

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



**Alert Digest**

**No. 6 of 2008**

**25 June 2008**



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# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator the Hon C Ellison (Chair)

Senator M Bishop (Deputy Chair)

Senator J Collins

Senator A McEwen

Senator A Murray

Senator the Hon J Troeth

## Terms of Reference

Extract from **Standing Order 24**

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



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

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

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

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## **Crimes Legislation Amendment (Enhanced Child Protection from Predatory Tourism Offences) Bill 2008**

Introduced into the Senate on 17 June 2008

By Senator Bernardi

### **Background**

This bill amends the *Australian Crime Commission Act 2002*, the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979* with the aim of ensuring that sexual crimes against children committed by Australians overseas are the subject of a comprehensive and up-to-date series of Commonwealth offences. The bill:

- provides for forfeiture of child abuse material or child pornography material if ordered by a court;
- specifies a number of sexual offences against overseas children under 16 years of age, including the procuring and ‘grooming’ of a child for the purposes of child sex overseas;
- specifies a number of offences of benefiting from, encouraging or preparing to commit sexual offences against children overseas;
- provides for courts to take evidence by video link in certain circumstances and provides for other rules about the conduct of trials; and
- provides new offences for Australian citizens and residents who possess, control, produce, distribute or obtain child pornography and/or abuse material while overseas.

The bill also contains application provisions.

**Absolute liability**  
**Schedule 1, item 8**

Proposed new subsections 272.7(2), 272.8(2), 272.9(6) and 272.10(3) of the *Criminal Code Act 1995*, to be inserted by item 8 of Schedule 1, would create offences of absolute criminal liability. The Committee notes, however, that the explanatory memorandum points out that these sections are being moved from Part IIIA of the *Crimes Act 1914* (which is proposed to be repealed by item 8 of Schedule 1), with no change in the substance of the law.

*In the circumstances, the Committee makes no further comment on these provisions.*

**Absolute liability**  
**Schedule 1, item 8**

Proposed new subsections 272.11(3) and 272.12(3) of the *Criminal Code Act 1995*, to be inserted by item 8 of Schedule 1, would create offences of absolute criminal liability. The Committee notes from the explanatory memorandum (pages 14 and 15) that the aspects of the crimes that will attract absolute liability are the location of the commission of the offence and the age of the victim. The Committee further notes that the explanatory memorandum argues that neither of these matters are central to the culpability of the accused, and that the imposition of absolute liability in respect of the age of the victim mirrors its use in relation to the offence of using a carriage service to procure a child for sexual activity.

*In the circumstances, the Committee makes no further comment on these provisions.*

**Absolute liability**  
**Schedule 1, item 8**

Proposed new subsections 272.15(3) and 272.16(3) of the *Criminal Code Act 1995*, to be inserted by item 8 of Schedule 1, would create offences of

absolute criminal liability. The Committee notes, however, that the explanatory memorandum points out (page 17) that the application of absolute liability is used in a technical sense only, as it refers only to the circumstance that, as an objective fact, the conduct of the accused is reasonably capable of resulting in a person benefiting from that conduct. Whether the accused actually intended to gain such a benefit must still be proved by the prosecution.

*In the circumstances, the Committee makes no further comment on these provisions.*

### **Absolute liability Schedule 1, item 8**

Proposed new subsections 273.5(2) and 273.6(2) of the *Criminal Code Act 1995*, to be inserted by item 8 of Schedule 1, would create offences of absolute criminal liability. The Committee notes from the explanatory memorandum (page 23), that absolute liability applies only to the location of the offence (ie, that the conduct occurred outside Australia) and that this matter is not central to the culpability of the accused.

*In the circumstances, the Committee makes no further comment on these provisions.*

## **Environment Protection and Biodiversity Conservation Amendment (Control of Power Station Emissions) Bill 2008**

Introduced into the Senate on 19 June 2008

By Senator Allison

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to introduce a greenhouse intensity threshold that new power stations must comply with.

The bill sets a greenhouse gas emissions threshold of no more than 0.6 tonnes of CO<sub>2</sub> equivalent per megawatt hour of power produced (on a full fuel cycle basis).

### **Explanatory memorandum**

This Bill has been introduced by Senator Allison and is accompanied by both a Second Reading speech and an explanatory memorandum. The Committee notes, however, that the explanatory memorandum comprises no more than a general outline of the purpose of the Bill and does not provide an explanation of individual provisions.

The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of such documents. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and explanatory material, *Preparing Private Senator's Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may assist Senators and Members in preparing explanatory memoranda.

*In the circumstances, the Committee makes no further comment on this issue.*

**Strict liability**  
**Schedule 1, items 9 and 11**

Proposed new subsections 142AB(2) and 142BA(2) of the *Environment Protection and Biodiversity Conservation Act 1999*, to be inserted by items 9 and 11 respectively of Schedule 1, create offences of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

Unfortunately, the explanatory memorandum to this bill does not refer to these particular measures. The Committee **seeks the advice of the proposer of the bill** as to reasons for the imposition of strict liability in these circumstances and whether this imposition of strict liability is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

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

## **Governance Review Implementation (AASB and AUASB) Bill 2008**

Introduced into the House of Representatives on 18 June 2008

Portfolio: Treasury

### **Background**

This bill amends the *Australian Securities and Investments Commission Act 2001* with the aim of improving corporate governance of the Australian Accounting Standards Board (AASB) and the Auditing and Assurance Standards Board (AUASB). The bill transfers the two boards from the *Commonwealth Authorities and Companies Act 1997* to the *Financial Management Accountability Act 1997* (FMA) framework.

The bill establishes two agencies under the FMA Act, the 'Office of the Australian Accounting Standards Board' and the 'Office of the Auditing and Assurance Standards Board' to support the operations of the AASB and the AUASB. Each agency will comprise of the Chair of the board, other members of the board and the staff of the board. The Chairs of the AASB and the AUASB will hold the position of Chief Executive of their respective agency.

The bill makes consequential changes to the functions of the Financial Reporting Council and also contains transitional provisions.

*The Committee has no comment on this bill.*

## **Governor-General Amendment (Salary and Superannuation) Bill 2008**

Introduced into the House of Representatives on 18 June 2008

Portfolio: Prime Minister

### **Background**

This bill amends the *Governor-General Act 1974* to increase the annual salary for the incoming Governor-General, Ms Quentin Bryce AC, from \$365,000 to \$394,000. The proposed salary has been calculated consistent with a convention applying since 1974 and has been reduced to take account of Ms Bryce's entitlement to a Commonwealth-funded pension from prior employment.

The bill also removes references in the *Governor-General Act 1974* to the Superannuation Surcharge, which was discontinued in 2005, and contains application and transitional provisions.

*The Committee has no comment on this bill.*

## Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008

Introduced into the House of Representatives on 18 June 2008  
Portfolio: Environment, Heritage and the Arts

### Background

This bill amends the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act), the *Great Barrier Reef Marine Park (Environmental Management Charge—Excise) Act 1993*, the *Great Barrier Reef Marine Park (Environmental Management Charge—General) Act 1993*, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the *Legislative Instruments Act 2003*, with the aim of providing a robust regulatory framework to support long-term protection and ecologically sustainable management of the Great Barrier Reef.

Schedule 1 establishes a new objects section for the GBRMP Act, which focuses on the administration and management of the Great Barrier Reef Marine Park to ensure long-term protection of the environment, biodiversity and heritage values of the reef, and to allow ecologically sustainable use of the reef.

Schedule 2 requires one member of the GBRMP Authority to be an Indigenous person and establishes a capacity for the authority to conduct business outside of formal meetings.

Schedule 3 requires the Authority to publicly consult on a proposal to proclaim an area as a part of the Marine Park, or to remove an area from the Marine Park, and updates the matters that must be considered in developing zoning plans and plans of management.

Schedule 4 contains amendments relating to environmental impact assessment and approval. It establishes the Great Barrier Reef Marine Park as a ‘matter of national environmental significance’ and establishes the *Environment Protection and Biodiversity Conservation Act 1999* as the primary basis for environmental impact assessment and approval requirements applying to the Marine Park.



Schedule 5 establishes a single investigations regime for the purposes of both the GBRMP Act and the EPBC Act. It establishes a broader range of enforcement mechanisms, including enforceable directions and enforceable undertakings, and introduces civil penalty and infringement notices regimes.

The bill also contains application, consequential, saving and transitional provisions.

### **Commencement on Proclamation Schedules 4, 5 and 6**

Item 3 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedules 4, 5 and 6 will commence on Proclamation, but must commence in any event 12 months after Assent. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation.

In this instance, the Committee notes from the explanatory memorandum (page 3) that there are a wide variety of reasons for this delay in commencement, including the education and training of those who will administer the new provisions, and the education of users of the Great Barrier Reef Marine Park.

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

### **Incorporating matter as in force from time to time Schedule 1, item 25**

Proposed new subsection 66(13) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 25 of Schedule 1, provides that ‘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’, in derogation of subsection 14(2) of the *Legislative Instruments Act 2003*. The Committee routinely draws attention to provisions that seek to incorporate into delegated legislation material ‘as in force from time to time’ where that incorporation involves material that appears not to be subject to sufficient parliamentary scrutiny.

The Committee notes that the explanatory memorandum (paragraph 18) seeks to justify the incorporation of extrinsic material as in force from time to time on the basis that “regulations made under the GBRMP Act ‘call up’ various statutory instruments made under Queensland legislation... Currently, whenever Queensland amends its legislation or management plans, the regulations under the GBRMP Act must also be amended. The change proposed by this item will avoid this need by allowing the GBRMP Regulations to require compliance with Queensland legislation and management plans as in force from time to time.”

The Committee notes, however, that the bill does not place any limits on the extrinsic material that may be applied, adopted or incorporated. That is, it does not limit it to Queensland legislation and management plans. As such, the Committee considers that this clause may insufficiently subject the exercise of legislative power to parliamentary scrutiny, and **seeks the Minister’s advice** as to whether there might be some limit put on the exercise of this power.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.*

### **Legislative Instruments Act—disallowance Schedule 3, item 17**

Proposed new section 35D of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 17 of Schedule 3, provides that a Zoning Plan prepared by the Great Barrier Reef Marine Park Authority and accepted by the Minister

is a legislative instrument, but ‘neither section 42 (disallowance) nor part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the plan.’ However, proposed new section 35E of the *Great Barrier Reef Marine Park Act 1975*, also to be inserted by item 17 of Schedule 3, provides for disallowance of zoning plans.

The Committee notes from the explanatory memorandum (paragraphs 43-47) that the purpose of these provisions is to ensure consistency between the *Legislative Instruments Act 2003* and the *Great Barrier Reef Marine Park Act 1975*. The explanatory memorandum notes that ‘Zoning plans (and amendments and revocations of zoning plans) are currently exempt from the disallowance provisions of the [Legislative Instruments] LI Act by virtue of item 40 of the table in subsection 44(2) of that Act. The exemption is provided on the basis that the GBRMP Act provides for disallowance of zoning plans. Application of LI Act disallowance requirements would therefore be duplicative...’.

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

### **Strict liability** **Schedule 4, item 2**

Proposed new section 24C of the *Environment Protection and Biodiversity Conservation Act 1999*, to be inserted by item 2 of Schedule 4, creates a number of offences of strict liability. The Committee will generally draw to Senators’ attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

The Committee notes that the explanatory memorandum (paragraph 67) provides a detailed explanation of why strict liability is appropriate in these circumstances and makes reference to both the Committee’s *Sixth Report of 2002* and the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

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

**Absolute liability  
Schedule 5, item 59**

New subsection 449BA(3) of the *Environment Protection and Biodiversity Conservation Act 1999*, to be inserted by item 59 of Schedule 5, creates an offence of absolute liability. The Committee will generally draw to Senators' attention provisions that create absolute liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance, the Committee notes from the explanatory memorandum (paragraph 131) that absolute liability applies only to the element that a thing has been released to a person subject to a condition, and that this is a jurisdictional element of the offence, and does not relate to the essence of the offence, which is non-compliance with the condition.

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

**Strict and absolute liability  
Schedule 5, item 125, new subsections 61AAC(2) and (3)**

New subsection 61AAC(2) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 125 of Schedule 5, applies strict liability to two of the elements of the offence created by subsection 61AAC(1), while new subsection 61AAC(3) applies absolute liability to two of the other elements of the offence. The Committee will generally draw to Senators' attention provisions that create strict liability and absolute liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The Committee notes from the explanatory memorandum (paragraphs 169 and 170) that all four of those elements are ‘jurisdictional’, in that they refer only to the fact that the offender is a ‘responsible person’, and that a vessel monitoring direction applies to the vessel and to the person. The essence of the offence is that the direction has not been complied with, and that still requires proof by the prosecution of intention on the part of the accused.

*In the circumstances, the Committee makes no further comment on these provisions.*

### **Absolute and strict liability**

#### **Schedule 5, item 125, new subsection 61ACB (2) and (3)**

New subsection 61ACB(2) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 125 of Schedule 5, applies absolute liability to one of the elements of the offence created by subsection 61ACB(1), while new subsection 61ACB(3) applies strict liability to two of the other elements of the offence. The Committee will generally draw to Senators’ attention provisions that create strict liability and absolute liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The Committee notes from the explanatory memorandum (paragraph 179), that all of those elements are ‘jurisdictional’, in that they refer only to the fact that an emergency direction applies to a person, and that it was communicated to the person. The essence of the offence is that the direction has not been complied with, and that still requires proof by the prosecution of intention on the part of the accused.

*In the circumstances, the Committee makes no further comment on these provisions.*

**Absolute liability**  
**Schedule 5, item 125**

New subsection 61AEB(2) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 125 of Schedule 5, applies absolute liability to the element of the offence created by subsection 61AEB(1), that a direction limiting access to the Marine Park has been issued to a person. However, the Committee notes from the explanatory memorandum (paragraph 191) that this element is ‘jurisdictional’, in that it refers to a question of fact, that the direction has been issued. The essence of the offence is that the direction has not been complied with, and that still requires proof by the prosecution of negligence on the part of the accused.

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

**Standing appropriation**  
**Schedule 5, item 141, section 65A**

Proposed new subsection 65A(1) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 141 of Schedule 5, provides that ‘the Consolidated Revenue Fund is appropriated’ for various purposes. This proposed new subsection is, therefore, establishing a standing appropriation.

The Committee notes, however, that this standing appropriation is limited in scope to amounts required for ‘making refunds of amounts’ and ‘making payments of interest, or other amounts, derived from the custody or banking of collected amounts’ in accordance with specified regulations.

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

**Strict liability**  
**Schedule 6, item 24**

New subsections 38AA(2), 38BA(2), 38BC(2), 38BD(2), 38CA(2), 38DA(2), 38DD(3) and 38DD(5) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 24 of Schedule 6, create offences of strict liability.

However, the Committee notes from the explanatory memorandum (paragraphs 241 to 247), that the elements of the various offences to which strict liability is applied relate to the fact that the offence was committed in the Marine Park, and are based on the principle that it should be incumbent on users of the Great Barrier Reef to be aware of the existence of the Marine Park, and the limitations imposed on its use. The explanatory memorandum further notes, at paragraph 248, that some of those instances of strict liability were developed after consulting the Committee's *Sixth Report of 2002*, and the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

*In the circumstances, the Committee makes no further comment on these provisions.*

**Absolute liability**  
**Schedule 6, item 24**

New subsections 38BD(3), 38DC(2) and 38EA(2) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 24 of Schedule 6, create offences of absolute liability. The Committee notes, however, that the explanatory memorandum (paragraphs 272, 281 and 297 respectively) observes that the elements of the offences to which strict liability is applied are 'jurisdictional' matters as they are concerned with matters of fact. The essence of the offence is the conduct of the alleged offender, and the issue of whether that was engaged in intentionally will still have to be proved by the prosecution.

*In the circumstances, the Committee makes no further comment on these provisions.*

**Strict liability**  
**Schedule 6, item 24**

New subsection 38EA(5) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 24 of Schedule 6, creates an offence of strict liability of engaging in conduct in contravention of a condition on which a permission or authority has been granted. The Committee notes that the explanatory memorandum (paragraph 299) states that strict liability was proposed only after considering the Committee's *Sixth Report of 2002*, together with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

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

**Strict liability**  
**Schedule 6, item 24**

New subsections 38FA(2), FB(2), FC(2) and FD(2) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 24 of Schedule 6, create offences of strict liability. The Committee notes that the explanatory memorandum states, at paragraphs 309, 313, 318 and 324, that each of these offences are committed by a person failing to exercise due diligence to ensure that equipment for which they are responsible is not used by others for the commission of crimes, and is therefore similar to vicarious liability in the civil law, which is also strict.

*In the circumstances, the Committee makes no further comment on these provisions.*



**Strict liability**

**Schedule 6, item 24, new subsection 38GA(4)**

New subsection 38GA(4) of the *Great Barrier Reef Marine Park Act 1975*, to be inserted by item 24 of Schedule 6, imposes strict liability on the elements of various ‘aggravated offences’ relating to the nature of the vessel used, or that an animal or plant is a member of a protected species. The Committee notes that the explanatory memorandum, at paragraphs 329 and 330, seeks to justify this instance of strict liability on the basis that such matters are peculiarly within the knowledge of the defendant, and that to prove, beyond reasonable doubt, the defendant’s ignorance thereof would be difficult, and would allow ignorance of the law to be used as an excuse for criminal behaviour.

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

## Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008

Introduced into the House of Representatives on 18 June 2008

Portfolio: Resources, Energy and Tourism

### Background

Part of a package of four bills, this bill amends the *Offshore Petroleum Act 2006* and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to establish a system of offshore titles that will authorise the transportation by pipeline and injection and storage of greenhouse gas substances in geological formations under the seabed. The bill:

- provides for the release of offshore acreage over which greenhouse gas titles may be obtained, establishes the system of titles that will authorise title-holders to engage in greenhouse gas related operations, and confers on the responsible Minister regulatory powers in relation to those titles and activities;
- seeks to balance the rights of the new storage industry with the rights of the petroleum industry;
- preserves pre-existing rights of the petroleum industry as far as is practicable to minimise sovereign risk to existing title holders' investment in Australia's offshore resources;
- establishes new categories of project inspectors and OHS inspectors; and
- provides for the meaning of a greenhouse gas substance to be extended in the future should the injection and storage of other greenhouse gases be permitted under the *Environment Protection (Sea Dumping) Act 1981*.

The bill also makes consequential amendments to the *Offshore Petroleum (Royalty) Act 2006*, the *Petroleum Excise (Prices) Act 1987*, the *Petroleum Resource Rent Tax Assessment Act 1987* and a number of other Acts to change definitions and references to petroleum titles.

## **Explanatory Memorandum**

In considering the bills that come before it, the Committee places considerable reliance on the explanatory material that accompanies each bill, in particular the explanatory memorandum. If this material does not clearly explain the operation and impact of the legislative proposal under consideration then the work of both the Committee and the Senate is made more difficult.

The Committee was disappointed with the quality of the explanatory memorandum that accompanied this bill, which failed to explain the intent and operation of numerous provisions.

## **Uncertain commencement Multiple Schedules**

The table to subclause 2(1) provides a range of commencement dates for various provisions within this bill, many of which are linked to the commencement of provisions in other Acts. For example, item 2 in the table to subclause 2(1) provides that Schedule 1 of this bill will commence on the later of a) the day after the Act receives the Royal Assent; and b) immediately after the commencement of item 32 of Schedule 1 to the *Offshore Petroleum Amendment (Miscellaneous Measures) Act 2008*. Reference to that Act advises that item 32 of Schedule 1 commences 'immediately after the commencement of subsections 22(3) and (4) of the *Offshore Petroleum Act 2006*. These provisions of the *Offshore Petroleum Act 2006* commence on Proclamation. However, item 32 of Schedule 1 to the *Offshore Petroleum Amendment (Miscellaneous Measures) Act 2008* repeals subsections 22(3) and (4) of the *Offshore Petroleum Act 2006*.

It appears, therefore, that the effect of item 2 in the table to subclause 2(1), when stated in full, is that subsections 22(3) and (4) of the *Offshore Petroleum Act 2006* will come into force on Proclamation, thereby bringing item 32 of Schedule 1 to the *Offshore Petroleum Amendment (Miscellaneous Measures) Act 2008* into force (with the effect that subsections 22(3) and (4) of the *Offshore Petroleum Act 2006* will immediately be repealed), which in turn will bring Schedule 1 of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* into force.

Similarly, item 6 in the table to subclause 2(1) provides that Schedule 2, items 58 to 61, of this bill will commence on the later of a) the day after the Act receives the Royal Assent; and b) immediately after the commencement of Schedule 2 to the *Offshore Petroleum (Repeals and Consequential Amendments) Act 2006*. Reference to that Act advises that Schedule 2 will commence ‘at the same time as Chapter 2 of the *Offshore Petroleum Act 2006* commences’. Reference to that Act indicates that Chapter 2 is to commence on ‘a single day to be fixed by Proclamation’, which does not appear to have occurred.

These problems of constant cross referencing to other Acts occur throughout the commencement provisions and the Committee notes that it is extremely difficult to ascertain when it is intended for the various provisions in this bill to commence. The Committee further notes that the explanatory memorandum is silent on the commencement clauses of the bill and, consequently, casts no light on the issue, nor does the explanatory memorandum provide any rationale for apparent extended delays in commencement.

The commencement provisions in this bill are some of the most complex that the Committee has encountered. In these circumstances, it is unacceptable for the explanatory memorandum to offer no guidance or clarity to the reader about the effect of these provisions.

The Committee **seeks the Minister’s advice** about the dates on which each of the items listed in the table to subclause 2(1) are due to commence, and why this information, along with an explanation for any extended delay, was not included in the explanatory memorandum, consistent with Drafting Direction No. 1.3.

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

**Strict liability****Schedule 1, item 169, new subsections 249AW(2) and 249BZA(2)**

New subsection 249AW(1) of the *Offshore Petroleum Act 2006*, to be inserted by item 169 of Schedule 1, creates the offence of failing to comply with a direction given by the responsible Commonwealth Minister which, by virtue of new subsection 249AW(2), is an offence of strict liability. New subsection 249BZA(1) of that Act, also to be inserted by item 169 of Schedule 1, creates a similar offence, which by virtue of new subsection 249BZA(2), is also an offence of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In these instances, the Committee notes that the explanatory memorandum (paragraphs 152 and 219 respectively) seeks to justify this imposition of strict liability on the ground that the offence 'could be difficult to establish if the prosecution were required to prove intention with respect to an omission to do the things required.' There is, however, no indication in the explanatory memorandum that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered in the framing of these offences.

The Committee **seeks the Minister's advice** whether consideration was given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in developing these offence provisions.

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

**Strict liability**  
**Schedule 1, item 169**

New sections 249CY, 249CZB and 249CZD of the *Offshore Petroleum Act 2006*, all to be inserted by item 169 of Schedule 1, create offences of strict liability for failing to comply with a direction given by the responsible Commonwealth Minister. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In these instances, the Committee notes that the explanatory memorandum makes no reference to these strict liability provisions. The Committee therefore **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing these offences.

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

**Strict liability**  
**Schedule 1, item 169**

Proposed new subsection 249CZE(7) of the *Offshore Petroleum Act 2006*, to be inserted by item 169 of Schedule 1, creates an offence of strict liability for failing to apply for a site closing certificate in relation to an identified greenhouse gas storage formation. Subsection 249CZE(11) of the same Act, also to be inserted by item 169 of Schedule 1, creates an offence of strict liability for failing to comply with a direction given by the responsible Commonwealth Minister. Unfortunately, the Committee notes that the explanatory memorandum makes no reference to these two sub-sections and,

as such, provides no rationale for the application of strict liability to these offences.

The Committee therefore **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing these offences.

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

### **Strict liability** **Schedule 1, item 191**

New subsection 298-290(4) of the *Offshore Petroleum Act 2006*, to be inserted by item 191 of Schedule 1, creates the offence of failing to comply with a notice from the responsible Commonwealth Minister to produce or make available a document which, by virtue of new subsection 298-290(5), is an offence of strict liability.

The Committee notes that the explanatory memorandum, at paragraph 488, states only that section 298-290 'includes offence provisions which are similar to those in sections 298-288 and 298-289.' However, the offences created by those sections are not offences of strict liability.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing this offence provision.

*Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

**Strict liability**  
**Schedule 1, item 200**

New subsection 316-307(1) of the *Offshore Petroleum Act 2006*, to be inserted by item 200 of Schedule 1, creates the offence of failing to comply with a direction from the responsible Commonwealth Minister which, by virtue of proposed new subsection 316-307(2), is an offence of strict liability. Unfortunately, the Committee notes that the explanatory memorandum provides no rationale for the application of strict liability in this instance.

The Committee **seeks the Minister's advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee's *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing this offence.

*Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

**Strict liability**  
**Schedule 1, item 238**

New subsection 335-329(9) of the *Offshore Petroleum Act 2006*, to be inserted by item 238 of Schedule 1, creates the offence of entering or being present in a greenhouse gas safety zone, in breach of a notice issued by the responsible Commonwealth Minister which, by virtue of proposed new subsection 335-329(10) is an offence of strict liability.



The Committee notes from the explanatory memorandum (paragraph 548) that the offence provisions in this section, including the strict liability offence, are ‘intended to act as a deterrent to persons whose dangerous navigation or other conduct could place at risk the lives of scores of people on board offshore structures’, but that the explanatory memorandum provides no rationale for why the offence in 335-329(9) should be one of strict liability.

The Committee **seeks the Minister’s advice** as to whether the imposition of strict liability is justified in these circumstances and, further, whether consideration has been given to the principles contained in the Committee’s *Sixth Report of 2002* and the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in framing this offence.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

### **Abrogation of the privilege against self-incrimination Schedule 1, item 274**

New subsection 406-412(1) of the *Offshore Petroleum Act 2006*, to be inserted by item 274 of Schedule 1, would abrogate the privilege against self-incrimination for a person required to answer a question or produce a document under proposed new section 406-409. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law privilege trespasses on personal rights and liberties.

The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. In this case, the Committee notes that proposed new subsection 406-412(2) would limit the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. The committee accepts that this

provision strikes a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

## **Legislative instruments – declarations**

### **Schedule 1**

Numerous provisions in Schedule 1 declare a direction, notice or instrument not to be a legislative instrument. They are proposed new subsections 177B(3), 181A(7), 249AL(9), 249AUBA(4), 249AV(6), 249BZ(6), 249CXA(8), 249CZA(10), 249CZC(10), 261(8), 275(8), 316-305(10), 335-329(11) and 406-407(4).

As outlined in Drafting Direction No. 3.8, where 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 would expect to see a full explanation justifying the need for the provision. The Committee notes that, in these instances, the explanatory memorandum is silent as to the nature of the provisions.

The Committee **seeks the Minister's advice** whether each of these provisions is declaratory in nature or provides for a substantive exemption, and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

## **Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008**

Introduced into the House of Representatives on 18 June 2008

Portfolio: Resources, Energy and Tourism

### **Background**

Part of a package of four bills, this bill amends the *Offshore Petroleum (Annual Fees) Act 2006* by adding greenhouse gas titles to the titles in respect of which annual fees are payable.

### **Uncertain commencement**

#### **Schedules 1 to 3**

Items 2, 3 and 4 in the table to subclause 2(1) provide that Schedules 1-3 of this bill will commence after various provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* commence. As noted earlier in this Alert Digest, the commencement provisions in the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 are such that it is extremely difficult to ascertain when it is intended for the various provisions in that bill to commence. The Committee further notes that the explanatory memorandum is silent on the commencement clauses of both of these bills and, consequently, casts no light on the issue.

The Committee **seeks the Minister's advice** about the dates on which Schedules 1, 2 and 3 of the Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008 are due to commence, and why this information, along with an explanation for any extended delay, was not included in the explanatory memorandum, consistent with Drafting Direction No. 1.3.

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

## Setting a fee by regulation

### Schedule 1, item 5, proposed new section 4A

Proposed new subsection 4A(3) of the *Offshore Petroleum (Annual Fees) Act 2006*, to be inserted by item 5 of Schedule 1, would permit the amount of the fee referred to there to be set by regulation. The Committee has consistently drawn attention to legislation which provides for the rate of a fee to be set by regulation. This creates a risk that the fee may, in fact, become a tax. It is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

In this instance, the Committee notes that the explanatory memorandum makes no reference to the fact that the rate of the fee is to be set by regulation. However, the Committee further notes that the proposed new section 4A is very similar to existing section 4 of the *Offshore Petroleum (Annual Fees) Act 2006*, on which the Committee commented in *Alert Digest No. 8 of 2005*. The Parliamentary Secretary's response to the concerns expressed at that time was to assure the Committee that the fees represented no more than recovery of the relevant administrative costs, which met the Committee's concerns.

At that time, the Committee indicated that the Parliamentary Secretary might care to consider including a clause giving legislative force to the assurance that the fees would be no more than cost recovery. The Committee **seeks the Minister's advice** as to whether the fees contained in the present bill are aimed at no more than cost recovery and, if so, whether further consideration has been given to giving legislative effect to that limitation.

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

## **Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008**

Introduced into the House of Representatives on 18 June 2008

Portfolio: Resources, Energy and Tourism

### **Background**

Part of a package of four bills, this bill amends the *Offshore Petroleum (Registration Fees) Act 2006* by adding greenhouse gas titles to the titles in respect of which transfers and dealings will attract the imposition of registration fees.

### **Uncertain commencement**

#### **Schedules 1 to 3**

Items 2, 3 and 4 in the table to subclause 2(1) provide that Schedules 1-3 of this bill will commence after various provisions of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* commence. As noted earlier in this Alert Digest, the commencement provisions in the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 are such that it is extremely difficult to ascertain when it is intended for the various provisions in that bill to commence. The Committee further notes that the explanatory memorandum is silent on the commencement clauses of both of these bills and, consequently, casts no light on the issue, nor does the explanatory memorandum provide any rationale for apparent extended delays in commencement.

The Committee **seeks the Minister's advice** about the dates on which Schedules 1, 2 and 3 of the Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008 are due to commence, and why this information, along with an explanation for any extended delay, was not included in the explanatory memorandum, consistent with Drafting Direction No. 1.3.

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

## **Setting a tax by regulation**

### **Schedule 1, item 17, new sections 6A and 6B**

Items 2, 3 and 4 in the table to subsection 6A(2) and items 5 and 6 in the table to subsection 6B(2) of the *Offshore Petroleum (Registration Fees) Act 2006*, to be inserted by item 17 of Schedule 1, provide that the amount of the fees referred to in those items is to be set by regulation, with no upper limit specified in the primary legislation. Proposed new subsections 6A(4) and 6B(6) of that Act, also to be inserted by item 17 of Schedule 1, declare that the fees to be imposed by those sections, are 'imposed as a tax.' The Committee has noted in the past, with similar provisions, that to set the amount of a tax by delegated legislation may be regarded as an inappropriate delegation of legislative power.

The Committee notes that the explanatory memorandum in respect of this bill, which is less than a page long, makes no reference to the fact that the bill imposes a tax by regulation. The Committee further notes that the proposed new sections 6A and 6B are very similar to existing clauses 5 and 6 of the *Offshore Petroleum (Registration Fees) Act 2006*, on which the Committee commented in *Alert Digest No. 8 of 2005*. The Parliamentary Secretary's response to the concerns expressed at that time included the comment that:

a general review of policy issues in this legislation is to be carried out by the Department of Industry, Tourism and Resources in consultation with the States, Northern Territory and industry. This may possibly lead to the introduction of legislative amendments at a later point in time. I have asked the Department to include in that review' the question of whether an upper limit should be set in the Act for the prescribed amounts. The review could also consider the alternative of merely inserting a new provision stating that these amounts cannot increase by more than the consumer price index. (Scrutiny of Bills, *Ninth Report of 2005*, p. 196)

The Committee **seeks the Minister's advice** as to whether this foreshadowed review has been undertaken and whether consideration was given to the matters outlined above.

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

## Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008

Introduced into the House of Representatives on 18 June 2008  
Portfolio: Resources, Energy and Tourism

### Background

Part of a package of four bills, this bill amends the *Offshore Petroleum (Safety Levies) Act 2003* by extending the imposition of those levies to greenhouse gas facilities and greenhouse gas pipelines in Commonwealth waters.

### Commencement by Proclamation Schedule 1

Item 2, in the table to subclause 2(1) provides that Schedule 1 of this bill will commence ‘immediately after Schedule 1 to the *Offshore Petroleum (Safety Levies) Amendment Act 2006*, which in turn is scheduled to commence ‘at the same time as Part 4.8 of the *Offshore Petroleum Act 2006* commences.’ Part 4.8 of the *Offshore Petroleum Act 2006* is to commence on a ‘single day to be fixed by Proclamation’, which does not appear to have occurred.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force, and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. In this instance, the Committee notes that the explanatory memorandum provides no advice as to why this Schedule is to commence on Proclamation, nor why the bill does not specify a period by which the Schedule either commences, or is taken to be repealed.

The Committee **seeks the Minister’s advice** regarding why Schedule 1 of this bill is to commence on Proclamation and whether the commencement clause should also be subject to a provision that, if the Schedule has not commenced by some fixed date, the Schedule will be automatically treated as having been repealed.



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

## **Uncertain commencement Schedule 2**

Item 3, in the table to subclause 2(1) provides that Schedule 2 will commence 'immediately after the commencement of item 1 of Schedule 4 of the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*.' As noted earlier in this Alert Digest, the commencement provisions in the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 are such that it is extremely difficult to ascertain when it is intended for the various provisions in that bill to commence. The Committee further notes that the explanatory memorandum is silent on the commencement clauses of both of these bills and, consequently, casts no light on the issue, nor does the explanatory memorandum provide any rationale for apparent extended delays in commencement.

The Committee **seeks the Minister's advice** about the date on which Schedule 2 of the Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008 is due to commence, and why this information, along with an explanation for any extended delay, was not included in the explanatory memorandum, consistent with Drafting Direction No. 1.3.

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

## **Poker Machine Harm Minimisation Bill 2008**

Introduced into the Senate on 19 June 2008

By Senator Fielding

### **Background**

This bill provides for the regulation of poker machines with a view to promoting responsible gambling practices and minimising problem gambling. The bill provides that gaming machines and poker machines may not be manufactured, sold or supplied if they:

- accept banknotes with a denomination greater than \$20;
- allow a player, by means of entering banknotes or other specified objects into the machine, to have more than \$100 in accumulated credit;
- have more than one payline;
- enable a maximum bet greater than \$1 per spin.

The bill also places limits:

- on the production, sale or supply of smart card gambling machines and poker machines, on linked jackpot arrangements, and on machines providing for free spins and free games; and
- on the provision of automatic teller machines and cash-back terminals in licensed venues in certain circumstances.

### **Explanatory memorandum**

The Committee notes that this bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanation of the intent and operation of the proposed amendments, preferably in the form of an

explanatory memorandum. The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of such documents. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and explanatory material, *Preparing Private Senator's Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may assist Senators and Members in preparing explanatory memoranda.

In this case, the Committee notes that the second reading speech provides some explanation of the intent and operation of the proposed amendments.

*In the circumstances, the Committee makes no further comment on this bill.*

## Protection of the Sea Legislation Amendment Bill 2008

Introduced into the House of Representatives on 18 June 2008

Portfolio: Infrastructure, Transport, Regional Development and Local Government

### Background

Schedule 1 of this bill amends the *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—Customs) Act 1993*, the *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—Excise) Act 1993*, the *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund—General) Act 1993* and the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* to implement the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, generally known as the Supplementary Fund Protocol. The Supplementary Fund Protocol, to be financed through levies on public or private entities, creates a third tier of compensation for pollution damage resulting from spills of oil from an oil tanker.

Schedule 2 of the bill amends the *Navigation Act 1912* and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (POTS Act) to: implement changes to Annexes I, III and IV of the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL); make miscellaneous amendments to the requirements for maintenance of garbage record books; and allow regulations under the POTS Act to prescribe penalties of up to 50 penalty units.

Schedule 3 of the bill amends the *Marine Navigation Levy Collection Act 1989*, the *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* and the *Protection of the Sea (Shipping Levy Collection) Act 1981* to make the definition of *Australian port* consistent. It also amends the definition of *Collector* in the *Protection of the Sea (Shipping Levy Collection) Act 1981*.

Schedule 4 of the bill makes minor amendments to the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*.

**Retrospective commencement**  
**Schedule 4, items 1 and 2**

Items 8 and 9 in the table to subclause 2(1) of this bill provide that the amendments proposed in items 1 and 2 of Schedule 4 will commence on 9 October 1996 and 8 January 1995 respectively, immediately after the commencement of particular earlier amendments to the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

In this instance, the Committee notes that the explanatory memorandum assures readers that these amendments are being made solely for the purpose of correcting typographical errors in the earlier amendments.

*In the circumstances, the Committee makes no further comment on these provisions.*

**Standing appropriation**  
**Schedule 1, item 20, subsection 46N(4)**

Proposed new subsection 46N(4) of the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*, to be inserted by item 20 of Schedule 1, provides that ‘the Consolidated Revenue Fund is appropriated for the purposes of subsection (2).’ This proposed new subsection is, therefore, establishing a standing appropriation.

The Committee notes, however, that this standing appropriation is limited in scope only to those amounts paid to the Commonwealth under subsection 46N(1), which in turn are to be paid into the Supplementary Fund under subsection 46N(2).

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

**Strict liability**  
**Schedule 1, item 20**

Proposed new subsection 46T(2) of the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*, to be inserted by item 20 of Schedule 1, would impose strict criminal liability for a failure to provide information to the Australian Maritime Safety Authority. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this case, the Committee notes that the explanatory memorandum (page 15), justifies this imposition of strict liability on a number of bases, and mentions that the Committee's *Sixth Report of 2002*, and the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, were consulted in the course of framing this offence.

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

**Abrogation of the privilege against self-incrimination**  
**Schedule 1, item 20**

New subsection 46S(4) of the *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993*, to be inserted by item 20 of Schedule 1, would abrogate the privilege against self-incrimination for a person required to give information or a return, or to produce a document or a copy of a document, under regulations made for the purpose of that Division. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation that interferes with this common law privilege trespasses on personal rights and liberties.

The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. In this case, the

Committee notes that proposed new subsection 46S(4) would limit the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. The committee accepts that this provision strikes a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

## **Therapeutic Goods Legislation Amendment (Annual Charges) Bill 2008**

Introduced into the House of Representatives on 18 June 2008  
Portfolio: Health and Ageing

### **Background**

This bill amends the *Therapeutic Goods Act 1989* and the *Therapeutic Goods (Charges) Act 1989* to make a number of changes to the existing regime for the imposition and collection of annual charges in relation to the registration, listing or inclusion of therapeutic goods in the Australian Register of Therapeutic Goods, and in respect of manufacturing licences issued under the Therapeutic Goods Act. The bill, to take effect from 1 July 2009,:

- proposes to set a uniform date for the payment of most annual charges, for all financial years after the year in which the initial charge is paid;
- repeals current provisions for low value low volume exemption from the Therapeutic Goods Charges Act and inserts them into the Therapeutic Goods Act;
- provides for third party confirmation that an applicant meets the eligibility criteria for the low value exemption; and
- allows for an annual charge to be set at nil for a particular class of goods.

The bill also contains application and saving provisions.

*The Committee has no comment on this bill.*



## COMMENTARY ON AMENDMENTS TO BILLS

### **Dental Benefits Bill 2008**

On 18 June 2008, the Senate agreed to one amendment to this bill, which does not fall within the Committee's terms of reference.

### **Tax Laws Amendment (2008 Measures No. 2) Bill 2008**

On 17 June 2008, the Senate agreed to three amendments to this bill, none of which fall within the Committee's terms of reference.

### **Wheat Export Marketing Bill 2008**

On 19 June 2008, the Senate agreed to nine amendments to this bill, none of which fall within the Committee's terms of reference.

## PROVISIONS OF BILLS WHICH IMPOSE CRIMINAL SANCTIONS FOR A FAILURE TO PROVIDE INFORMATION

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

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

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

Bill/Act	Section/Subsection	Offence	Penalty
Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008	Schedule 1, item 191, subsections 298-288(4), 298-289(4) and 298-290(4)	Failure to provide information to a public authority	50 penalty units
Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008	Schedule 1, item 274, subsection 406-409(5)	Failure to provide information to a public authority	100 penalty units
Protection of the Sea Legislation Amendment Bill 2008	Schedule 1, item 20	Failure to provide information to a public authority	300 penalty units

## SCRUTINY OF STANDING APPROPRIATIONS

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

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

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

### Bills introduced with standing appropriation clauses – 42nd Parliament

*Indicates passed by Senate	Bills and Clauses
	<b>Commonwealth Securities and Investment Legislation Amendment Bill 2008</b> — Schedule 1, item 10, subsection 5BA(7)
*	<b>Defence Home Ownership Assistance Scheme Bill 2008</b> — Clause 84
*	<b>Dental Benefits Bill 2008</b> — Clause 65
*	<b>Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008</b> — Schedule 1, item 29.
*	<b>Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008</b> — Schedule 1, item 79, section 94B (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
	<b>Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008</b> — Schedule 5, item 141, section 65A.
	<b>Protection of the Sea Legislation Amendment Bill 2008</b> — Schedule 1, item 20, section 46N.
	<b>Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008</b> — Schedule 1, item 1
*	<b>Wheat Export Marketing Bill 2008</b> — clause 58 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )

### Other relevant appropriation clauses

<b>*Indicates passed by Senate</b>	<b>Bills and Clauses</b>
<b>*</b>	<b>Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008</b> — Schedule 2, items 1 and 2, and Schedule 4, item 1: special appropriation clauses – for a finite period of time (ie. For circumstances arising in a particular financial year).

## STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2007/2008

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
<b>Bills dealt with in 2007</b>							
Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures Bill 2007	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007	8(8.8.07)	21.6.07	13.9.07	Treasurer	9.8.07	20.9.07	1(12.3.08)
Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007	8(8.8.07)	21.6.07	13.9.07	Treasurer	9.8.07	19.9.07	1(12.3.08)
National Greenhouse and Energy Reporting Bill 2007	11(12.9.07)	15.8.07	18.9.07	Environment and Water Resources	13.9.07	2.10.07	1(12.3.08)
<i>Northern Territory National Emergency Response Act 2007</i>	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
<i>Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007</i>	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
<i>Water Act 2007</i>	10(15.8.07)	8.8.07	15.8.07	Environment and Water Resources	16.8.07	23.11.07	1(12.3.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
<b>Bills introduced 2008</b>							
<i>Aged Care Amendment (2008 Measures No. 1) Act 2008</i>	1(12.3.08)	13.2.08	14.2.08	Health and Ageing	13.3.08		
<i>Australian Crime Commission Amendment Act 2007</i>	3(14.5.08)	19.9.07	18.9.07	Home Affairs	15.5.08	20.6.08	6(25.6.08)
Australian Energy Market Amendment (Minor Amendments) Bill 2008	3(14.5.08)	20.3.08	23.6.08	Resources, Energy and Tourism	15.5.08	28.5.08	4(4.6.08)
Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Infrastructure, Transport, Regional Development and Local Government	15.5.08	19.6.08	6(25.6.08)
Communications Legislation Amendment (Miscellaneous Measures) Bill 2008	2(19.3.08)	17.3.08	12.3.08	Broadband, Communications and the Digital Economy	20.3.08	13.5.08	3(14.5.08)
Customs Amendment (Strengthening Border Controls) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Home Affairs	15.5.08	13.6.08	5(18.6.08)
Customs Legislation Amendment (Modernising) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Home Affairs	15.5.08	13.6.08	5(18.6.08)
Dental Benefits Bill 2008	4(4.6.08)	29.5.08	18.6.08	Health and Ageing	5.6.08	23.6.08	6(25.6.08)
Drink Container Recycling Bill 2008	2(19.3.08)		13.3.08	Senator Fielding			
Excise Legislation Amendment (Condensate) Bill 2008	4(4.6.08)	15.5.08	16.6.08	Treasury	5.6.08	17.6.08	5(18.6.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008	4(4.6.08)	29.5.08	16.6.08	Education, Employment and Workplace Relations	5.6.08	18.6.08	6(25.6.08)
Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008	4(4.6.08)	29.5.08	16.6.08	Agriculture, Fisheries and Forestry	5.6.08	17.6.08	5(18.6.08)
Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008	1(12.3.08)	11.3.08	13.2.08	Treasury	13.3.08	18.3.08	2(19.3.08)
First Home Saver Accounts Bill 2008	4(4.6.08)	28.5.08	16.6.08	Treasury	5.6.08	16.6.08	5(18.6.08)
Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority And Other Matters) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Agriculture, Fisheries and Forestry	15.5.08	28.5.08	4(4.6.08)
Horse Disease Response Levy Bill 2008	1(12.3.08)	21.2.08		Agriculture, Fisheries and Forestry	13.3.08		
Horse Disease Response Levy Collection Bill 2008	1(12.3.08)	21.2.08		Agriculture, Fisheries and Forestry	13.3.08		
Independent Reviewer of Terrorism Laws Bill 2008	3(14.5.08)	17.3.08		Mr Georgiou MP	15.5.08	26.5.08	4(4.6.08)
Infrastructure Australia Bill 2008	1(12.3.08)	21.2.08	18.3.08	Infrastructure, Transport, Regional Development and Local Government	13.3.08	18.3.08	2(19.3.08)
National Commissioner for Children Bill 2008	3(14.5.08)		18.3.08	Senator Bartlett	15.5.08		

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
National Fuelwatch (Empowering Consumers) (Consequential Amendments) Bill 2008	4(4.6.08)	29.4.08	16.6.08	Treasury	5.6.08	24.6.08	6(25.6.08)
Protection of the Sea (Civil Liability For Bunker Oil Pollution Damage) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Infrastructure, Transport, Regional Development and Local Government	15.5.08	2.6.08	4(4.6.08)
Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008	4(4.6.08)		15.5.08	Senator Milne	5.6.08	12.6.08	5(18.6.08)
Unit Pricing (Easy comparison of Grocery prices) Bill 2008	4(4.6.08)		15.5.08	Senator Fielding	5.6.08	5.6.08	5(18.6.08)
Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008	3(14.5.08)	19.3.08	16.6.08	Veterans' Affairs	15.5.08	24.6.08	6(25.6.08)
<i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008</i>	1(12.3.08)	13.2.08	17.3.08	Employment and Workplace Relations	13.3.08 20.3.08	18.3.08 22.4.08	2(19.3.08) 3(14.5.08)