Senate Standing Committee

for the Scrutiny of Bills

The work of the committee

during the 43rd Parliament

September 2010 – June 2013

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MEMBERSHIP OF THE COMMITTEE

DURING THE 43rd PARLIAMENT

Members

Senator the Hon Ian Macdonald (Chair from 21.3.12 to 11.11.13)	LP, Queensland	16.03.12 – 11.11.13
Senator Mitch Fifield (Former Chair from 6.7.11 to 16.3.12)	LP, Victoria	01.07.11 – 16.03.12
Senator the Hon Helen Coonan (Former Chair 30.9.10 to 1.7.11)	LP, New South Wales	30.09.10 – 01.07.11
Senator Carol Brown (Deputy Chair from 6.7.11 to 11.11.13)	ALP, Tasmania	01.07.11 – 11.11.13
Senator Mark Bishop (Deputy Chair from 30.9.10 to 5.7.11)	ALP, Western Australia	30.09.10 – 11.11.13
Senator Doug Cameron	ALP, New South Wales	30.09.10 – 01.10.10
Senator Sean Edwards	LP, South Australia	01.07.11 – 11.11.13
Senator Gavin Marshall	ALP, Victoria	01.10.10 – 21.06.12
Senator Louise Pratt	ALP, Western Australia	30.09.10 – 01.07.11
Senator Rachel Siewert	AG, Western Australia	30.09.10 – 11.11.13
Senator the Hon Judith Troeth	LP, Victoria	30.09.10 – 30.06.11
Senator the Hon Lin Thorp	ALP, Tasmania	21.06.12 – 11.11.13

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Preface

This report discusses the work of the Senate Standing Committee for the Scrutiny of Bills during the 43rd 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 it scrutinises.

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 43rd Parliament were:

Chairs

Senator the Hon Helen Coonan	LP, New South Wales	30.09.10 – 01.07.11
Senator Mitch Fifield	LP, Victoria	06.07.11 – 16.03.12
Senator the Hon Ian Macdonald	LP, Queensland	21.03.12 – 11.11.13

Members

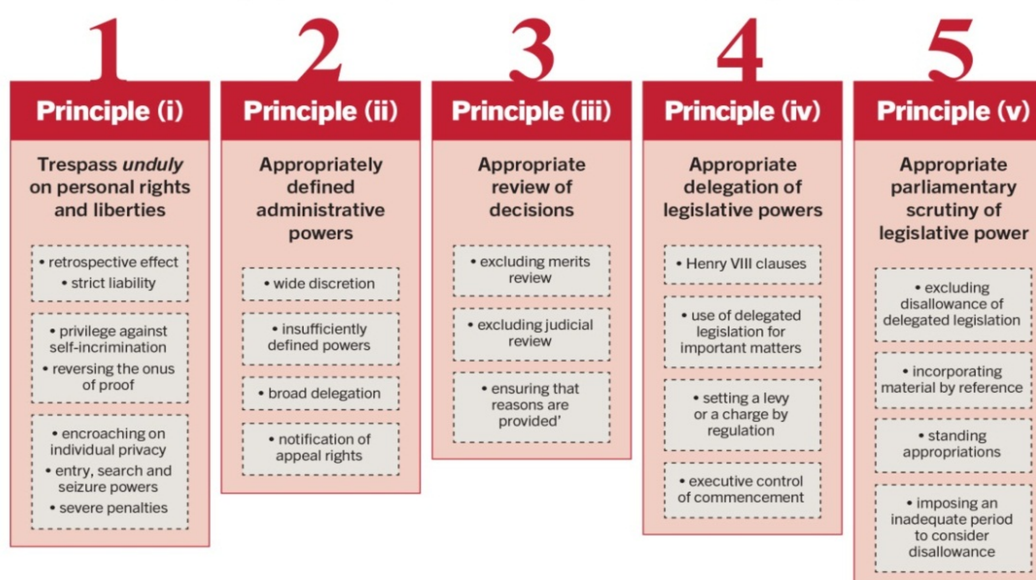
Senator Mark Bishop	ALP, Western Australia	30.09.10 – 11.11.13
Senator Carol Brown	ALP, Tasmania	01.07.11 – 11.11.13
Senator Doug Cameron	ALP, New South Wales	30.09.10 – 01.10.10
Senator Sean Edwards	LP, South Australia	01.07.11 – 11.11.13
Senator Mitch Fifield	LP, Victoria	01.07.11 – 16.03.12
Senator the Hon Ian Macdonald	LP, Queensland	16.03.12 – 11.11.13
Senator Gavin Marshall	ALP, Victoria	01.10.10 – 21.06.12
Senator Louise Pratt	ALP, Western Australia	30.09.10 – 01.07.11
Senator Rachel Siewert	AG, Western Australia	30.09.10 – 11.11.13
Senator the Hon Judith Troeth	LP, Victoria	30.09.10 – 30.06.11
Senator the Hon Lin Thorp	ALP, Tasmania	21.06.12 – 11.11.13

The committee's scrutiny principles

1.5 As noted above, the scope of the committee's interest in bills and amendments to 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.



The committee's workload

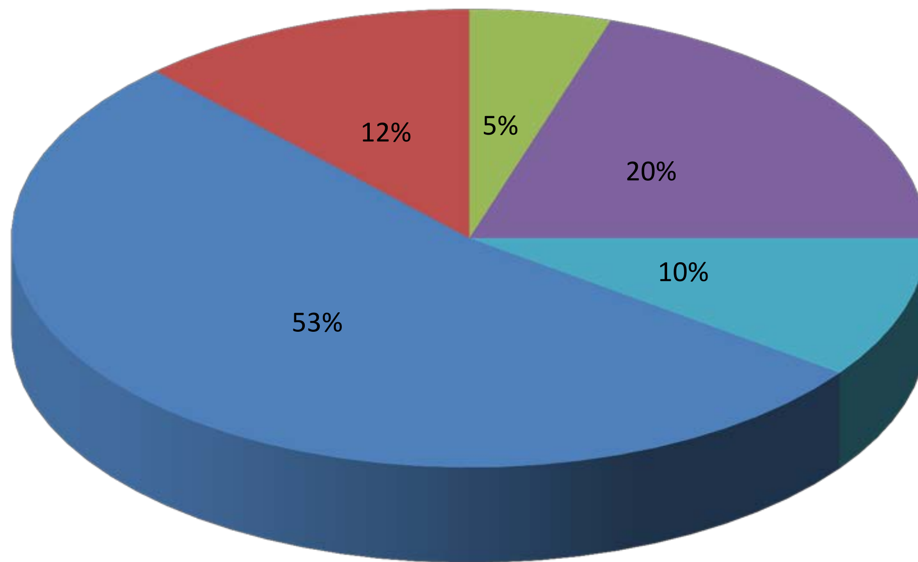
1.8 Each year the committee usually analyses between 200 and 250 bills. The following table sets out the number of bills and amendments considered during the 43rd Parliament.

Year	Bills considered	Bills commented on	Amendments to bills considered	Amendments to bills commented on	Digests tabled	Reports tabled
2010[1]	111	21	22	3	3	3
2011	252	128	98	9	14	14
2012	237	114	116	11	14	15
2013[2]	196	80	47	4	7	7
Total 43rd Parliament	**796**	**343**	**283**	**27**	**38**	**39**

1 From September 2010 (election year).

2 To June 2011 (election year).

Scrutiny comments on bills per principle under Standing Order 24(1)(a) during the 43rd Parliament



- (i) trespass unduly on personal rights and liberties
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently definded 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 comprised of a secretary and a 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 Associate Professor Leighton McDonald during the 43rd Parliament.

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.)

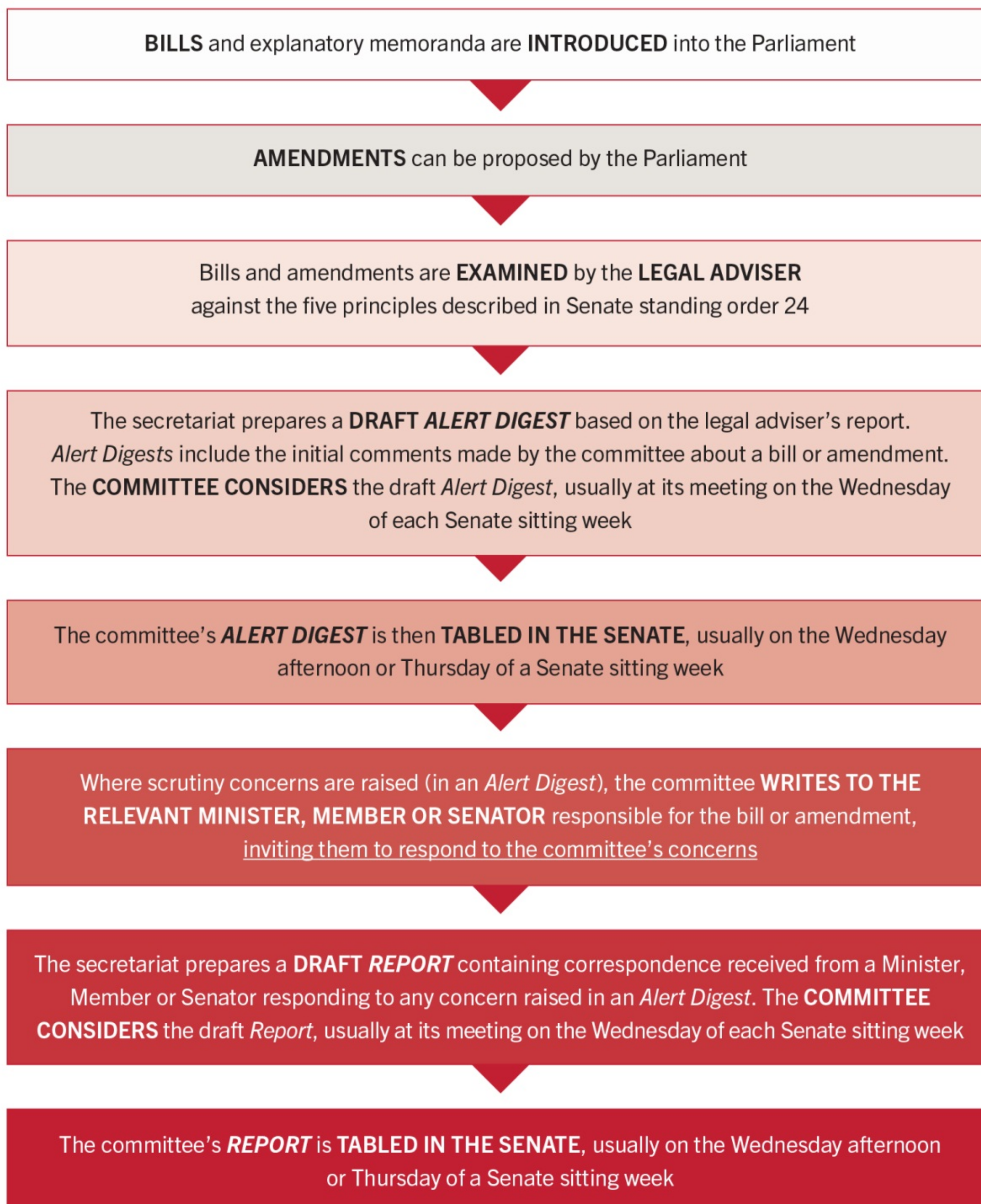
1.12 In the usual scrutiny process, after introduction into either the House of Representatives or the Senate, a copy of each bill, together with its explanatory memorandum and the minister's second reading speech, is provided to the committee's legal adviser. The legal adviser considers this material 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 the committee's consideration of the legislative proposals before the Parliament.

> **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.

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

1.14 Once a response is received, 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 identified 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 outlined in an *Alert Digest*, the process noted above in relation to the committee's workflow is followed: correspondence is forwarded to the Minister or proposer responsible for the bill inviting him or her to respond to the committee's concerns. A Minister generally seeks advice from his or her department before responding.

Reports

1.18 When a minister or other proposer 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* and *Reports* can be found here:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Alerts_Digests/2014/index

and here, respectively:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Reports/2014/index

Other resources

1.21 The committee also produces occasional reports on matters specifically referred to it by the Senate – see for example, Inquiry into the future direction and role of the Scrutiny of Bills Committee 2012 and the 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. Traditionally, this has been done during each Parliament following the completion of the relevant Parliament. However, the committee intends updating its approach so that for 2014 onwards it will table reports on its work annually.

Structure of the report

1.22 The structure of this report is:

- Chapter 2 provides examples of the committee's work during the 43rd Parliament against principle 24(a)(1)(i), trespass unduly on personal rights and liberties;
- Chapter 3 provides examples of the committee's work during the 43rd Parliament against principle 24(a)(1)(ii), appropriately defined administrative powers;
- Chapter 4 provides examples of the committee's work during the 43rd Parliament against principle 24(a)(1)(iii), appropriate review of decisions;
- Chapter 5 provides examples of the committee's work during the 43rd Parliament against principle 24(a)(1)(iv), appropriate delegation of legislative powers; and
- Chapter 6 provides examples of the committee's work during the 43rd Parliament against principle 24(a)(1)(v), appropriate parliamentary scrutiny of legislative power.

Acknowledgements

1.23 The committee wishes to acknowledge the work and assistance of its legal adviser during the 43rd Parliament, Associate Professor Leighton McDonald.

1.24 The committee also wishes to acknowledge the assistance of ministers and other proposers of bills, 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, especially 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 43rd 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 itself 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 forbad 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 43rd Parliament include the:

- **SUPERANNUATION LEGISLATION AMENDMENT BILL 2010:**

  This bill included a provision with retrospective commencement. The provision provided changes to the *Superannuation (Unclaimed Money and Lost Members) Act 1999* which applied to transfers occurring before, on or after the commencement of the provision. The explanatory memorandum did not appear to deal with the question that the provision could have the potential to detrimentally affect any person. The committee sought the Minister's advice on the matter.

  The Minister explained that retrospective application of the provision was necessary to ensure that the legislation allowed unclaimed superannuation moneys that were transferred to State and Territory authorities prior to the commencement of the Act to be subsequently transferred to the Commissioner of Taxation and claimed back by individuals. Therefore, the retrospective commencement did not give rise to potential detriment to any person. The committee noted the Minister's advice that this proposal would facilitate more uniform treatment of unclaimed money and would not have a detrimental effect on any person. *(Tenth Report of 2010)*

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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.

- **SOCIAL SECURITY AND OTHER LEGISLATION AMENDMENT (FURTHER 2012 BUDGET AND OTHER MEASURES) BILL 2012:**

  This bill included provisions with retrospective application and were designed to 'undo the effect of the majority's interpretation of the child support legislation in the judgment of the Full Court of the Family Court of Australia in *Child Support Registrar v Farley* [2011] FAMCAFC 207 (*Farley*)'. Prior to this decision the Child Support Registrar had a longstanding policy that had been assumed to be consistent with the legislation. In effect, however, the Full Court held that this policy was not consistent with the legislative scheme.

  The effect of the provisions applying to amendments in schedule 4 would enable the Registrar to continue to administer the legislation according to its existing policy, which the Court held to be inconsistent with the existing legislation.

  Given the potential significance of the proposal, the committee suggested that the information in the explanatory memorandum was not sufficiently detailed to assess whether retrospective legislation was appropriate. The committee therefore sought further information from the Minister in relation to the rationale for the retrospective application to these provisions, and in particular:

  - the nature of the disadvantage that may be occasioned in relation to all parties (including any affected children whether or not they are covered by any order);
  - the extent of the practical problem (i.e. how many previously decided cases could potentially be revisited);
  - whether consideration had been given to solutions to the problem that did not involve retrospective legislation (such as compensation for faulty administration); and
  - how excess child support in these circumstances would be recovered under the existing legislation (for example, it was not clear whether there would be a right to recover all such amounts and how the interests of the child could be factored into such proceedings).

  The Minister provided a detailed response which included an example of possible detriment to payees and payers if changes were not retrospective. However, the committee remained of the view that it was possible that the disadvantage from the proposed approach would not always be evenly distributed. Nevertheless, it agreed that it was desirable to minimise the need to require court action to recover overpayments, and therefore left the question of whether the proposed approach was appropriate to the Senate as a whole. *(Thirteenth Report of 2012)*

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:

- **DEFENCE TRADE CONTROLS BILL 2011:**

  Part 4 of the bill deals with monitoring powers and these appeared to be consistent with *A Guide to Framing Commonwealth Offences, Penalties and Enforcement Powers*. While the requirement imposed on persons to produce documents and answer questions abrogates the privilege against self-incrimination, it was made subject to a use and derivative use immunity in relation to general criminal proceedings.

  The explanatory memorandum stated that this approach was consistent with enforcement powers in other equivalent Commonwealth legislation and would enhance the ability to monitor and ensure compliance with the defence trade control regime and therefore assist in the effective administration of the regime; was a matter of major public importance; and raised issues of national security and international relationships.

  The same issue in relation to self-incrimination arose in relation to the information gathering powers granted in Part 5 and in relation to the record-keeping requirements in Part 6 of the bill.

  In light of the proposed approach and explanation provided the committee left the question of whether the proposed monitoring powers granted in Part 4, and the issue relating to privilege against self-incrimination in Parts 5 and 6 were

appropriate to the consideration of the Senate as a whole. (*Alert Digest No. 14 of 2011*).

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:

- **TELECOMMUNICATION INTERCEPTION AND INTELLIGENCE SERVICES LEGISLATION AMENDMENT BILL 2010:**

  The bill included a provision which reversed the onus of proof in relation to a proposed offence where a defendant bears an evidential burden in relation to establishing the existence of the circumstances which would authorise the disclosure of material that would, but for those circumstances, constitute an offence. The provision was consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* insofar as the circumstances justifying the exception to the offence related to matters which would be peculiarly within the defendant's knowledge. Nevertheless, the committee has not always accepted that the fact a matter is 'within the defendant's knowledge' is a sufficient justification for reversing the onus of proof. Given that the explanatory memorandum did not address the question

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

4 September 2011 edition, p. 50.

as to why the defendant should bear the burden of proof, the committee sought the Attorney-General's advice on the justification for this approach.

The Attorney-General responded explaining that the relevant defendant would likely have detailed knowledge of the relevant circumstances. This information was not easily accessible to the plaintiff who was unlikely to have been involved. As a result the defendant would be best placed to provide the justification for an exemption to the offence. The committee appreciated the detailed response, which satisfied its concerns. *(Ninth Report of 2010)*

- **DEFENCE TRADE CONTROLS BILL 2011:**

The relevant provision in the bill provided for the regulations to prescribe exceptions in relation to offences and for defendants to bear an evidential burden of proof in relation to these exceptions, but no details were available as to the likely nature of any exceptions. This approach effectively reversed the usual burden of proof, with the additional issue of including important information in delegated legislation. In relation to the reversal of onus of proof, the explanatory memorandum stated that:

> …where a defendant seeks to raise the defence, it is appropriate and practical to require the defendant to adduce or point to evidence that suggests the particular exception applies as these would be matters within the defendant's personal knowledge'.

However, it was difficult for the committee to evaluate whether it was appropriate for a defendant to bear the evidential burden of proof in the proposed circumstances without knowing the nature of the exceptions to be prescribed by regulation. The committee therefore sought the Minister's advice about the exemptions, and also whether they could be outlined in the primary legislation.

The Minister provided further information about the nature of the two exemptions explaining that they would apply in circumstances in which:

- an Australian Community member supplies goods, technology or defence services and holds a valid licence or other authorisation granted by the Government of the United States of America that permits the supply; and
- an Australian Community member supplies goods or technology to an approved intermediate consignee for the purpose of transporting the US Defence Articles.

The Minister was of the opinion that due to the exemptions needing to contain a high level of detail it would be more appropriate that this be delegated to regulations rather than included primary legislation. The Minister also noted that Commonwealth criminal law policy had been applied in reversing the evidential burden of the onus of proof. The committee thanked the Minister

and requested that the key information be included in the explanatory memorandum. *(First Report of 2012)*

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:

- **DEFENCE LEGISLATION AMENDMENT (SECURITY OF DEFENCE PREMISES) BILL 2010:**

  The bill proposed that a new section 71W would make it an offence for a person to hinder or obstruct a search under Division 6 if certain requirements were complied with (e.g. the production of an identity card). The offence was not expressed to be a strict liability offence, but the explanatory memorandum claimed that it was such an offence. The committee noted that the related offence of refusing to provide evidence pursuant to section 71V was not said, in the bill or the explanatory memorandum, to be a strict liability offence. The committee therefore sought the Minister's advice.

  The Minister replied indicating that the explanatory memorandum incorrectly stated this as a strict liability offence and reassured the committee that the error would be corrected. A replacement explanatory memorandum was tabled in the Senate which corrected this issue. *(First Report of 2011)*

- **CRIMES LEGISLATION AMENDMENT (SLAVERY, SLAVERY-LIKE CONDITIONS AND PEOPLE TRAFFICKING) BILL 2012:**

  The provision creates a new offence of harbouring a victim to assist a third person with a related offence. Absolute liability attached to an element of the offence, which is that the third person offence (the related offence) must be an offence against specified parts of the bill (Division 270, or 271 apart from section 271.7F(3)).

  The explanatory memorandum stated that the ‘application of absolute liability to this element of the offence means that there is no fault element for the physical element…and that the defence of mistake of fact…would not be available to the defendant’. However, the explanatory memorandum did not indicate why the application of absolute liability is considered appropriate.

Although the committee has accepted in the past that absolute liability is appropriate in some circumstances, it routinely requests that explanatory memoranda justify the approach whenever absolute liability is proposed. Therefore, the committee sought the Attorney-General's advice as to the rationale for the proposed provisions.

The Attorney-General provided an informative response and agreed that the explanatory memorandum did not provide a justification for the application of absolute liability and provided an explanation. The committee thanked the Minister and requested that the key information be included in the explanatory memorandum. An addendum to the explanatory memorandum was tabled in the House of Representatives providing justification of this issue. (*Ninth Report of 2012)*

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:

- **MARINE SAFETY (DOMESTIC COMMERICAL VESSEL) NATIONAL LAW BILL 2012**

  The bill included provisions for entry and search powers without a warrant. The committee noted that the Statement of Compatibility provided a detailed explanation in relation to search and entry powers without warrant in the bill, but was unclear as to why no consideration had been given to establishing an oral 'authorisation' system similar to the arrangements in the Maritime Powers Bill[5], including a requirement for 'authorisations' to be recorded as soon as practicable. The committee therefore sought the Minister's advice as to whether these safeguards could be included.

  The Minister responded stating that:

  - an 'oral authorisation' scheme is 'not considered appropriate for the subset of monitoring, detention and limited seizure powers';
  - appropriate safeguards to ensure the lawful and proportionate use of search and entry powers without warrant in limited circumstances were in place and achieved by:

    (i) satisfactory experience and qualification prerequisites that a marine safety inspector must satisfy prior to being appointed and authorised to exercise the compliance and enforcement powers;

5 *Alert Digest* No.6 of 2012, p. 55 and response in *Eighth Report of 2012,* p. 316.

(ii) these qualification and experience standards were consistent with key elements of Public Sector Training Package (PSP04) that deals with compliance and enforcement, investigation and regulatory control. This training package was the recognised Commonwealth standard for persons exercising such powers and functions; and

(iii) safeguards such as reporting requirements, including reasons for the exercise when certain compliance and enforcement powers have been exercised without consent or warrant.

The committee thanked the Minister for the response, but remained unclear as to why an 'oral authorisation' scheme could not be implemented, at least in a modified form. The committee therefore left the question of whether the proposed approach was appropriate to the consideration of the Senate as a whole. *(Seventh Report of 2012)*

- **MARITIME POWERS BILL 2012**

The bill included provisions for entry and search powers without a warrant. Although these were addressed in detail in the explanatory memorandum, the committee remained concerned about the circumstances and sought the advice from the Attorney-General regarding:

- whether consideration had been given to including further procedures in the bill for the authorisation scheme, for example a requirement that oral authorisations pursuant to clause 25 be recorded as soon as practicable; and
- whether there were any subsequent reporting requirements on the use of maritime powers without authorisation pursuant to clause 29.

The Attorney-General provided a detailed response stating that the authorisation regime, accompanied by the operational procedures of agencies, would be appropriately tailored to recording authorisations for the use of power, as well as the exercise of power, including power exercised without an authorisation. The Attorney-General therefore did not consider that legislatively mandating reporting requirements would serve any appreciable utility. The committee still remained concerned that the status of an obligation under an operational procedure was not the same as being under a legal obligation to take particular action. The committee therefore requested that the key information provided by the Attorney-General be included in the explanatory memorandum, and left the question of whether the proposed approach was appropriate to the consideration of the Senate as a whole. *(Eighth Report of 2012)*

A replacement explanatory memorandum was tabled in the Senate which included the key information the committee had requested.

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 1981, 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:

- **PERSONALLY CONTROLLED ELECTRONIC HEALTH RECORDS BILL 2011:**

  The bill provided the relevant Commonwealth, State and Territory Minister wide discretion to terminate the appointment of a member who represents their interests on the Jurisdictional Advisory Committee (JAC) without any criteria or guidelines for removal. The advice and recommendations given by the jurisdictional advisory committee were not binding on the System Operator in performing functions under the Act. Therefore, the committee sought the Minister's advice as to why such a broad discretionary power was justified in the circumstances.

  The Minister replied stating that it was envisaged that members of the JAC would be relatively senior members of the relevant public services. It was also important that each jurisdiction had the ability to retain an effective voice on the JAC and if, for whatever reason, they wished to change their representative, they would be able to do so quickly.

  The committee thanked the Minister for the response, but left the question of whether the proposed approach was appropriate to the consideration of the Senate as a whole. *(Fourth Report of 2012)*

- **STRONGER FUTURES IN THE NORTHERN TERRITORY BILL 2011:**

  The bill requires the Minister to determine whether to approve or refuse an alcohol management plan after an application has been lodged. Although the provision sets out considerations that must be taken into account, they lacked precision and it appeared intended that the relevant matters that must be considered would be prescribed in the rules. A similar issue arose in relation to another provision in the bill, which provided for approvals in relation to applications for alcohol management plans to be varied.

  As there were no statements explaining why these delegations of legislative power were appropriate**,** the committee sought the Minister's advice as to the justification for the proposed approach. The Minister replied that given the specific and detailed nature of these local circumstances, it was considered that specifying these matters in legislation impractical. The preferred approach was to have these matters set out in a legislative instrument which would balance the need for both transparency and flexibility.

  The committee thanked the Minister for the detailed response and noted that:

  - the power would need to be exercised in a wide range of specific and detailed local circumstances;
  - the Minister had the ability to prescribe relevant matters, which would inform applicants about considerations in the decision making process;
  - consultation on draft legislative instruments would be undertaken before they were made; and
  - AAT review was available.

  The committee requested that the key information be included in the explanatory memorandum.

  For a similar example see also the **DEFENCE TRADE CONTROLS BILL 2011** *(First and Fifth Reports of 2012).*

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:

- **NATIONAL MEASUREMENT AMENDMENT BILL 2010:**

  This item replaced a number of regulation-making provisions with a provision permitting the Chief Meteorologist to make written determinations which would not be legislative instruments.

  Although this could have given rise to a concern that legislative powers were being inappropriately delegated, the justification in the explanatory memorandum, including the highly technical nature of the content and frequency with which they would need to be updated, was detailed and

satisfactory. The committee therefore made no further comment. *(Alert Digest No.8 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:

- **BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT AMENDMENT (TRANSITION TO FAIR WORK) BILL 2011:**

  The bill provided for the appointment of Fair Work Building Industry Inspectors with the powers to 'search and seize'. The only requirement for the appointment is for the Director to be satisfied that the person is of 'good character'. The committee generally prefers that as many guidelines as possible outlining qualifications and/or training procedures are included in primary legislation. The committee therefore sought the Minister's advice as to whether consideration had been given to whether any further qualifications should be required or the appropriateness of providing for the formulation of training procedures and guidelines for the exercise of these powers to be included in the primary legislation.

  The Minister replied that the Government had decided, consistent with the approach to appointing Fair Work Inspectors under the *Fair Work Act 2009,* not to codify this level of detail in the primary legislation. Also, being too prescriptive or requiring specific qualifications in the legislation could adversely limit the pool of potential applicants for these positions. Further, Inspectors would be appointed based on merit, using selection criteria determined by the Building Industry Inspectorate, after assessing the relevant skills, experience and qualifications of applicants. Any further general or specific training and development requirements for Inspectors once they were appointed would also be a matter for the Inspectorate.

  In light of the importance of the issue and the coercive powers the Inspectors would be able to exercise, the committee requested that the Minister reconsider the approach to this issue and at least include a statutory requirement that guidelines and processes be issued by the appropriate authority. *(First Report of 2012)*

- **AUSTRALIAN CIVILIAN CORPS BILL 2010:**

  The committee raised concerns in relation to the Minister's broad power to delegate his or her powers to any 'person who holds an office or appointment under an Act'. The explanatory memorandum simply described the effect of the provision and did not provide any explanation or justification of it. The committee therefore sought the Minister's advice on this matter.

  In replying the Minister explained that the powers mentioned were identical in scope to those under section 15 and subsection 78(4) of the *Public Service Act 1999* relating to the delegation of Ministerial powers and therefore considered to be consistent and appropriate. The committee thanked the Minister for the response. *(Third Report of 2011)*

  For similar example see also the **NATIONAL VOCATIONAL EDUCATION AND TRAINING REGULATOR BILL 2010** *(Second Report of 2011).*

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:

- **FINANCIAL FRAMWORK LEGISLATION AMENDMENT BILL (No. 3) 2012:**

  This bill responded to the decision of the High Court on 20 June 2012 in *Williams v Commonwealth* [2012] HCA 23. The bill contains provisions excluding specified decisions from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The decisions are those made under Division 3B of Part 4, and section 44, of the *Financial Management and Accountability Act 1997*. This exclusion is achieved by listing these provisions in Schedule 1 of the ADJR Act.

  In most instances of Commonwealth decision-making, section 39B(1) review jurisdiction will be available even if the ADJR Act cannot be relied upon. However, the ADJR Act was enacted as a remedial statute and seeking judicial review under it has a number of important advantages. Potential applicants are entitled to a statement of reasons, there is a single test for standing, and the availability of remedies proceeds on a comparatively straightforward basis. It was also the case that applicants may succeed on the basis of establishing errors that would not justify a prerogative (or 'constitutional') writ. Given these advantages, and the fact that the enactment of the ADJR Act was intended to become the primary means for the review of Commonwealth administrative decisions (due to its comparative simplicity and the absence of technicality), the committee looks for compelling reasons before accepting that jurisdiction under the Act should be excluded. The availability of alternative sources of judicial review jurisdiction does not explain the justification for excluding the ADJR Act.

Further, although the proposed approach was intended to maintain the status quo, the status quo rests on the assumption that the relevant powers were part of the executive power of the Commonwealth and did not require statutory authorisation. Given that this bill provided a statutory basis for entering into arrangements the committee sought a further explanation for the necessity of excluding the ADJR Act. In this regard it was noted that jurisprudence concerning the applicability of the ADJR Act to decisions made to enter into contracts or pursuant to existing contracts would typically not be reviewable. Nevertheless, there may be some circumstances where contractual powers are subject to clear legal limits (in a statute or regulations) in which ADJR Act review is available. In these circumstances, it was the committee's view that the explanatory memorandum did not provide a sufficiently detailed explanation for the proposed exclusion of ADJR Act review. The committee therefore sought the Minister's advice as to the justification for the proposed approach.

The Minister replied explaining that the provisions would maintain the status quo that has existed since the ADJR Act was established. A decision to make, vary or administer a spending arrangement was not subject to judicial review under the ADJR Act. The amendments in this item did not exclude decisions from review under the ADJR Act that had previously been subject to review under that Act. Further, the amendments did not affect review under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution.' The Minister also noted that 'there are additional mechanisms which provide for the transparency and accountability of decisions relating to making, varying or administering arrangements, including rules and requirements under the *Financial Management and Accountability Act 1997*'.

The committee thanked the Minister for the response, but remained concerned about the justification for the proposed approach. However, the committee made no further comment as the bill had already been passed by the Parliament. *(Eleventh Report of 2012)*

- **AUSTRALIAN NATIONAL REGISTRY OF EMISSIONS UNITS BILL 2011:**

The bill provided the Administrator with the discretion to refuse to transfer emissions units where the Administrator has reasonable grounds to suspect that the transaction is fraudulent (in relation to Kyoto and non-Kyoto units respectively). Although decisions made under subclause 53(2) would be reviewable, decisions made under subclause 36(2) would not and the explanatory memorandum did not address this issue. The committee therefore sought the Minister's advice as to why a decision made under subclause 36(2) would not reviewable.

The Minister replied confirming that the omission of clause 36(2) from being reviewable was an oversight and that action had already been taken to ensure that this decision was reviewable. The committee thanked the Minister for the response. *(Sixth Report of 2011)* In accordance with the committee's

recommendation, the bill was amended on 22 August 2011 to include a decision of the administrator made under clause 36.

For examples of similar scrutiny issues see also the **AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION BILL 2012** *(Thirteenth Report of 2012)*, **ROAD SAFETY REMUNERATION (CONSEQUENTIAL AMENDMENTS AND RELATED PROVISIONS) BILL 2011** *(Fourth Report of 2012)*, **CLEAN ENERGY (HOUSEHOLD ASSISTANCE AMENDMENTS) BILL 2011** *(Twelfth Report of 2011)* and the **FINANCIAL FRAMEWORK LEGISLATION AMENDMENT BILL (NO.3) 2012** (*Eleventh Report of 2012*).

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 committed is assisted to come to this conclusion when the explanatory memorandum comprehensively and persuasively describes the rationale for the proposed approach. An example was found in the following bill:

- **PRODUCT STEWARDSHIP BILL 2011**

The provision contained a list of reviewable decisions. As the explanatory memorandum noted, the approach taken to reviewable decisions differs from the default position set out in section 27 of the *Administrative Appeals Tribunal Act 1975*. In particular, the review of a reviewable decision could only be sought by persons stated to be a 'person affected' by the decision, whereas the AAT Act states a person whose interests are affected has standing to bring a review application.

The provision thus had the result that fewer persons may be able to seek review than would be the case if the default position (drawn from the AAT Act) were to apply. However, the explanatory memorandum argued that this modified approach is warranted 'because of the particular policy and statutory context'. In relation to each reviewable decision, the explanatory memorandum provided a detailed explanation of this general point. The committee therefore made no further comment. *(Alert Digest No. 4 of 2011)*

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:

- **NATIONAL HEALTH REFORM AMENDMENT (ADMINISTRATOR AND NATIONAL HEALTH FUNDING BODY) BILL 2012:**

  In this bill the *Henry VIII* clause was a provision which enabled regulations to modify the operation of a number of important Commonwealth statutes in so far as they related to things done by, or in relation to, the Administrator, the Funding Body CEO or the Funding Body. In this instance, the regulations could only be made with the agreement of all members of the Standing Council on Health. The approach adopted appeared to be a solution to a genuine problem, namely, that relevant decision-makers could potentially be subject to nine different sets of administrative law and related requirements.

The explanatory memorandum provided the following explanation:

> ...the simple solution of the states adopting the Commonwealth legislation as it stands would not be acceptable to the states, as Commonwealth legislation would not contain appropriate references to state entities. (e.g. in exemptions for Cabinet material from the operation of the Commonwealth Freedom of Information legislation).

The proposed approach also envisaged that:

> ...the regulations will modify the Commonwealth Acts so that they could apply effectively as laws of the states, conferring appropriate rights and obligations on state responsible Ministers and referring appropriately to state entities.

In light of the comprehensive explanation provided in the explanatory memorandum the committee left the appropriateness of the approach to the consideration of the Senate as a whole. *(Alert Digest No. 5 of 2012)*

- **AUSTRALIAN AGED CARE QUALITY AGENCY (TRANSITIONAL PROVISIONS) BILL 2013**

The relevant provision allowed the Governor General to modify the Act by regulations (a *Henry VIII* clause) and the explanatory memorandum provided the following explanation for its necessity:

> This subitem has been included because of the complexity of the transitional matters associated with the transfer of functions from ACSAA Limited to the Quality Agency. Its purpose is to provide a means of varying the operation of the Schedule in a timely way to avoid any results that were not intended, with the aim of preventing any disruption to the oversight of aged care services quality.

As the explanatory memorandum provided a detailed explanation, the committee decided to leave the question of whether the proposed approach was appropriate to the Senate as a whole. *(Alert Digest No. 5 of 2013)*

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

- **FAMILY ASSISTANCE LEGISLATION AMENDMENT (CHILD CARE FINANCIAL VIABILITY) BILL 2011:**

The relevant provision allowed the Minister, by legislative instrument, to vary the definition of 'large long day care centre operator'. It was difficult for the committee to assess the appropriateness of the delegation of legislative power as the explanatory memorandum is silent on the justification for the approach taken. The committee therefore sought the Minister's advice as to the necessity for the provision.

The Minister responded by advising the committee about the basis of the present definition and the possibility of needing to adjust the definition quickly to preserve 'the stability of the child care sector'. The Minister also

noted that any variation would be subject to disallowance. The committee thanked the Minister for the comprehensive response and requested that the information provided to the committee be included in the explanatory memorandum. *(Eighth Report of 2011)*

- **BUSINESS NAMES REGISTRATION (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) BILL 2011:**

  The bill allowed regulations to amend primary legislation 'to deal with business names in relation to which outstanding matters under the law of a State or Territory are to be resolved. Unfortunately, the explanatory memorandum did not address the justification of this delegation of legislative power and the committee therefore sought the Minister's advice.

  The Minister responded by explaining that the provision was required to respond to State and Territory court decisions, such as appeals against decisions to deregister business names and that the differences in jurisdictions added to the complexity. The committee thanked the Minister for the response and noted that it would have been helpful if this information had been included in the explanatory memorandum. *(Twelfth Report of 2011)*

Determining important matters by delegated legislation

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

- **SHIPPING REGISTRATION AMENDMENT (AUSTRALIAN INTERNATIONAL SHIPPING REGISTER) BILL 2012**

  The bill enabled additional requirements relating to the cancellation of registration to be prescribed by the regulations. Given the significance of the power to cancel registration and as the matter was not addressed in the explanatory memorandum the committee sought the Minister's advice as to the rationale for the proposed approach.

  The Minister responded and agreed that for important matters such as the power to cancel registration should be included in primary legislation. However, in order to maintain Australia's maritime reputation, it was considered prudent to include a regulation making power to address unforeseen circumstances. The committee thanked the Minister for the detailed response, and noted that the information would have been useful in the explanatory memorandum. *(Sixth Report of 2012)*

- **PERSONALLY CONTROLLED ELECTRONIC HEALTH RECORDS BILL 2011:**

  The bill sought to provide that the regulations could prescribe penalties for offences and civil penalties for contraventions of the regulations. Although the maximum limit of penalties that may be set was consistent with the limits in the *Guide to Framing Commonwealth Offences* (not more than 50 penalty units for a criminal offence) the committee was of the view that it would be

appropriate to include the details of offences in primary legislation unless a persuasive justification for the use of subordinate legislation existed. In this instance the explanatory memorandum merely repeated the effect of the provisions. The committee sought the Minister's advice as to the rationale for the proposed approach.

The Minister advised the committee that allowing the regulations to prescribe offences and civil penalties for a contravention of the regulations was intended to enable varying circumstances to be treated differently as appropriate and provide flexibility in dealing with different situations. In addition, the approach of permitting offences to be detailed in subordinate legislation was consistent with that taken under the *Healthcare Identifiers Act 2010* and the Healthcare Identifiers Regulations 2010. The committee thanked the Minister for the detailed response, which justified the proposed approach. *(Fourth Report of 2012)*

Setting the rate of a 'levy' by regulation

5.5 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.

5.6 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:

- **OFFSHORE PETROLEUM AND GREENHOUSE GAS STORAGE REGULATORY LEVIES LEGISLATION AMENDMENT (2011 MEASURES NO.1) BILL 2011:**

The provisions provided that the rate of each well levy to be imposed were to be fixed by regulations, with no upper limit being set in the bill. The committee noted that the explanatory memorandum stated that the levy in each case 'is the amount specified in or calculated in accordance with the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004'*, but it was not clear whether it was intended that additional regulations would be made and how the levy would be calculated. The explanatory memorandum provided no explanation as to why the rate of the levy needed to be set by regulation. Similarly, the explanatory memorandum gave no explanation of why the primary legislation did not provide some limits on the exercise of this power, such as specifying a maximum amount above which the levy cannot be set by regulation, or a formula for calculating

the amount of the levy. The committee sought the Minister's advice in respect of these matters.

The Minister responded providing detailed information about the need to use regulations, how levies would be calculated, and existing processes and consultation. The committee thanked the Minister for the detailed response and left to the Senate as a whole the question of whether the proposed arrangements for determining and reviewing the amount of each levy was appropriate. *(Third Report of 2011)*

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 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 delegated legislation that is not to be tabled in Parliament, or which is to be tabled but is not disallowable;
- require delegated 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 legislative instruments 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:

- **EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS LEGISLATION AMENDMENT BILL 2011:**

  These provisions declare that these functions are not legislative instruments, but it was not clear whether this was merely describing the effect of the *Legislative Instruments Act 2003* or was done to avoid the usual operation of that Act. For example, in relation to a certain provision, the explanatory memorandum stated that an undertaking was not a legislative instrument

within the meaning of section 5 of the *Acts Interpretation Act 1901*, but did not clearly address whether or not such instruments would usually fall within the definition of legislative instruments in section 5 of the *Legislative Instruments Act 2003* and were not otherwise exempt under that Act.

The committee was concerned to ensure that there was appropriate scrutiny of these legislative powers and sought clarification from the Minister. The Minister replied stating that these provisions were declaratory of the existing law and the committee thanked the Minister for the response, which addressed its concerns. *(Twelfth Report of 2011)*

- **NATIONAL BROADBAND NETWORK COMPANIES BILL 2010:**

  The relevant provision allowed the Minister to declare a security or financial product to be a 'sale-scheme hybrid security'. The reason was outlined in explanatory memorandum and was said to be in 'the interests of ensuring commercial certainty in connection with an NBN Co sale scheme'. Although the committee left the question of whether the approach was appropriate to the consideration of the Senate as a whole, the Minister took the opportunity to provide further information concerning the provision.

  The Minister noted that the declaration was required to maintain flexibility for the Commonwealth to determine the offer structure for the sale of NBN Co Limited, at the appropriate time, taking into account relevant commercial issues. Accordingly, it was said to be important to allow the sale to respond to market circumstances and avoid unnecessary timetable delays and associated potential loss of buyer interest and sale value. The Minister argued that to ensure that the sale process would not be compromised, the declaration should not be a disallowable instrument. *(Third Report of 2011)*

- **NATIONAL HEALTH REFORM AMENDMENT (NATIONAL HEALTH PERFORMANCE AUTHORITY) BILL 2011:**

  The relevant provision enabled the Minister to specify in an instrument additional functions to be performed by the Authority. Although the explanatory memorandum provided reasons for this exemption, the committee sought the Minister's advice as to whether consideration had been given to alternative means for enabling public scrutiny of these instruments, such as a requirement that they be published on the Authority's website.

  The Minister responded confirming that instruments made under paragraph 50(1)(f) would be available to the public. The committee thanked the Minister for the response and the commitment to make the instruments public. *(Fourth Report of 2011)*

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:

- **FEDERAL FINANCIAL RELATIONS AMENDMENT (NATIONAL HEALTH AND HOSPITALS NETWORK) BILL 2010:**

  For States participating in the National Health and Hospitals Network Agreement (NHHN), the amendments to the *Federal Financial Relations Act* allowed the Minister to make determinations. The explanatory statement justified this on the basis that the determinations would facilitate the operation of an intergovernmental body or scheme involving the Commonwealth and the States. It was also noted that the Minister's discretion was structured by the requirement in the proposed section 21A to consider the NHHN Agreement and the intergovernmental Agreement. Section 21B provided for procedural protection for States where a determination which was inconsistent with the NHHN was made and would result in 'substantial financial detriment' to one or more States.

  Exemption from the normal disallowance provisions of the *Legislative Instruments Act* was justified in the explanatory memorandum on the basis that the determinations facilitate the operation of an intergovernmental body or scheme. In light of the comprehensive explanation the committee made no further comment. *(Alert Digest No. 9 of 2010)*

- **TELECOMMUNICATION LEGISLATION AMENDMENT (NATIONAL BROADBAND NETWORK MEASURES-ACCESS ARRANGEMENTS) BILL 2010**

  The explanatory memorandum pointed out that the bill imposed requirements on the ACCC to consult on draft instruments and that this would ensure that any instrument was subject to appropriate public commentary and transparency. The explanatory memorandum further argued that the exclusion of the *Legislative Instruments Act* would be appropriate given that the telecommunications industry would require certainty about what specific grounds or circumstances identified by the ACCC would be permissible. In light of the explanation the committee left the matter to the consideration of the Senate as a whole. *(Alert Digest No. 1 of 2011)*

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 non-legislative 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 43rd Parliament include the:

- **CLEAN ENERGY FINANCE CORPORATION BILL 2012:**

  The term 'GFS Australia' was defined by reference to the 'publication of the Australian Bureau of Statistics known as *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, as updated from time to time'. The definition further provided that the updating took the form of 'new versions' of the publication and when material in the current version is updated by other publications of the Australian Bureau of Statistics. Furthermore, 'GFS system' is defined as having 'the same meaning as in GFS Australia'. The committee sought the Assistant Treasurer's advice as to:

  - why it was necessary to define this term by reference to a publication that may be updated from time to time as this approach may be thought to undermine the capacity of Parliament to scrutinise changes which may affect how the law is understood; and
  - whether the *Australian System of Government Finance Statistics: Concepts, Sources and Methods* and updates are publicly available, especially updates which are included in other publications of the ABS, and if so, whether they are free or require payment.

  The Assistant Treasurer replied stating that 'The GFS' was the accounting standard used throughout the Government's Budget process and was freely available to the public on the Australian Bureau of Statistics website. The Minister also indicated that the wording of the relevant provision was consistent with the *Future Fund Act 2006*. The committee thanked the Assistant Treasurer for the response and not that it would have been useful for key aspects of the explanation to have been included in the explanatory memorandum. *(First Report of 2013)*

- **NATIONAL VOCATIONAL EDUCATION AND TRAINING REGULATOR (CONSEQUENTIAL AMENDMENTS) BILL 2011:**

  The provisions provided that standards may apply, adopt, or incorporate with or without modification any matter contained in any other instrument in writing as existing at a particular time or from time to time. As the explanatory memorandum only repeated the effect of the provisions without

any explanation or justification of why it was considered appropriate in this instance the committee sought the Minister's advice.

The Minister replied by assuring the committee in a detailed response that it was envisaged that current versions of any document incorporated by reference in legislative instruments in question would be publicised on the relevant website. The committee requested that the key aspects of this information be reflected in the explanatory memorandum. *(Third Report of 2011)*

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

- **INTERNATIONAL TAX AGREEMENTS AMENDMENT BILL (NO. 1) 2011:**

  The explanatory memorandum clarified that the relevant international agreements are published and readily available through a number of hard copy and online sources. These sources include government websites (the Department of Foreign Affairs and Trade's Australian Treaties Database and via the Treasury's public website). The explanatory memorandum also indicated that the bill was 'not intended to change the effect of the [current law] or the extent to which Australia's tax treaties are given the force of law in Australia'. The bill's purpose was to present the law in a less unwieldy and more convenient manner. As there was no difficulty for the public or legal profession to access the text of the specified international taxation agreements specified in the bill, the committee made no further comment. *(Alert Digest No. 4 of 2011)*

Standing Appropriations

In the committee's *Fourteenth Report of 2005*, the committee stated (at page 272) that:

> The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation in the period during which it applies. Examples of the committee alerting the Senate to concerns about this issue during the 43rd Parliament include the:

- **CLEAN ENERGY BILL 2011:**

  The relevant provisions provided for the Consolidated Revenue Fund to be appropriated for the purposes of paying amounts payable by the

Commonwealth under a contract or arrangement with a constitutional corporation, authorised by the Treasurer, made for the purpose of protecting energy security.

The explanatory memorandum merely repeated the effect of the provisions, and provided no explanation justifying the inclusion of standing appropriations. The committee therefore sought the Minister's advice as to the reasons for including these standing appropriations in the bill, which had the effect of excluding the appropriations from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process.

The Minister replied by noting that one of the provisions would only be used in rare circumstances and that there would be an urgency to act quickly to preserve energy security, and it would be impractical to seek legislative approval for each response. The other provision was only seen as a precautionary measure in case loans were not available for eligible generators on reasonable terms. It was also said that it was not possible to anticipate whether any loans would be made under this provision. The committee thanked the Minister for the detailed response and left the matter to the consideration of the Senate as a whole. *(Twelfth Report of 2011)*

- **JUDGES AND GOVERNORS-GENERAL LEGISLATION AMENDMENT (FAMILY LAW) BILL 2012:**

  Three provisions authorised appropriations for payments from the Consolidated Revenue Fund for lump-sum benefits and a transitional pension in specified circumstances relating to pension-splitting for judges or the Governor-General. An appropriation was needed up-front to finalise the settlement. When an amount is transferred to a former spouse under these arrangements, the Judge's or Governor-General's benefit would be reduced accordingly from the time it became payable. The explanatory memorandum described the arrangements as 'similar to the arrangements in the Judges' Act for payment of other lump sum benefits', 'consistent with the payment of other pensions under the Judges' Act' and 'similar to the arrangements in the Governor General's Act for payment of other benefits'. In these circumstances the committee left the question of whether the proposed approach was appropriate to the consideration of the Senate as a whole. *(Alert Digest No. 4 of 2012)*

Chapter 7

Inquiry into the future role and direction of the committee

Background

7.1 In early 2010, in anticipation of its 30th anniversary in November 2011, the committee considered that it would be timely to conduct an inquiry into its future role and direction to review its work and the terms of reference in Senate standing order 24. The committee had not encountered any difficulties that significantly hindered its work and it did not hold any grave concerns about the operation of standing order 24. However, after 30 years it considered that it would be worth revisiting the framework for the scrutiny of bills to ensure that the committee remains well placed to continue to work effectively for many years into the future.

7.2 On 3 March 2011 the Senate referred the following terms of reference for the inquiry:

The Committee shall inquire into and report on:

(1) The future direction and role of the Scrutiny of Bills Committee, with particular reference to whether its powers, processes and terms of reference remain appropriate.

(2) In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar committees in other jurisdictions.

(3) The committee be authorised to hold public hearings in relation to this inquiry and to move from place to place.

(4) The committee be authorised to access the records and papers of the 2010 inquiry into its future role and direction. [This inquiry lapsed due to the federal 2010 election.]

7.3 The committee tabled its final report on 14 May 2012.

Recommendations

7.4 In its report the committee made 14 recommendations intended to streamline the foundation for the committee's work. Some of the matters to which the recommendations relate include:

- reporting during non-sitting periods;
- reporting to the chamber about responsiveness to committee requests for information;
- permanent inquiry and general committee powers; and
- framework and uniform (or national scheme) legislation.

7.5 Since the report was tabled the committee has been progressively implementing its recommendations.

Senator Helen Polley

Chair