatives. The committee has no comment on this additional material.

### **Paid Parental Leave Amendment Bill 2014**

*[Digest 5/14 – no comment]*

On the 2 June 2014 a correction to the explanatory memorandum was presented by the Minister for Small Business (Mr Billson) in the House of Representatives. The committee has no comment on this additional material.

### **Public Governance, Performance and Accountability Amendment Bill 2014**

*[Digest 5/14 – awaiting response]*

On 5 June 2014 the House of Representatives agreed to three Government amendments and the Parliamentary Secretary to the Minister for Finance (Mr McCormack) presented a supplementary explanatory memorandum. The committee has no comment on this additional material.

## Provisions of bills which impose criminal sanctions for a failure to provide information

The committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that report, the committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The committee also recommended that such criteria be made available to ministers, drafters and to the Parliament.

The government responded to that report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The committee notes that imprisonment is still prescribed as a penalty for some such offences.

Bill/Act	Section	Offence	Penalty
Trade Support Loans Bill 2014	s 63	Refusal or failure to give information or produce a document	Imprisonment for 12 months
Trade Support Loans Bill 2014	s 73	Refusal or failure to comply with a notice requiring information or statements	Imprisonment for 6 months

## 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 44<sup>th</sup> Parliament.

### **Bills introduced with standing appropriation clauses in the 44<sup>th</sup> Parliament since the previous *Alert Digest***

Asset Recycling Fund Bill 2014  
Business Services Wage Assessment Tool Payment Scheme Bill 2014  
Student Identifiers Bill 2014  
Trade Support Loans Bill 2014

### **Other relevant appropriation clauses in bills**

Nil