

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

**The work of the committee
during the 42nd Parliament
February 2008 – June 2010**

© Commonwealth of Australia 2013

ISBN 978-1-74229-880-1

This document was produced by the Senate Standing Committee for the Scrutiny of Bills Secretariat and printed by the Senate Printing Unit, Parliament House, Canberra

MEMBERSHIP OF THE COMMITTEE

DURING THE 42nd PARLIAMENT

Members

Senator Helen Coonan (Chair) ¹	LP, New South Wales
Senator Christopher Ellison, (Former Chair) ²	LP, Western Australia
Senator Mark Bishop, (Deputy Chair) ³	ALP, Western Australia
Senator Doug Cameron ⁴	ALP, New South Wales
Senator Jacinta Collins ⁵	ALP, Victoria
Senator Anne McEwen ⁶	ALP, South Australia
Senator Andrew Murray ⁷	AD, Western Australia
Senator Louise Pratt ⁸	ALP, Western Australia
Senator the Hon Robert Ray ⁹	ALP, Victoria
Senator Rachel Siewert ¹⁰	AG, Western Australia
Senator Judith Troeth ¹¹	LP, Victoria

-
- 1 Appointed to the Committee this Parliament on 13.10.2008. Elected Chair on 15.10.2008.
 - 2 Appointed to the Committee this Parliament on 13.2.2008. Elected Chair on 20.2.2008 until 13.10.2008.
 - 3 Appointed to the Committee this Parliament on 14.10.2008. Elected Deputy Chair on 15.10.2008.
 - 4 Appointed to the Committee this Parliament on 1.7.2008.
 - 5 Appointed to the Committee this Parliament on 14.5.2008. Discharged on 13.5.2010.
 - 6 Appointed to the Committee this Parliament on 14.2.2008. Discharged on 30.6.2008.
 - 7 Continuous service first appointed in 1.7.1996. Discharged 30.6.2008.
 - 8 Appointed to the Committee this Parliament on 13.5.2010.
 - 9 Appointed to the Committee this Parliament on 14.2.2008. Discharged on 5.5.2008.
 - 10 Appointed to the Committee this Parliament on 22.9.2008.
 - 11 Appointed to the Committee this Parliament on 13.2.2008.

TABLE OF CONTENTS

MEMBERSHIP OF THE COMMITTEE	iii
--	-----

PREFACE	vii
----------------------	-----

Chapter 1

Introduction	1
---------------------------	---

Background.....	1
-----------------	---

Committee establishment	1
-------------------------------	---

Committee membership.....	1
---------------------------	---

The committee's scrutiny principles	2
---	---

The committee's workload.....	3
-------------------------------	---

The committee's mode of operation	4
---	---

The committee's workflow	4
--------------------------------	---

Committee publications and resources.....	6
---	---

<i>Alert Digest</i>	6
---------------------------	---

<i>Reports</i>	6
----------------------	---

<i>Other resources</i>	6
------------------------------	---

Structure of the report.....	7
------------------------------	---

Acknowledgements	7
------------------------	---

Chapter 2

Provisions which <i>trespass unduly</i> upon personal rights and liberties	9
---	---

Application of criterion set out in standing order 24(1)(a)(i).....	9
---	---

Retrospectivity.....	9
----------------------	---

Abrogation of the privilege against self-incrimination	11
--	----

Reversal of the onus of proof	12
-------------------------------------	----

Strict and absolute liability offences	13
--	----

Powers of search and seizure without warrant	14
--	----

Political opinion.....	15
------------------------	----

Chapter 3

Insufficiently defined administrative powers.....	17
Application of criterion set out in standing order 24(1)(a)(ii)	17
Ill-defined and wide powers	17
Delegation of power to 'a person' or a wide class of persons.....	18

Chapter 4

Undue dependence upon non-reviewable decisions.....	21
Application of criterion set out in standing order 24(1)(a)(iii)	21
Excluding merits and judicial review	21

Chapter 5

Inappropriate delegation of legislative power	23
Application of criterion set out in standing order 24(1)(a)(iv)	23
Henry VIII clauses.....	23
Determining important matters by delegated legislation	24
Setting the rate of a 'levy' by regulation	25

Chapter 6

Appropriate parliamentary scrutiny of legislative power.....	27
Application of criterion set out in standing order 24(1)(a)(v).....	27
Not tabled or not subject to disallowance	27
Incorporating material 'as in force from time to time'	28

Preface

This report discusses the work of the Senate Standing Committee for the Scrutiny of Bills during the 42nd Parliament. It gives an account of the operation of the committee during that period, including examples of the kinds of issues that arose under each of the five criteria against which the committee tests the legislation with which it deals.

Chapter 1

Introduction

Background

1.1 Since 1981, the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament in relation to:

- undue trespass on personal rights and liberties;
- whether administrative powers are described sufficiently;
- whether merits review is appropriately available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

Committee establishment

1.2 The Scrutiny of Bills Committee was first established by a resolution of the Senate on 19 November 1981, following a report of the Senate's Constitutional and Legal Affairs Committee (tabled in November 1978). That report recommended the establishment of a new parliamentary committee to highlight provisions in bills which potentially affected individuals by interfering with their rights or by subjecting them to the exercise of an undue delegation of power.

1.3 The government of the day had considerable misgivings about this proposal, seeing it as having the potential to 'interfere' in the legislative process. Nevertheless, on the motion of Liberal Senator Alan Missen and Labor Senator Michael Tate, the committee was established on a trial basis in November 1981, was constituted on a discrete basis under a sessional order in May 1982 and became a permanent feature of the Senate committee system on 17 March 1987.

Committee membership

1.4 Senate standing order 24(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members – three senators from the government party and three from non-government parties (as nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators). Since 1984 the committee chair is a member of the Opposition. While it is not a formal requirement, in practice the committee also nominates a member of the government to be the deputy chair. Members of the committee during the 42nd Parliament were:

Chairs

Senator the Hon Chris Ellison (13.2.08 – 13.10.08)

Senator the Hon Helen Coonan (15.10.08 – 30.9.10)

Members

Senator Mark Bishop (14.2.08 – 30.09.10)

Senator Doug Cameron (1.7.08 – 30.9.10)

Senator Jacinta Collins (14.5.08 – 13.5.10)

Senator Anne McEwen (14.2.08 – 30.6.08)

Senator Andrew Murray (13.02.08 – 30.6.08)

Senator Louise Pratt (13.5.10 – 30.9.10)

Senator the Hon Robert Ray (14.2.08 – 5.5.08)

Senator Rachel Siewert (22.9.08 – 30.9.10)

Senator the Hon Judith Troeth (13.2.08 – 30.9.10)

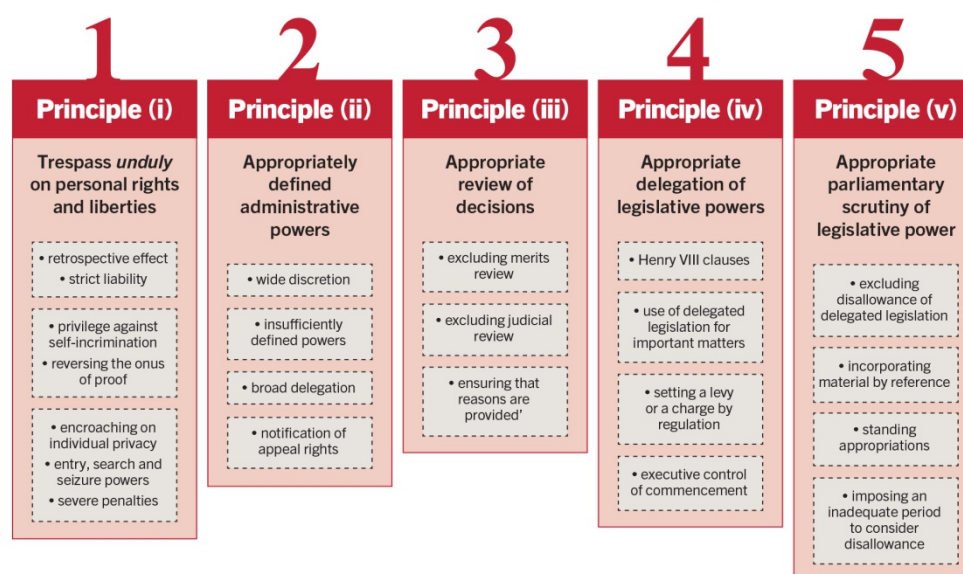
The committee's scrutiny principles

1.5 As noted above, the scope of the committee's interest in bills is established by the principles outlined in Senate standing order 24(1)(a). Over the years the committee has primarily taken a case-by-case approach to articulating issues of concern and then communicating them through its correspondence with ministers and through its regular publications.

1.6 When applying each principle there are a number of well-established matters that the committee considers to be of concern. Therefore, when it is developing comments on the provisions of each new bill before it for consideration, the committee takes its previous views on these matters into account though it does not consider that it is constrained by them.

1.7 Some of the long-standing matters of concern identified by the committee over the years by reference to individual criteria are included in the diagram below and discussed in more detail in chapters 2 to 6.

Summary of standing order 24 and examples of issues considered under each principle



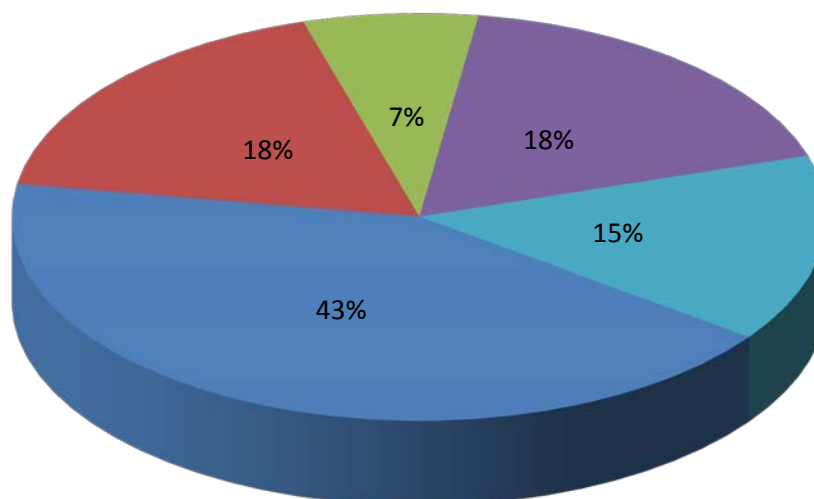
The committee's workload

1.8 Each year the committee usually analyses between 200 and 250 bills. The following table sets out the number of bills and amendments considered during the 42nd Parliament.

Year	Bills considered	Bills commented on	Amended bills considered	Amended bills commented on	Digests tabled	Reports tabled
2008	225	112	25	6	14	12
2009	238	139	62	15	15	14
2010*	143	90	38	17	7	7
Total 42nd Parliament	606	341	125	38	36	33

* To June 2010

Scrutiny comments on bills per principle under Standing Order 24(1)(a) during the 42nd Parliament



- (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
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny

The committee's mode of operation

1.9 The committee examines all bills that come before the Parliament against the five principles set out in subparagraph 1(a) of Senate Standing Order 24 (discussed in detail in chapters 2 to 6) and usually meets each sitting week to consider them. The committee's approach is that it operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the scrutiny principles. The policy content of the bill provides context for its scrutiny, but is not a primary consideration for the committee. In addition, while the committee provides its views on a bill's level of compliance with standing order 24(1)(a) it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

1.10 In undertaking its work the committee is supported by a secretariat comprising a secretary and legislative research officer. The committee also obtains advice from a legal adviser who is appointed by the committee with the approval of the President of the Senate. The committee enjoyed the assistance of three legal advisers during the 42nd Parliament:

- Professor Jim Davis (continuing as adviser) from February 2008 to December 2009;
- Professor Suzanne Tongue from January to December 2009; and
- Associate Professor Leighton McDonald from April 2010 to present.

The committee's workflow

1.11 The committee's usual process for undertaking its work is shaped by the process for the introduction into, and passage of bills through, the Parliament. (The main steps in the committee's work are outlined in the diagram on the following page.)

1.12 In the usual scrutiny process, after introduction into either the House of Representatives or the Senate, a copy of each bill, together with its explanatory memorandum and the minister's second reading speech, is provided to the committee's legal adviser. The legal adviser considers this material and provides a report indicating the level of compliance for each bill against the committee's scrutiny principles. The secretary is also involved in examining the bills as well as proposed parliamentary amendments to bills. The work undertaken by the legal adviser and the secretariat provides the foundation for

Explanatory Memoranda

The committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions.

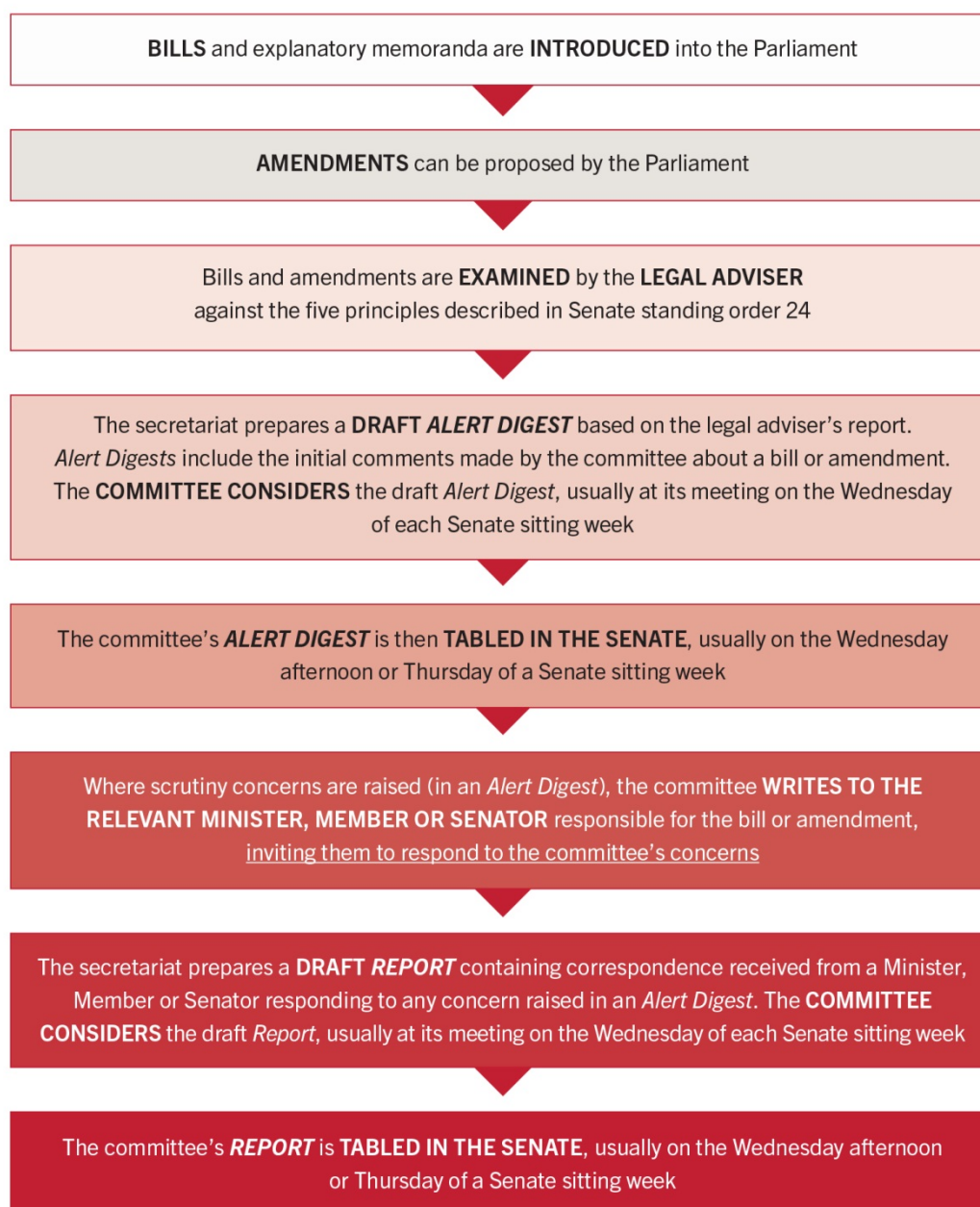
In relation to the scrutiny process, a comprehensive explanatory memorandum can provide the foundation for avoiding adverse scrutiny committee comment because whether or not a provision is of concern often depends on the context and circumstances. An explanatory memorandum should demonstrate that the proposed policy approach reflects an informed choice that is appropriately justified.

the committee's consideration of the legislative proposals before the Parliament.

1.13 Where a concern is raised about possible inconsistency with the scrutiny principles, the committee's usual approach is to write to the responsible minister seeking further information or requesting that consideration be given to amending the relevant provision.

1.14 Once a response is received from the minister, the committee reconsiders the relevant provisions and provides a further view on its compliance with the relevant scrutiny principle or principles.

Committee's Work Flow



Committee publications and resources

1.15 The committee regularly publishes two documents: its *Alert Digest* and its *Report*, which can be accessed online from the committee's Australian Parliament House webpage once they have been presented to the Senate [www.aph.gov.au/senate_scrutiny].

Alert Digest

1.16 On the basis of the legal adviser's report, the secretariat prepares a draft *Alert Digest* which is considered by the committee at its regular meeting on the Wednesday morning of each Senate sitting week. The *Alert Digest* contains a brief outline of each of the bills introduced in the previous week, as well as any comments the committee wishes to make. Comments are usually set out by reference to the relevant principle in standing order 24. The *Alert Digest* is tabled in the Senate on the Wednesday afternoon or the Thursday morning of each Senate sitting week.

1.17 When concerns are raised by the committee and noted in an *Alert Digest*, correspondence is forwarded to the Minister responsible for the bill (on the Thursday following the tabling of the *Alert Digest*) inviting him or her to respond to the committee's concerns. The Minister generally seeks advice from his or her department before responding.

Reports

1.18 When a minister or parliamentary secretary responds to a concern raised in an *Alert Digest*, the secretariat produces a draft *Report* for the committee's consideration. A draft *Report* contains the relevant extract from the *Alert Digest*, the text of the minister's response, and any further comments the committee may wish to make. Draft *Reports* are also considered at the committee's regular meetings, and, once agreed, are presented to the Senate at the same time as the *Alert Digest* for that week.

1.19 The committee requests that any response from a minister be received in sufficient time for it to be circulated to members for consideration before the next committee meeting. Ideally, the committee likes to report to the Senate prior to the Senate's detailed consideration of bills (committee-of-the-whole stage), so that its views can be taken into account before passage.

1.20 Links to the committee's *Alert Digests* can be found here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2013/index.htm and to the committee's *Reports* here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/bills/2013/index.htm.

Other resources

1.21 The committee also produces occasional reports on matters specifically referred to it by the Senate – see for example, *Entry, Search and Seizure Provisions in Commonwealth Legislation, Twelfth Report of 2006*. The committee also tables a report, such as this one, which summarises its work during each Parliament following the completion of the relevant Parliament.

Structure of the report

1.22 The structure of this report is:

- Chapter 2 provides examples of the committee's work during the 42nd Parliament against principle 24(a)(1)(i);
- Chapter 3 provides examples of the committee's work during the 42nd Parliament against principle 24(a)(1)(ii);
- Chapter 4 provides examples of the committee's work during the 42nd Parliament against principle 24(a)(1)(iii);
- Chapter 5 provides examples of the committee's work during the 42nd Parliament against principle 24(a)(1)(iv); and
- Chapter 6 provides examples of the committee's work during the 42nd Parliament against principle 24(a)(1)(v).

Acknowledgements

1.23 The committee wishes to acknowledge the work and assistance of its legal advisers during the 42nd Parliament: Professor Jim Davis, Professor Suzanne Tongue and Associate Professor Leighton McDonald.

1.24 The committee also wishes to acknowledge the assistance of ministers, departments and agencies during the reporting period. Their responsiveness to the committee is critical to the legislative process by ensuring that the committee can perform its scrutiny function effectively.

Chapter 2

Provisions which *trespass unduly* upon personal rights and liberties

Application of criterion set out in standing order 24(1)(a)(i)

2.1 The committee is required to report on whether the provisions of proposed legislation could ‘trespass *unduly* on personal rights and liberties’ (emphasis added). For example, a bill might raise issues relating to:

- having a retrospective and adverse effect on those to whom it applies, sometimes from the date of a media announcement (in these instances known as ‘legislation by press release’);
- abrogating the privilege against self-incrimination (the right people have at common law to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved);
- reversing the common law onus of proof (requiring a person to prove their innocence when legal proceedings are taken against them);
- imposing strict or absolute liability as an element of fault for an offence;
- authorising search and seizure without the need to obtain a judicial warrant;
- privacy, including the confidentiality of professional communications with a person's legal advisers;
- equipping officers with oppressive powers for use against a vulnerable group of people; or
- taking away Parliament's right to obtain information from the Executive.

2.2 These are categories that have arisen for consideration during most parliaments and are ones with which the committee is very familiar. However, Standing Order 24(1)(a)(i) may also apply in other circumstances and the committee is alert to identifying any new matters that may be considered inconsistent with the intent of the principle. More detail about matters that give rise to scrutiny concern and examples from the 42nd Parliament are discussed below.

Retrospectivity

2.3 Legislation has retrospective effect when it makes a law apply to an act or omission that took place *before* the legislation was enacted. Criticism of this practice is longstanding. For example, in 1651 Thomas Hobbes in *Leviathan* observed that 'No law, made after a Fact done, can make it a Crime', and also that 'Harme inflicted for a

Fact done before there was a Law that forbid it, is not Punishment, but an act of Hostility'.¹ This view was expounded upon further in 1765 by Sir William Blackstone in his *Commentaries*. He referred to the problem of making laws but not publicly notifying those subject to them and then went on to say:

There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.²

2.4 The committee endorses the view that retrospective legislation is of concern where it will, or might, have a detrimental effect on people. The committee will comment adversely in these circumstances. Where proposed legislation will have retrospective effect the committee expects that the explanatory memorandum should set out in detail the reasons retrospectivity is sought. The justification should include a statement of whether any person will or might be adversely affected and, if so, the number of people involved and the extent to which their interests are likely to be affected. Some examples encountered by the committee during the 42nd Parliament include the:

- **CUSTOMS AMENDMENT (ENHANCED BORDER CONTROLS AND OTHER MEASURES) BILL 2008:**

This bill included two provisions with retrospective effect. In relation to one, the explanatory memorandum made it clear that any effect would be beneficial and the committee therefore did not comment further. However, the other provision sought to provide the power to arrest without a warrant a person believed to have escaped lawful custody. The committee accepted that circumstances could exist in which this power may be appropriate, but the explanatory memorandum did not address why it should be accepted that the provision could operate in circumstances in which the initial arrest took place before the amendments commenced. The committee therefore sought the Minister's advice as to the rationale. The Minister then provided some additional background to the provision and noted his view that a power to re-apprehend a person is not unreasonable even if the initial arrest occurred prior to the amendments coming into effect (*Second Report of 2009*).

1 Hobbes, T. *Leviathan*, as referred to by Toohey, J. in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 687.

2 Blackstone, W. *Commentaries on the Laws of England*, Book 1 (1965, Clarendon Press, Oxford), pp. 45-6 as referred to in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 534 per Mason, CJ.

- **FAMILY ASSISTANCE LEGISLATION AMENDMENT (CHILD CARE BUDGET AND OTHER MEASURES) BILL 2008:**
The bill provided that an amendment would apply to care provided by an approved child care service, including retrospectively to 1 July 2006. The explanatory memorandum did not indicate whether the amendment would be beneficial or adverse to recipients of child care services and the committee therefore sought the Minister's advice about this. The minister replied that the item corrected a drafting error and would not give rise to any adverse effect. The committee thanked the Minister, noted that the information would have been helpful in the explanatory memorandum and requested that its views be drawn to the attention of the department (*Sixth Report of 2008*).
- **CUSTOMS TARIFF AMENDMENT (INCORPORATION OF PROPOSALS) BILL 2009:**
This bill included three items with retrospective commencement, however, the explanatory memorandum clearly and comprehensively outlined the rationale, which was acceptable to the committee. The committee noted that this was an excellent example of the detail it looks for in explanatory memoranda when considering the retrospective commencement of legislation (*Alert Digest No. 13 of 2009*).

Abrogation of the privilege against self-incrimination

2.5 At common law, a person can decline to answer a question on the ground that their reply might tend to incriminate them. Legislation that interferes with this common law entitlement trespasses on personal rights and liberties and causes the committee considerable concern. However, the committee is also conscious of a government's need to have sufficient information to enable it to properly carry out its duties to the community. The committee accepts that in some circumstances good administration might necessitate access to information that can only be obtained, or can best be obtained, by forcing a person to answer questions even though this means that he or she must provide information showing that he or she may be guilty of an offence.

2.6 The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a provision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.

2.7 One of the factors the committee considers is the subsequent use that may be made of any incriminating disclosures. The committee generally holds to the view that it is relevant to take into account whether the proposed legislation balances the harm of abrogating the privilege by including a prohibition against any direct or indirect uses of the information beyond the purpose for which it is being obtained.

2.8 To date the only exception to this that the committee generally finds acceptable is that a forced disclosure should only be available for use in criminal proceedings when they are proceedings for giving false or misleading information in the disclosure the person has been compelled to make. The committee's experience is that the importance of the availability of these use and derivative use immunities are

generally understood and they are usually included bills that seek to abrogate the privilege against self-incrimination. For a typical example, see the:

- **AVIATION LEGISLATION AMENDMENT (2008 MEASURES NO. 2) BILL 2008:**
The bill sought to abrogate the privilege against self-incrimination for a person required to provide aviation security information under new section 111 of that Act. However, use and derivative use immunities were included and the provision was explained in the explanatory memorandum. The committee accepted that this provision struck a reasonable balance between the competing interests of obtaining information in specific circumstances and protecting the rights of individuals (*Alert Digest No. 1 of 2009*).

Reversal of the onus of proof

2.9 At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence; the accused is not required to prove anything. Provisions in some legislation reverse this onus and require the person charged with an offence to prove, or disprove, a matter to establish his or her innocence or at least identify evidence that suggests a reasonable possibility that the matter exists or does not exist.

2.10 The committee usually comments adversely on a bill that places the onus on an accused person to disprove one or more elements of the offence with which he or she is charged, unless the explanatory memorandum clearly adequately justifies the rationale for the approach, particularly by reference to the principles outlined in its comments on this issue recorded in its alert digest and in the Commonwealth *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*,³ which states in relation to a provision which reverses the onus of proof (often drafted, in effect, as a defence):

However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence.

Creating a defence is also more readily justified if:

- the matter in question is not central to the question of culpability for the offence
- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.⁴

2.11 Some examples considered during this Parliament include the:

3 Released by the Commonwealth Attorney-General and available at www.ag.gov.au.

4 September 2011 edition, p. 50.

- **CRIMES LEGISLATION AMENDMENT (SERIOUS AND ORGANISED CRIME) BILL 2009:**

The bill provided that once an 'unexplained wealth order' had been made the person against whom the order was sought had the burden of proving that their wealth was not derived from a relevant offence. Unfortunately the explanatory memorandum did not seek to explain the reversal of onus and the committee therefore sought the minister's advice. The Minister provided a detailed reply to the committee, noting that several safeguards were in place and that the approach was consistent with the findings of the Parliamentary Joint Committee on the Australian Crime Commission (*Tenth Report of 2009*).

- **PERSONAL PROPERTY SECURITIES BILL 2009:**

The bill provided for actual or constructive knowledge in relation to certain property transfers unless there is proof to the contrary beyond a reasonable doubt (the criminal standard). The explanatory memorandum provided some information as to the rationale for the approach, however, as the provision was significant and unusual the committee sought further background information from the Attorney-General. The Attorney-General replied noting the limited circumstances in which the reversal of onus would apply and the reasons justifying this approach. The committee found the reply useful and requested that the information be included in the explanatory memorandum (*Eleventh Report of 2009*).

Strict and absolute liability offences

2.12 The committee draws the Senate's attention to provisions that create offences of strict or absolute liability and expects that where a bill creates such an offence the reasons for its imposition will be set out in the explanatory memorandum that accompanies the bill.

2.13 An offence is one of **strict liability** where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. A person charged with a strict liability offence is able to invoke a defence of mistake of fact.

2.14 An offence of **absolute liability** also provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. However, in the case of absolute liability offences, the defence of mistake of fact is not available.

2.15 For examples considered by the committee see the:

- **TRANSPORT SECURITY LEGISLATION AMENDMENT (2010 MEASURES NO. 1) BILL 2010:**

The bill included a provision to establish a new offence, of strict liability, when a person attempts to hinder a security assessment inspector in the exercise of a power. The explanatory memorandum included some material seeking to justify the approach, however, in light of the significance of the powers involved and the absence of any reference in the explanatory

memorandum to the principles outlined in the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, the committee sought the Minister's further advice about the matter. In its comment about this bill the committee took the opportunity to outline its approach to matters of strict liability in some detail. The Minister provided an explanation to the committee consistent with the *Guide*, though the committee noted that the information would have been useful in the explanatory memorandum (*Fifth Report of 2010*).

- **THERAPEUTIC GOODS AMENDMENT (MEDICAL DEVICES AND OTHER MEASURES) BILL 2008:**

The bill proposed that a new subsection of the *Therapeutic Goods Act* would provide that an offence against proposed new subsection 41MNB(5) (breaching a condition of an exemption relating to a device) would be 'an offence of strict liability'. The explanatory memorandum sought to justify the approach on the basis that strict liability would ensure that persons complied with relevant conditions attached to the exemption. However, the committee was not persuaded that this explanation was adequate and sought further advice from the Minister. The Parliamentary Secretary then provided a detailed explanation consistent with the *Guide*, though the information would have been useful in the explanatory memorandum (*Second Report of 2009*).

- **HIGHER EDUCATION SUPPORT AMENDMENT (VET FEE-HELP AND TERTIARY ADMISSION CENTRES) BILL 2009:**

The bill sought to include an offence of absolute liability and no explanation was included in the explanatory memorandum. The committee therefore sought the minister's advice. The Minister provided a comprehensive response noting the limited application of absolute liability, the justification for it and consistency with similar provisions. The Minister agreed to amend the explanatory memorandum to include the relevant information (*Twelfth Report of 2009*).

Powers of search and seizure without warrant

2.16 The committee consistently draws the Senate's attention to provisions that allow search and seizure without the issue of a warrant. As a general rule, a power to enter premises without the consent of the occupier, or without a warrant, trespasses unduly on personal rights and liberties. A provision giving such a power will be acceptable only when the circumstances and gravity of the matter justify it (and this information should be included in the explanatory memorandum). For example, see the:

- **CUSTOMS AMENDMENT (STRENGTHENING BORDER CONTROLS) BILL 2008**

The bill sought to include a power to permit the search, without a warrant, of a person (and their property) who boarded a ship or aircraft in specified circumstances. The explanatory memorandum did not provide a justification and the committee sought the minister's advice. The Minister provided a comprehensive reply which included additional background, examples of relevant circumstances and noted that the approach was consistent with the

Guide. The committee thanked the Minister and noted that the information would have been useful in the explanatory memorandum (*Fifth Report of 2008*).

Political opinion

2.17 In *Alert Digest No. 14 of 2009* the committee commented on an issue of concern relating to a provision which sought to render people ineligible for appointment as the Chairperson or a Director of the Australian Broadcasting Commission and Special Broadcasting Service boards if they had held specified parliamentary roles. The committee felt that this raised a number of important issues relating to personal rights and liberties:

- **NATIONAL BROADCASTING LEGISLATION AMENDMENT BILL 2009:**

The explanatory memorandum argued that the intention was to strengthen the independence and impartiality of the Boards (consistent with Board duties) and to overcome past perceptions of political bias. Such disqualification was based on bias – actual, perceived or vicarious – and the disqualification of all those covered by the provisions would be for life. Importantly, it would also apply to people who occupied the relevant positions *prior to the commencement* of the legislation and the term ‘senior political staff member’ would be defined by legislative instrument rather than being defined in the bill itself. In light of the significance of the issues raised the committee felt that the explanation was not adequate and sought the minister's further advice.

The Minister then provided a detailed reply explaining the rationale for the approach, but the committee was not satisfied that the approach struck a reasonable balance between the competing interests of strengthening the independence of these statutory appointments and protecting people's rights. The committee sought the Minister's further advice about whether consideration had been given to removing the retrospective application of the requirement. In his further reply, the Minister expressed the view that the rule was appropriately narrow and did not intend to alter it. The committee continued to express significant concern and drew the provisions to the attention of the Senate (*Second and Fifth Reports of 2010*).

Chapter 3

Insufficiently defined administrative powers

Application of criterion set out in standing order 24(1)(a)(ii)

3.1 Legislation may contain provisions which make rights and liberties unduly dependent upon insufficiently defined administrative powers. For example, a provision might:

- give administrators ill-defined and/or wide powers;
- delegate power to ‘a person’ without any further qualification as to who that person might be; or
- fail to provide for people to be notified of their rights of appeal against administrative decisions.

Ill-defined and wide powers

3.2 Since its establishment in the early 1980s, the committee has drawn the Senate's attention to legislation that gives administrators seemingly ill-defined and wide powers. The committee sees a number of approaches that are of concern from year to year, though it is also always alert to identifying novel ways in which this issue may arise. Some examples of ill-defined and wide powers considered by the committee during this Parliament include the:

- **AGED CARE AMENDMENT (2008 MEASURES NO.1) BILL 2008:**
The bill provided that the secretary could give to an applicant a notice requesting further information relating to flexible care grants within the period specified in the notice or, if no period is specified in the notice, within 28 days. When a bill confers powers of this nature on an official the committee expects that they will be exercised in a way that is not arbitrary or unreasonable. However, the clause as written would permit the secretary to request information within very short periods of time without having regard to the circumstances of the applicant or to what would be considered reasonable. The committee therefore sought the minister's advice. The Minister replied that the provisions were based on existing powers and no complaints about the operation of those provisions had been received (*Seventh Report of 2008*).

For similar examples see also the **HORSE DISEASE RESPONSE LEVY COLLECTION BILL 2008** and the **NATIVE TITLE AMENDMENT BILL 2009** (both in the *Seventh Report of 2009*);
- **BUILDING ENERGY EFFICIENCY DISCLOSURE BILL 2010:**
The bill included a broad discretionary power enabling the secretary to recognise a person or body as an issuing authority for the purposes of issuing a building energy efficiency certificate. No criteria for recognition were specified in the bill, however a number were discussed in the explanatory

memorandum. Given the important role an issuing authority would have under the proposed legislation, the committee sought the minister's advice about the criteria upon which an analysis of a possible issuing authority would be conducted and whether the criteria could be included in the primary legislation. The Minister provided more detailed information about the background and rationale and prepared an amendment to the bill that addressed the committee's concern by appropriately limiting the discretion (*Sixth Report of 2010*).

3.3 As is often the case, if a provision that is of interest to the committee is accompanied by a comprehensive explanation of the rationale for the approach in the explanatory memorandum, the committee is able to better understand the proposal and either make no further comment or leave the matter to the consideration of the Senate. For example, see the committee's comments about the:

- **TEXTILE, CLOTHING AND FOOTWEAR STRATEGIC INVESTMENT PROGRAM AMENDMENT (BUILDING INNOVATIVE CAPABILITY) BILL 2009:**

The bill provided that '(t)he Minister must, by legislative instrument, formulate a scheme...for the making of grants'. While the content of the bill outlined general policy objectives for the scheme and the operative provisions, the criteria for eligibility and other matters were to be contained in a legislative instrument. This amounted to a broad delegation of power. However, the committee noted that the explanatory memorandum advised that the relevant legislative instrument would be subject to the usual scrutiny and disallowance process for legislative instruments and that grant totals would be published pursuant to proposed section 37ZZN. The committee therefore made no further comment (*Third Report of 2010*).

Delegation of power to 'a person' or a wide class of persons

3.4 The committee consistently draws attention to legislation that allows significant and wide-ranging powers to be delegated to anyone who fits an all-embracing description (such as 'a person') or which allows delegations to a relatively large class of persons with little or no specificity as to appropriate qualifications or attributes. Generally the committee prefers to see a limit set either on the sorts of powers that might be delegated or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

3.5 Where delegations are made the committee also expects that an explanation of why they are considered necessary should be included in the explanatory memorandum, especially if the delegation is broad. See, for example the:

- **FISHERIES LEGISLATION AMENDMENT (NEW GOVERNANCE ARRANGEMENTS FOR THE AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY AND OTHER MATTERS) BILL 2008:**

The committee raised concerns about a provision allowing the Chief Executive Officer (CEO) being able to delegate to a wide range of people any of Australian Fisheries Management Authority's functions and powers for

which the CEO would be responsible. In the absence of adequate information in the explanatory memorandum the committee sought the minister's advice about the matter. The Minister provided a detailed response to the committee outlining the justification for the approach and undertook to revise the explanatory memorandum (*Fourth Report of 2008*).

For similar examples see also the **HORSE DISEASE RESPONSE LEVY COLLECTION BILL 2008** (*Seventh Report of 2008*), the **THERAPEUTIC GOODS AMENDMENT (2009 MEASURES NO. 1) BILL 2009** - (*Sixth Report of 2009*) and the **COORDINATOR-GENERAL FOR REMOTE INDIGENOUS SERVICES BILL 2009** (*Sixth Report of 2009*).

Chapter 4

Undue dependence upon non-reviewable decisions

Application of criterion set out in standing order 24(1)(a)(iii)

4.1 Legislation may contain provisions which make ‘rights, liberties or obligations unduly dependent upon non-reviewable decisions’. Relevantly, a bill may seek to:

- exclude review on the merits by an appropriate appeal tribunal;
- exclude judicial review of the legality of a decision; or
- provide that reasons need not be given for a decision.

Excluding merits and judicial review

4.2 The committee is of the view that, where a decision may have a substantial impact on a person's rights and interests, judicial review should generally be available to ensure that such decisions are lawfully made. Since its establishment, the committee has drawn attention to provisions that explicitly or otherwise exclude or fail to provide for effective judicial review. During this Parliament examples of concern that the committee has encountered include the:

- **COMMUNICATIONS LEGISLATION AMENDMENT (MISCELLANEOUS MEASURES) BILL 2008:**
This bill sought to provide the Australian Communications Management Authority with discretion to consider a late application for the renewal of a community broadcasting licence, but the bill made no provision for the holder of such a licence to seek merits review of a decision to refuse to consider such a late application (such as under the *Administrative Appeals Tribunal Act 1975*). However, the explanatory memorandum argued that the approach was appropriate as it was consistent with the process for ACMA's substantive decisions on licence renewal. The committee accepted this argument and made no further comment (*Alert Digest No. 2 of 2008*);
- **THERAPEUTIC GOODS AMENDMENT (MEDICAL DEVICES AND OTHER MEASURES) BILL 2008:**
A ministerial order determining that a particular standard would not apply to certain goods under proposed subsection 13(5) was described as ‘not a legislative instrument’ on the basis that it was not legislative in character. Since the Ministerial order was said to be not legislative in character, the committee assumed it was therefore an administrative decision and sought the minister's advice as to why it was not made subject to merits review under the *Administrative Appeals Tribunal Act 1975* (*Second Report of 2009*).

For similar examples see also the **FUEL QUALITY STANDARDS AMENDMENT BILL 2009** (*Ninth Report of 2009*), **CARER RECOGNITION BILL 2010** (*Alert Digest*

No. 5 of 2010), **SOCIAL SECURITY AND FAMILY ASSISTANCE LEGISLATION AMENDMENT (WEEKLY PAYMENTS) BILL 2010** (*Third Report of 2010*) and the **HIGHER EDUCATION SUPPORT AMENDMENT (VET FEE-HELP AND PROVIDERS) BILL 2009** (*Sixth Report of 2009*).

4.3 As noted above, the committee routinely draws attention to bills that seek to deny the opportunity for effective review. However, the committee also accepts that there are circumstances in which review is not, or may not be, necessary. The committee is assisted to come to this conclusion when the explanatory memorandum comprehensively and persuasively describes the rationale for the proposed approach. Two examples were found in the following bill:

- **TELECOMMUNICATIONS LEGISLATION AMENDMENT (NATIONAL BROADBAND NETWORK) BILL 2008:**

Under the bill a telecommunications carrier would not be entitled to an opportunity to be heard in relation to specified decisions. While the committee retained a concern that the proposed provisions were not consistent with its scrutiny principles, the detailed explanation in the explanatory memorandum allowed the committee to outline the reasoning on both sides of the issue and leave the matter to the consideration of the Senate as a whole (*Alert Digest No. 3 of 2008*).

Chapter 5

Inappropriate delegation of legislative power

Application of criterion set out in standing order 24(1)(a)(iv)

5.1 Legislation often includes the delegation of a power to make laws, giving delegates (usually a member or representative of the Executive Government) the authority to make regulations or other instruments that are not required to be considered and approved by Parliament before they take effect. The committee's task under this criterion is therefore to draw the Senate's attention to provisions that seek to delegate Parliament's power inappropriately. Examples of provisions that may inappropriately delegate legislative power include those which:

- enable subordinate legislation to amend an Act of Parliament (often called a 'Henry VIII' clause);
- provide that matters which are so important that they should be regulated by Parliament are, in fact, to be dealt with by subordinate legislation;
- provide that a levy or a charge be set by regulation; or
- give to the Executive unfettered control over whether or when an Act passed by the Parliament should come into force.

Henry VIII clauses

5.2 A *Henry VIII* clause is an express provision which authorises the amendment of either the empowering Act, or any other primary legislation, by means of delegated legislation. Since its establishment, the committee has consistently drawn attention to *Henry VIII* clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Once again, a clear and helpful explanation in the explanatory memorandum can allow the committee to leave the matter to the Senate. For example, see the:

- **FAIR WORK AMENDMENT (STATE REFERRALS AND OTHER MEASURES) BILL 2009:**
In this case the *Henry VIII* clause was a transitional provision, which the explanatory memorandum noted 'provide[d] a mechanism to deal with any unintended consequences that may arise as a result of the exclusion of an employer from the coverage of the F[air]W[ork] Act'. The explanatory memorandum noted that the usual scrutiny and disallowance mechanisms would apply to any regulations made under the provision and the committee made no further comment (*Alert Digest 13 of 2009*); and the
- **WATER AMENDMENT BILL 2008:**
The explanatory memorandum provided a detailed explanation of the justification for the proposed approach and the committee accepted the rationale provided (*Alert Digest 11 of 2008*).

5.3 Examples of bills that include a *Henry VIII* provision, but for which the explanatory memorandum did not provide an adequate explanation included the:

- **COMSUPER BILL 2010:**

The bill included a *Henry VIII* provision with 'sufficient flexibility to allow the administration of PSSAP to be outsourced to the available competitive market.' Although the usual scrutiny and disallowance mechanisms were to apply to any regulations made under the provision, the committee was concerned that a future decision to outsource the administration of a government superannuation scheme established by an Act of Parliament should be implemented by a future Act of Parliament rather than by regulation. The Minister provided additional detail about the rationale, noting that the provisions were included to ensure that there would be flexibility to allow the administration of PSSAP to be outsourced to the available competitive market and thus allow PSSAP administration to be delivered efficiently and effectively in line with superannuation industry better practice (*Fifth Report of 2010*);

- **EDUCATION SERVICES FOR OVERSEAS STUDENTS AMENDMENT (RE-REGISTRATION OF PROVIDERS AND OTHER MEASURES) BILL 2009** (*Twelfth Report of 2009*); and the
- **NATIONAL CONSUMER CREDIT PROTECTION (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) BILL 2009** (*Tenth Report of 2009*).

5.4 In these instances the committee wrote to the relevant minister seeking advice as to the reasons for the proposed approach and the relevant ministers provided further information which allowed the committee to finalise its interest in the provisions.

Determining important matters by delegated legislation

5.5 The committee also draws attention to provisions that inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. Crucial matters should be undertaken by Parliament and not left to subordinate legislation. For examples, see the:

- **NATIONAL SECURITY LEGISLATION MONITOR BILL 2009:**

For the purposes of the bill the term 'law enforcement or security agency' included 'any other agency prescribed by regulations'. The explanatory memorandum did not explain the need to rely on regulation to expand or modify the scope of the definition and did not give an indication of the types of circumstances in which it might be required. The committee therefore sought the Cabinet Secretary's advice as to the justification for the power. The Cabinet Secretary replied that the provision was specifically included to ensure that any new law enforcement agency could be captured under the definition in future and noted that the regulations would be disallowable (*Tenth Report of 2009*); and the

- **NATIONAL GREENHOUSE AND ENERGY REPORTING AMENDMENT BILL 2009:**

The bill sought to provide that some decisions relating to the registration of auditors would be reviewable, but the details were to be included in regulations and the explanatory memorandum did not explain the approach. The committee therefore sought the Minister's advice in relation to the rationale for the proposed use of delegated legislation to determine review rights. The Minister advised the committee that the requirements would be inherently procedural and

detailed and appropriate for delegated legislation. In addition, review by the Administrative Appeals Tribunal would be made available and public consultation was intended (*Seventh Report of 2009*).

Setting the rate of a 'levy' by regulation

5.6 The committee has also consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation. This creates a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

5.7 The committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the committee expects that there will be some limits imposed on the exercise of this power. For example, the committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees. See for example the:

- **HORSE DISEASE RESPONSE LEVY BILL 2008:**

The bill provided that the rate of the horse disease response levy imposed by clause 4 was to be fixed by regulations, with no upper limit being set in the bill and the explanatory memorandum provided no explanation for the approach. The committee therefore sought the Minister's advice. The Minister advised that the horse disease response levy arrangements were being introduced at the request of industry and that effective limits would be applied by the Emergency Animal Disease Response Agreement (*Seventh Report of 2008*).

Chapter 6

Appropriate parliamentary scrutiny of legislative power

Application of criterion set out in standing order 24(1)(a)(v)

6.1 Whenever Parliament delegates power to legislate to others it should properly address the question of how much oversight to maintain over the exercise of that delegated power. Provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny include those which:

- provide a power to make subordinate legislation that is not to be tabled in Parliament, or which is to be tabled but is not disallowable;
- require subordinate legislation to be tabled and disallowable, but with a disallowance period so short that Parliament may not be able to scrutinise it properly;
- provide that regulations to be made under primary legislation may incorporate rules or standards of other bodies as in force from time to time; or
- enable a Minister or other person to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised, with no obligation that they be tabled in Parliament or subject to disallowance.

Not tabled or not subject to disallowance

6.2 As outlined in the Office of Parliamentary Counsel's Drafting Direction No. 3.8, when a provision specifies that an instrument is *not* a legislative instrument, the committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the committee expects to see a full explanation outlined in the explanatory memorandum justifying the need for the exemption. An example which demonstrated to the committee that the provisions were declaratory is the:

- **WORKPLACE RELATIONS AMENDMENT (TRANSITION TO FORWARD WITH FAIRNESS) BILL 2008:**
The explanatory memorandum noted that the exemptions sought were consistent with the *Legislative Instrument Act 2003* exemptions for instruments that deal with a person's 'terms and conditions of employment' (*Second and Third Reports of 2008*).

6.3 The committee also encountered instances which demonstrated that a substantive exemption can be appropriate, particularly when the explanatory memorandum includes a useful justification. For example, see the:

- **GREAT BARRIER REEF MARINE PARK AND OTHER LEGISLATION AMENDMENT BILL 2008:**
Disallowance would not apply to zoning plans submitted by the Authority, but the explanatory memorandum noted that the purpose of the approach was to ensure consistency with existing arrangements and to avoid duplication as another disallowance process was available. In light of the explanation the committee did not comment further on the matter (*Alert Digest 6 of 2008*); and the
- **TRADE PRACTICES AMENDMENT (ACCESS DECLARATIONS) BILL 2008:**
The explanatory memorandum noted that the bill was responding to a Federal Court decision in *Roche Products Pty Limited v National Drugs and Poisons Schedule Committee* [2007] FCA 1352 to forestall any argument that access declarations would be legislative instruments. The explanatory memorandum further argued that a 'high level of accountability applies to the making of access declarations' and that, therefore, there was no need for the further accountability provided for in the *Legislative Instruments Act 2003*. In light of the comprehensive explanation the committee made no further comment (*Alert Digest 1 of 2008*).

Incorporating material 'as in force from time to time'

6.4 The *Legislative Instruments Act 2003* includes a general rule which allows a legislative instrument, such as a regulation, to adopt or incorporate additional material and give it the force of law. The incorporated material applies in the form in which it exists *at the time of adoption* unless a provision in the relevant Act allows material to be incorporated 'as in force from time to time'. Typical wording included in bills to achieve this outcome provides that the relevant regulations may:

...apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing as in force from time to time.

6.5 Allowing material to be incorporated 'as in force from time to time' is of concern from a scrutiny perspective because it:

- allows a change in legal obligations to be imposed without the Parliament's knowledge and without the opportunity for the Parliament to scrutinise the variation;
- can create uncertainty in the law because those affected may not be aware that the law has changed; and
- those obliged to obey the law may have inadequate access to its terms, depending on the nature of the material being incorporated.

6.6 The committee expects that the explanatory memorandum for a bill that includes a provision which seeks to incorporate material 'as in force from time to time' will clearly and comprehensively explain the necessity for this approach and indicate

how the concerns outlined above will be met. Examples of the committee alerting the Senate to concerns about this issue during the 42nd Parliament include the:

- **GREAT BARRIER REEF MARINE PARK AND OTHER LEGISLATION AMENDMENT BILL 2008:**
The explanatory memorandum included some explanation justifying the approach on the basis that it would streamline the then current process in which the regulations needed to be amended every time various statutory instruments and legislation were amended. However, the proposed provision was framed very broadly ('the regulations may make provision in relation to a matter by applying, adopting, or incorporating any matter contained in any instrument or other writing as in force or existing from time to time') so the committee sought the Minister's advice as to whether the scope of the provision could be appropriately limited. The Minister provided a comprehensive response noting the complex jurisdictional arrangements and indicating that a key mechanism for minimising regulatory and administrative complexity was a capacity to apply, adopt or incorporate matters established under one law, in another (*Seventh Report of 2008*); and the
- **NATIONAL CONSUMER CREDIT PROTECTION BILL 2009:**
No explanation was included in the explanatory memorandum for the ability to incorporate the Australian Bureau of Statistics' publication entitled *Housing Finance, Australia* into provisions of the bill. The committee therefore sought the Treasurer's advice. The Treasurer advised that the ability was required as a mechanism to respond to constitutional limitations and explained the rationale (*Tenth Report of 2009*).

6.7 Some examples in which the committee noted that a bill sought to incorporate material 'as in force from time to time', but acknowledged that appropriate explanation was provided in the explanatory memorandum included the:

- **AUSTRALIAN CAPITAL TERRITORY AND OTHER LEGISLATION AMENDMENT (WATER MANAGEMENT) BILL 2009** (*Alert Digest 15 of 2009*);
- **SOCIAL SECURITY AND OTHER LEGISLATION AMENDMENT (INCOME SUPPORT FOR STUDENTS) BILL 2009** (*Alert Digest 12 of 2009*); and the
- **THERAPEUTIC GOODS AMENDMENT (2009 MEASURES NO. 2) BILL 2009:** (*Alert Digest 9 of 2009*).

