

Senate Standing Committee
for the
Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

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Terms of Reference

Extract from **Standing Order 24**

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

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

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

Australian National Registry of Emissions Units Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Climate Change and Energy Efficiency

Background

This bill is part of a package of three bills to establish the Carbon Farming Initiative. The bill provides for the establishment and maintenance of the National Registry of Emissions Units which will support the implementation of the Carbon Farming Initiative and includes:

- rules for opening and closing accounts in the registry;
- different types of registry accounts;
- procedures and requirements relating to Kyoto and non-Kyoto international units in the registry;
- publication of information;
- voluntary cancellation of emissions units; prevention or rectifying non-compliance with registry requirements; and
- merits review of decisions.

Incorporating material by reference

Part 3

Part 3 of the bill provides for the recognition of the emissions units created under the Kyoto Protocol, and sets out how these units can be issued and transferred. The explanatory memorandum indicates (at page 11) that the bill has been drafted to ensure that the Australian legislation is consistent with the Kyoto Protocol rules. To this end, the bill defines the Kyoto rules to include rules drawn from a number of sources beyond the Protocol itself (see clause 4 of the bill). In particular the rules include 'a standard or other instrument, as existing from time to time' which has been adopted by the Meeting of the Kyoto Parties for a purpose relating to the Protocol or a decision of the Meeting of the Kyoto Parties. Further, the regulations may identify any other instruments that relate to the Kyoto Protocol or a decision of the Meeting of

the Kyoto Parties to be considered part of the rules. The explanatory memorandum (at page 12) gives a detailed explanation of the need to define the rules in this manner: it allows ‘for all the relevant elements of the Kyoto Protocol framework to be adopted for various purposes in the bill’. The Kyoto Protocol provides an overarching framework, and the definition of the Kyoto rules is ‘intended to accommodate new and amended decisions, standards and instruments, as well as amendments to the Kyoto Protocol as in force for Australia’.

The Committee routinely draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. However, the Committee understands that the incorporation of instruments into regulations ‘from time to time’ may be justified in certain circumstances. Given the detailed justification provided for this approach in the explanatory memorandum and the expectation that the content of incorporated material will be widely available the Committee has no further comment about whether this delegation of legislative power is appropriate.

In the circumstances, the Committee makes no further comment on the proposed approach.

Delegation of legislative power

Various

In this bill there is a general power to make regulations, but it is also often stated that the regulations ‘may make provision’ for particular matters, for example in relation to the opening of accounts, identification procedures, transactions limits etc. In fact, there are a large number of particular issues which are clearly flagged as requiring legislation to enable the registry to function as intended. One particular example is clause 12: ‘The regulations may empower the Administrator to designate a Commonwealth Registry account as an account with a name specified in the regulations.’ This provision is dealt with at pages 7-8 of the explanatory memorandum, where it is said that this clause outlines Australia’s obligations under the Kyoto rules.

The Committee acknowledges that there may be reasons why it is desirable that areas relating to the bill are to be provided for in future delegated

legislation, but is concerned to ensure that as much information as possible is included in the primary legislation or a justification for the use of delegated legislation is provided. The Committee therefore **seeks the Minister's further advice as to the rationale for the significant reliance on the use of delegated legislation.**

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.

Delegation of legislative power Part 2, Division 7, Clause 27

Clause 27 allows for the creation of civil penalty provisions that carry significant penalties (see paragraph 69(4)(b) and paragraph 69(5)(b)) by regulation. The explanatory memorandum states at paragraph 5.20 that:

Additional provisions in relation to the Registry may be made in the regulations. For example, it is expected that regulations will be required to set out detailed rules for the use of accounts and the registry. Failure to comply with the regulations may lead to the imposition of a civil penalty.

The explanatory memorandum also notes at paragraph 5.21 that the provisions are civil penalties rather than criminal offences because 'contravention of these provisions does not involve conduct of such serious moral culpability'. The Committee acknowledges the rationale provided, but retains concern about the ability for provisions attracting significant penalties to be created by delegated legislation rather than in the primary legislation. In the circumstances the Committee **leaves consideration of this matter to the consideration of the Senate as a whole.**

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.

Possible severe penalties

Part 2, Division 7, Clauses 23 and 24

Part 2, Division 7, clauses 23 and 24 introduce offences for a person to knowingly make a false entry in the Registry or to tender in evidence a document which falsely purports to be a copy or extract from an entry in the Registry. The explanatory memorandum notes that the penalty for the first offence is not in line with the standard penalty/imprisonment ratio set out in section 4B of the *Crimes Act 1914*, whereas 7 years imprisonment equates to 420 penalty units, the penalty in the bill is 2000 units. The explanatory memorandum accepts that cogent reasons are required to depart from the accepted ratio. The reason given for departure in this instance is (see page 31 of the explanatory memorandum) that ‘the financial gain which could be made from tampering with the Registry would amount to several lifetimes’ worth of imprisonment on the standard ratio’ and that a large financial penalty is necessary given the potential gains which may be made from an offence under this provision. In the circumstances **the Committee leaves the question of whether the penalty imposed is appropriate to the consideration of the Senate as a whole.**

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

Reversal of onus

Part 2, Division 7, Clause 26

Clause 26 of the bill is a civil penalty provision which relates to the use and disclosure of information obtained from the Registry. Subclause (3) states that the obligations imposed do not apply if the use or disclosure of the information is relevant to a number of matters. A defendant bears an evidential burden of proof in relation to these matters and at page 34 of the explanatory memorandum this approach is said to be ‘justified’ as the matters are ‘peculiarly within the defendant’s knowledge and not available to the prosecution’. In the circumstances **the Committee leaves the question of whether this approach is appropriate to the Senate as a whole.**

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

Delegation of legislative power

Part 4, Clause 57

Clause 57 is a broad regulation power which provides that 'the regulation may make further provision in relation to non-Kyoto international emissions units.' The explanatory memorandum states at paragraph 2.64 that:

The bill provides a framework with the detailed arrangements for transfers of non-Kyoto international emissions units to be specified in regulations. This allows the transfer arrangements of such units to be in accordance with, for example, any associated treaty or agreement.

Further, at paragraph 2.71:

Regulations may make further provisions in relation to non-Kyoto international emissions units. For example, they might detail any conditions that may apply to outgoing international transfers of non-Kyoto international emissions units. The administrative arrangements for giving effect to the transfer could also be specified in regulations.

These examples assist to understand some possible uses of the provision, but the Committee remains concerned about the breadth of this delegation of legislative power. However, in the circumstances the Committee leaves **the question of whether this delegation of legislative power is appropriate to the consideration of the Senate as a whole.**

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

Part 7, Clause 79

Clause 79 in effect provides that civil penalty provisions are strict liability offences: subclause 79(2) provides that in civil penalty proceedings it is not necessary to prove a person's intention, knowledge, recklessness, negligence

or any other state of mind. The explanatory memorandum states at page 35 that the ‘reason for this provision is that it is reasonable to expect those subject to the provision will take steps to guard against any inadvertent contravention’.

The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (at page 25) indicates that strict liability is appropriate only if (i) the penalty imposed is no more than 60 penalty units for an individual and 300 for a body corporate, (ii) the punishment of offences not involving fault is likely to significantly enhance enforcement, and (iii) there are legitimate grounds for penalising persons lacking ‘fault’. The reason cited in the explanatory memorandum for the imposition of strict liability is relevant to consideration (iii). The penalties which may be imposed (see subclause 69(4) and subclause 69(5)) do exceed the general limits for strict liability criminal offences indicated in the *Guide*, however the *Guide* also indicates that maximum penalty of a civil penalty provision will often be higher than that in relation to a criminal offence (see page 66) and that the use of strict liability is easier to justify ‘where it is reasonable to expect those subject to the civil penalty to take steps to guard against any inadvertent contravention’ (see page 65).

Although the justification in the explanatory memorandum of this approach might have been more detailed and informative, in the circumstances the Committee considers that **the question of whether the approach is appropriate should be left to the consideration of the Senate as a whole.**

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

Merits review

Part 3, subclause 36(2) and Part 8, clause 82

Clause 82 provides for merits review in relation to a number of decisions. Subclauses 36(2) and 53(2) both give the Administrator the discretion not to transfer 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) are reviewable, decisions made under subclause 36(2) are not and the explanatory

memorandum does not address this issue. The Committee therefore **seeks the Minister's advice as to why a decision made under subclause 36(2) is not reviewable.**

The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Incorporating material by reference

Part 9, clause 95

Clause 95 enables the making of regulations which apply, adopt or incorporate, with or without amendment, a matter contained in other instruments as they exist from time to time. An instrument so incorporated must be published on the Administrator's website (unless it would infringe copyright). The explanatory memorandum at page 41 cites a standard published by the International Organization for standardisation as in force from time to time as an example. Beyond this, no justification for this approach is given. The concern is that legislative power may, by this arrangement, be delegated inappropriately and that the law may change without Parliament having the opportunity to scrutinise the changes. Although the requirement for the publication of instruments is welcomed as it increases the capacity for regulations to be scrutinised, it is unfortunate that the explanatory memorandum does not directly address this issue. The Committee therefore **seeks the Minister's advice as to why it is considered appropriate to include material by reference rather than including it directly in the primary legislation.**

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

The Committee notes that this bill was referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Aviation Transport Security Amendment (Air Cargo) Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Infrastructure and Transport

Background

The bill amends the *Aviation Transport Security Act 2004* to:

- amend the definition of aviation industry participant (AIP) to include Accredited Air Cargo Agents (AACAs);
- extend the validity of Regulated Air Cargo Agent (RACA) Transport Security Programs to minimise the administrative burden on industry during the transition to the new air cargo security framework which includes the introduction of the Regulated Shipper Scheme;
- allow for a Legislative Instrument to prescribe security training requirements for RACAs and AACAs; and
- include minor technical amendments which will simplify the air cargo clearance process by removing certification provisions and removing all references to the term 'freight' and replacing them with the term 'cargo' which is more relevant terminology for industry.

The bill also amends two strict liability offences.

The Committee has no comment on this bill.

Carbon Credits (Carbon Farming Initiative) Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Climate Change and Energy Efficiency

Background

This bill is one of a package of three related bills which creates a framework for investment in carbon abatement for the agricultural industry. In particular the bill provides for:

- types of abatement projects eligible for Australian carbon credit units (ACCUs);
- requirements for recognition as an offsets entity;
- eligibility for offsets projects;
- participation by holders of Aboriginal and Torres Strait Islander land;
- characteristics of methodology determinations;
- permanence arrangements for sequestration projects;
- reporting requirements for offsets projects;
- framework for auditing offset reports;
- the issue and exchange of ACCUs;
- monitoring and enforcement powers; merits review of decisions;
- establishment and functions of the Domestic Offsets Integrity Committee and the Carbon Credits Administrator; and
- publication of information and the treatment of confidential information.

'Henry VIII' clause Clause 5

A number of the definitions in clause 5 of the bill allow the meaning of the defined terms to be modified or elaborated in regulations (see 'land rights land', 'native forest', 'prescribed native forest protection project', 'prescribed non-CFI offsets scheme'). The explanatory memorandum explains at page 87 the need for this in relation to 'prescribed native forest protection project', but not the other terms. The Committee **seeks the Minister's advice as to why this approach is considered appropriate for the other definitions.**

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.

Delegation of legislative power Clause 41

Clause 41 of the bill sets out the 'additionality test', which is imposed to ensure that projects do not accrue credits for abatement that would have occurred in any event. The clause states that a project passes the test if 'the project is of a kind specified in the regulations' and is not required to be undertaken by or under a Commonwealth, State, or Territory law. Regulations will therefore list the activities or types of projects that are additional.

The Minister, prior to making the regulations, must consider advice from the expert committee established under the bill (the DOIC) and also whether the practice under consideration is a 'common practice'. The additionality test is thus envisaged as being based on expert advice (from a body to be established by the bill) and common practice which may obviously change over time.

The Committee acknowledges that the bill includes some legislative guidance as to requirements for the regulations, but is concerned that in practice it may be difficult to establish what is a 'common practice'. To better evaluate whether the proposed delegation of legislative power is appropriate the Committee **seeks the Minister's further advice about the justification for the approach and whether more precise legislative guidance can be provided in the primary legislation.**

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.

Incorporating material by reference

Clauses 106 and 302

Clause 106 of the bill provides for the making of methodology determinations by legislative instrument. The methodology determinations establish procedures for estimating the extent of abatement attributable to particular projects and for project specific rules for monitoring and reporting on abatement. Subsection 106(8) enables a methodology determination to incorporate other instruments as in force or existing 'from time to time'. The Committee has consistently questioned whether such provisions appropriately delegate legislative power because the approach allows a change in obligations to be imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

In this instance subclause 106(10) requires that any instrument which is incorporated must be published on the relevant website. This provision is welcomed as it enables members of the public to readily access the content of the laws that may not have been completely specified in the published regulations. Nevertheless, the explanatory memorandum merely repeats the effect of these provisions rather than explaining why they are necessary.

The same issue arises in relation to clause 302 which enables the general regulation making power to incorporate other instruments as in force or existing from time to time. Again, the explanatory memorandum does no more than repeat the effect of these provisions (see pages 138 to 139).

Due to the Committee's concern about possible inappropriate delegations of legislative power the Committee **seeks the Minister's further advice about the reasons for allowing the incorporation of material by reference in these clauses.**

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.

Abolition of the privilege against self-incrimination Clauses 185 and 202

Clause 185 would empower the Administrator to obtain information or documents if he or she believes on reasonable grounds that the person has information or a document that is relevant to the operation of the Act. Clause 189 states that a person is not excused from giving information or producing a document on the grounds that it might incriminate them or expose them to a penalty. However, in the case of an individual the provision provides for a use and derivative use immunity in relation to civil and criminal proceedings. There are limited exceptions, namely, proceedings for the recovery of a penalty under section 179 or 180 of the proposed Act and for offence against section 137.1 or 137.2 of the *Criminal Code* which relate to the giving of false or misleading information or documents to the Commonwealth. The exceptions to the provision for a use and derivative use immunity in relation to proceedings under the bill, relate to (i) proceedings to enforce a penalty imposed due to non-compliance with a requirement to relinquish carbon credit units (clause 179) and (ii) proceedings to enforce a late payment penalty for amounts payable under clause 179).

The Committee has consistently drawn attention to provisions that abrogate the privilege against self-incrimination, and accepts that this may be more easily justified where the loss of a person's right to silence is balanced by a prohibition on the direct and indirect use of the forced disclosure.

Although the need for the limited exceptions to the use and derivative use immunity are not explained, the explanatory memorandum at page 98 provides the following justification for the general effect of these provisions. It is argued that:

[t]he effective administration of the scheme is an issue of public importance which could impact on the Australian community and business. Non-compliance could undermine the scheme's integrity. [The provisions] enhance the ability of the Administrator to monitor compliance with the scheme in a way that is consistent with the views of the Scrutiny of Bills Committee, as

well as Commonwealth legal policy regarding the privilege against self-incrimination.

The same issue arises in relation to clause 202 which abrogates the privilege in relation to information gathering powers given to inspectors in the execution of monitoring warrants.

In the circumstances the Committee leaves **the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

Possible trespass on personal rights and liberties Part 20, clause 217

Part 20, clause 217 imposes liability on 'executive officers of body corporates' where the body corporate has contravened a civil penalty provision, but only in circumstances where the officer's conduct has been reckless or negligent. The explanatory memorandum at page 103 argues that liability is appropriate given the aim to ensure compliance with obligations under the proposed law is taken seriously at a high level within liable entities, and that liability 'is not being imposed simply because the person is an officeholder...but requires a degree of blame before a civil penalty can be imposed'.

In order to better evaluate if the proposed approach trespasses unduly on personal rights and liberties, the Committee is interested to understand if the liability is commensurate with that imposed on executive officers in any other circumstances (possibly under the Corporations Law, for example) and the justification for imposing the liability on the basis of 'negligence'. The Committee therefore **seeks the Minister's advice about these issues.**

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.

Possible severe penalties

Part 21, clause 221

Part 21, clause 221, empowers a court to impose penalties of up to 2000 and 10000 penalty units for each contravention for a person and a body corporate respectively. The severity of these penalties is justified by reference to the importance of the scheme and the magnitude of financial gains that may be made from contravening civil penalty provisions (see the explanatory memorandum at page 106). The Committee **leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.**

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

Strict liability

Part 21, subclause 231(2)

Subclause 231(2) of Part 21 of the bill removes any requirement to prove the state of mind of a person (namely, their intention, knowledge, recklessness or negligence) in relation to civil penalty proceedings. In effect, this means that such provisions are to be tried on the basis of strict liability. The reason for this, given in the explanatory memorandum at page 108, is 'that it is reasonable to expect those subject to the provision will take steps to guard against any inadvertent contravention'. Although the maximum penalties that may be awarded are significant—and exceed the level of penalties that are generally considered appropriately in relation to strict liability offences (ie a maximum of 300 penalty units for a body corporate), the justification offered is relevant to determining the appropriateness of the measure. Further, clause 221 of the bill does require a court to have regard to all relevant matters, including the nature and extent of the contravention and the nature and extent of any loss or damage suffered as a result of the contravention in determining a pecuniary penalty. In the circumstances the Committee **leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.**

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

**Reversal of onus
Subclause 270(2)**

Subclause 270(2) of the bill places an evidential burden on a person seeking to rely on the exceptions specified an offence relating to the disclosure or use of protected information. The exceptions relate to instances where the bill authorises the use of disclosure of the information or is undertaken in compliance with a law of the Commonwealth or a prescribed law of a State or Territory. The justification for placing an evidential burden on a defendant is that 'in many cases it is peculiarly within the defendant's knowledge as to which of the exceptions, if any, apply' (see the explanatory memorandum at page 131). In the circumstances the Committee **leaves the question of whether these provisions inappropriately trespass on personal rights to the consideration of the Senate as a whole.**

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

The Committee notes that this bill was referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Carbon Credits (Consequential Amendments) Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Climate Change and Energy Efficiency

Background

This bill is part of a package of three bills to establish the Carbon Farming Initiative. The bill amends the:

- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to provide that financial institutions and other persons who buy Australian carbon credit units are subject to reporting and other obligations;
- *Australian Securities and Investments Commission Act 2001, Competition and Consumer Act 2010 and National Greenhouse and Energy Reporting Act 2007* to provide exchange of information between administrators; and
- *National Greenhouse and Energy Reporting Act 2007* to extend arrangements for reporting transfer certificates beyond 30 June 2011.

The Committee has no comment on this bill.

The Committee notes that this bill was referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Child Support (Registration and Collection) Amendment Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Human Services

Background

This bill amends the *Child Support (Registration and Collection) Act 1988* to:

- broaden the powers of the Child Support Registrar to delegate powers to perform his or her duties to persons outside the Department to enable more efficient service delivery; and
- amend a number of criminal penalty provisions to ensure that the offences contained therein can be successfully prosecuted, protecting the integrity of the Child Support Scheme.

Delegation of legislative power

Schedule 1, item 1

One purpose of the Bill is achieved through item 1 of Schedule 1 of the bill, which broadens the powers of the Child Support Registrar to delegate powers under the *Child Support (Registration and Collection) Act*. The proposed subsection 15(1B) enables delegation of all or any of the Registrar's powers or functions to a person engaged, 'whether as an employee or otherwise', by the Registrar, an Agency, another authority of the Commonwealth, or an organisation that performs services for the Commonwealth. The text of the provision is said to be based upon paragraph 234(7)(c) of the *Social Security (Administration) Act 1999* and subsection 303(1) of the *Paid Parental Leave Act 2010*.

The explanatory memorandum states at paragraph 6 that 'as the Department of Human Services moves towards an integrated service model, it is appropriate to align the scope of the delegation powers to ensure consistency of delivery in service'. However, the Committee remains concerned about the breadth of the provision, which goes much further than enabling a response to the particular problem of allowing for the outsourcing of debt collection services. The provision enables the delegation of all or any of the Registrar's powers or functions to a person who may be outside of the APS. Given that the

Committee generally prefers to see powers to delegate limited to the holders of particular officers or members of the senior executive service or to people with specified skills, or expects that legislative guidance will be provided in the primary legislation about the regulations, in this case such as guidance as to the particular areas (such as debt collection) in which the delegation will be exercised. The Committee therefore **seeks the Minister's further explanation as to why such a broad power of delegation is required and about the extent to which any delegations to persons outside the public service may limit the application of administrative law review and complaint mechanisms.**

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, items 5, 9, 11 and 13

The offences inserted by items 5, 9, 11 and 13 of the bill are existing offences which have been redrafted to clarify their operation. The offences continue to be strict liability offences and in two instances (see item 5 and 11) an evidential burden is placed on defendants in relation to exceptions to the offences on the basis that the information required to ascertain the defence can only be supplied by the employer (ie defendant) (see explanatory memorandum paragraph 18 and paragraph 39). However, the explanatory memorandum gives detailed justification for the approach and in the circumstances the Committee has no further comment.

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

Competition and Consumer Amendment Bill (No.1) 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Treasury

Background

This bill amends the *Competition and Consumer Act 2010* to:

- prohibit the private disclosure of pricing information to a competitor;
- prohibit disclosure of that or other information if the disclosure is made to substantially lessen competition;
- provide that prohibitions only apply to goods and services prescribed by regulations;
- provide exceptions to the prohibitions; and
- extend existing authorisation and notification regimes to enable businesses to obtain immunity from the Australian Competition and Consumer Commission from the prohibitions where a public net benefit results.

Delegation of legislative power

Schedule 1, item 2, section 44ZZT

This bill prohibits businesses from disclosing pricing information to competitors in various circumstances. The prohibitions in the bill will only apply to classes of goods and services prescribed by the regulations (see Schedule 1, item 2, proposed section 44ZZT). The explanatory memorandum states at page 11 that this 'allows an assessment to be undertaken [by the Minister] as to the potential impacts of the new prohibitions on specific goods or services before they are applied to those goods or services'. Although the making of regulations reflecting such assessments will continue to be subject to Parliamentary scrutiny through the disallowance procedure under the *Legislative Instruments Act*, it is of concern that this scope of the prohibitions introduced by this bill are to be determined entirely through delegated legislation. Regrettably, the explanatory memorandum merely states the effect of the provisions rather than justifying the need to leave the scope of operation

of these new provisions to be determined by the regulations. The Committee therefore **seeks the Treasurer's advice about this approach and in particular whether consideration has been given to the possibility of defining the scope of operation of the laws (such as the intended areas of operation, guidance as to the types of industries to which it will apply or relevant considerations that will be examined before a decision is made) in the primary legislation.**

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.

Reversal of onus

Schedule 1, item 2, section 44ZZZA

Section 44ZZZA, which would also be inserted by item 1 of Schedule 1, places an evidential burden on a person who wishes to rely on various exceptions and defences from the prohibitions on disclosure which are being introduced by the bill. The explanatory memorandum at page 28 indicates that the 'intention for imposing an evidential burden is to ensure the party bringing the action does not have to disprove all imaginable defences, only those properly supported by sufficient evidence'. It is also the case that the exceptions appear to relate to matters which are within the knowledge of the party wishing to rely on the exception. **In the circumstances the appropriateness of this approach is a matter which is left to the consideration of the Senate as a whole.**

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

ComSuper Bill 2011

Introduced into the House of Representatives on 24 March 2011
Portfolio: Finance and Deregulation

Background

This bill is part of a package of three bills to establish governance arrangements for Commonwealth superannuation schemes. This bill establishes ComSuper as a statutory agency for the purposes of the *Public Service Act 1999* and *Financial Management and Accountability Act 1997* and provides for:

- terms and condition of employment;
- functions and powers of the Chief Executive; and
- finance and reporting requirements.

This bill is similar to a bill introduced into the House of Representatives on 4 February 2010. The Committee previously commented on the bill in its *Fifth Report of 2010*.

Delegation of legislative power – 'Henry VIII' clause Part 3, clause 8

This bill will establish ComSuper as a statutory agency, consisting of a CEO and staff. Clause 8 of the bill sets out the function and powers of the CEO. The primary function is to provide administrative services to CSC in performance of its functions in relation to a superannuation scheme administered by CSC. Paragraph 8(6)(a) provides that, in relation to the PSSAP, the functions of the CEO have effect subject to such modification (if any) as are prescribed by the regulations, and paragraph 8(6)(b) provides that the regulations may provide that these functions may cease to have effect at a specified time. The regulations can thus, in effect, modify and remove functions conferred on the CEO by the Parliament. The particular reason cited for this arrangement at page 9 of the explanatory memorandum is to allow for the outsourcing of the administration of the PSSAP. The flexibility afforded by these paragraphs is needed as 'outsourcing would involve engaging a commercial provider to carry out the administration function under contractual arrangements and there may be a need for arrangements to

commence without being subject to the uncertainty surrounding timing of legislative passage' (see the explanatory memorandum at page 9). The Committee consistently identifies provisions which enable regulations to amend the primary legislation (so-called Henry VIII clauses). However, as the operation of the provision is limited to the operation of the PSSAP and the explanatory memorandum does give a detailed reason for the approach, the Committee **leaves the question of whether the approach is appropriate to the consideration of the Senate as a whole.**

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

Crimes Legislation Amendment Bill (No.2) 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Justice

Background

This bill amends processes for the confiscation of criminal assets and expands the jurisdiction of the Australian Commission for Law Enforcement Integrity (ACLEI) by:

- amending the *Law Enforcement Integrity Commissioner Act 2006* and a related Act to include the Australian Customs and Border Protection Service (ACBPS) within the jurisdiction of ACLEI;
- enabling the Commissioner of Australian Federal Police (AFP) to commence litigation under the *Proceeds of Crime Act 2002* (POCA);
- enabling the Commonwealth Director of Public Prosecutions (DPP) to transfer POCA matters to the Commissioner of the AFP, and vice versa;
- extending procedures currently available in the *Family Law Act 1975*, for when a Commonwealth proceeds of crime order or forfeiture application applies to property the subject of certain family law proceedings, to when State and Territory proceeds of crime orders and forfeiture applications apply to such property;
- improving the interaction between collection of tax-related liabilities and proceeds of crime proceedings in the POCA, and
- extending the definition of ‘property-tracking document’ in the POCA to enable production orders to be issued in relation to documents relevant to identifying, locating or quantifying property which forms part of a person’s wealth.

Delayed Commencement

Clause 2

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

In this bill, table items 3 and 5 respectively provide that items 1 to 154 and 195 to 242 commence on the later of 1 January 2012 and the day after the Act receives the Royal Assent. If the bill is passed during this sitting period then commencement of these sections of the bill will be delayed by longer than six months.

The explanation for the commencement date outlined in the explanatory memorandum at page 5 is that it will allow arrangements to be put in place to enable the Commissioner to take action under the POCA on behalf of the newly established Criminal Assets Confiscation Taskforce, which commenced operation in January 2011. Agencies participating in the Taskforce (including the AFP, DPP, Australian Crime Commission and Australian Taxation Office) are currently working on arrangements to enable the AFP to take on responsibility for litigation once these amendments commence. A commencement date of 1 January 2012 will give the Commissioner time to put in place structures, procedures and safeguards in relation to the exercise of the powers, duties and functions which will be conferred on him or her by this Act.

In light of the explanations provided the Committee has no further comment about possible delayed commencement of these provisions.

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

Retrospective commencement

Schedule 1, Part 1, item 139 and others

Item 139 is an application provision relating to amendments made in Divisions 1-4 of Part 1, Schedule 2. These amendments relate to proceeds of crime litigation. The amendments are given, by item 139, retrospective application, as they apply in relation to applications for orders and to proceedings regardless of when they were made or started, or when the conduct giving rise to that order occurred (see the explanatory memorandum at page 17). However, as the explanatory memorandum explains, the provision does not 'create any retrospective criminal liability'. The provisions are considered necessary as the amendments enable proceedings, which may have been commenced prior to the commencement of the amendments, to be

transferred from the DPP to the Commissioner of the AFP. The explanatory memorandum continues (also at page 17):

Retrospective application will also ensure that the Commissioner is able to apply for proceeds of crime orders, regardless of when the conduct leading to those orders occurred. As the conduct giving rise to the order may continue over several years or may not be discovered immediately, this item will give certainty to persons whose property is subject to proceeds of crime action and legal practitioners who work with the POCA as to when the Commissioner has the power to apply for an order.

Given this detailed justification for the retrospective application of the amendments and the fact that no retrospective criminal liability is imposed the Committee **leaves the question of whether the approach is appropriate to the consideration of the Senate as a whole.**

A similar issue arises in relation to items 150, 153, 194, 197, 209, 217, 239, 242, 246, and 249, for which the respective explanatory memorandum explanations are found at pages 21, 22, 30, 31, 33-34, 35-36, 40, 41, 43, and 44. In relation to all of these items the Committee also **leaves the question of whether the approach is appropriate to the consideration of the Senate as a whole.**

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

Exclusion of judicial review Schedule 1, items 140 and 141

In the Committee's view the justifications in the explanatory memorandum for the inclusions (see items 140 and 141) of certain decisions in Schedule 1 of the ADJR Act (which excludes judicial review under the Act) are detailed and satisfactory.

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

Customs Amendment (Export Controls and Other Measures) Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* and the *Customs Depot Licensing Charges Act 1997* to amend Customs controls relating to export cargo and ensure consistent depot and warehouse licence conditions.

Strict liability

Schedule 1, Part 2, item 14, subsection 112D(2); and Schedule 2, Part 2, item 43 , subsection 82(C)(2)

A new strict liability offence is inserted by item 14 in the proposed subsection 112D(2). In developing this offence consideration was given to the Committee's *Sixth Report of 2001* and the *Guide to Framing Commonwealth Offences* and the Committee considers that the justification for this at page 11 of the explanatory memorandum is satisfactory.

The same applies to the new strict liability offence inserted by item 43, which is described at pages 31 and 32 of the explanatory memorandum.

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

Wide delegation of power

Schedule 2, item 7

Item 7 of Schedule 2 would insert new subsection 77Q(1), which provides that the CEO may, at any time, impose additional conditions to which a depot licence is subject if the conditions are considered to be necessary and desirable: (a) for the protection of the revenue; or (b) for ensuring compliance with customs statutes or any other law of the Commonwealth or a State or Territory prescribed by regulations; or (c) for any other purpose. The explanatory memorandum (at page 17) does not indicate why paragraph (c) must be drafted in terms which confer such a wide discretionary power on the

CEO and why it is not possible to draft the authorised legislative purposes with more precision.

An identical issue also arises in relation to item 41, which would insert a new subsection 83(2) into the *Customs Act 1901* (see the explanatory memorandum at pages 29-30) and item 43, which would insert a new subsection 82A(1).

The Committee seeks the Minister's further explanation of the appropriateness of these items.

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.

Reversal of onus Schedule 2, item 19

Item 19 of Schedule 2 inserts a new offence in relation to suspended depot licences. Subsection 77VA(2) sets out a number of exceptions to the offence which relate to actions which a Collector may authorise. The defendant has an evidential burden in relation to these matters. Paragraph 105 of the explanatory memorandum refers to, but does not explain, the provision and does not indicate whether the *Guide to Framing Commonwealth Offences* has been considered. Given that actions which may be permitted or authorised by a Collector are not matters which are uniquely within the knowledge of a defendant, the Committee **seeks the Minister's advice about the need for this approach.**

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

Customs Tariff Amendment (2012 Harmonized System Changes) Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Home Affairs

Background

This bill amends the *Customs Tariff Act 1995* and implements changes resulting from the fourth review of the International Convention on the Harmonized Commodity Description and Coding System, commonly referred to as the Harmonized System.

Delayed Commencement

Clause 2

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

Paragraphs 2 and 4 of the HS2012 Bill, in accordance with the application provisions of the HS2012 Bill in item 307, provide that all items in the Schedule to the HS2012 Bill will take effect on 1 January 2012, with the exception of item 110.

Paragraph 3 of the commencement provisions provides that item 110, relating to the description of goods in subheading 2710.19.20 (diesel fuel), will also commence on 1 January 2012. However, this item will not commence at all if the *Customs Tariff Amendment (Taxation of Alternative Fuels) Act 2011* commences on or before 1 January 2012.

If the bill is passed during this sitting period then commencement of these sections of the bill will be delayed by longer than six months. The explanatory memorandum refers to, but does not explain, the reason for the proposed commencement date. The Committee can understand that there are reasons that the beginning of a new calendar year is an appropriate date for commencement, but given the possibility of delayed commencement **seeks the Minister's advice about the justification for the proposed approach.**

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.

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further Election Commitments and Other Measures) Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *A New Tax System (Family Assistance) Act 1999*, *Child Support (Assessment) Act 1989* and *Social Security Act 1991* to:

- streamline notification processes for compensation recipients;
- provide for advance payments of the family tax benefit;
- provide a payment for a child turning four in a particular income year conditional on the child undertaking a health check;
- modify the current rules applicable to the Child support Registrar in determining a person's adjusted taxable income where a parent's taxable income has not been formally assessed; and
- make minor amendments to the family assistance law and child support legislation to clarify technical or drafting matters.

Retrospective application

Schedule 3, items 9 and 10

The amendments referred to in items 9 and 10 of Schedule 3 apply in relation to figures published before or after the commencement of the items. As the explanatory memorandum indicates at page 37 that these applications provisions will not have an adverse effect on anyone the Committee has no further comment.

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

Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Attorney-General

Background

This bill amends the *Family Law Act 1975* to:

- prioritise the safety of children in parenting matters;
- change the definitions of ‘abuse’ and ‘family violence’ to better capture harmful behaviour;
- amend advisers obligations by requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children;
- change court access to evidence of abuse and family violence by amending reporting requirements; and
- facilitate state and territory child protection authorities participation in family law proceedings where appropriate.

The purpose of this bill is to prioritise the safety of children in family law proceedings. This general purpose is sought to be achieved through a number of amendments, including: changes to the definitions of ‘abuse’ and ‘family violence’, the strengthening of obligations of certain advisers (eg family counsellors and legal practitioners), giving the courts better access to relevant evidence by improving reporting requirements and making it easier for child protection authorities to participate in family law proceedings where appropriate.

Retrospective effect

Schedule 1, Part 2, item 45

Part 2 of Schedule 1 of the bill contains application and transitional provisions. Item 45 indicates that ‘subject to item 47’, key amendments made by Schedule 1 of the bill ‘apply in relation to proceedings whether instituted before, on or after commencement’. Item 47 ensures that existing orders and

certain certificates are preserved following the commencement of the Schedule, and that the amendments it contains are not taken to be changed circumstances that would justify making an order to vary a parenting order made before commencement. As the explanatory memorandum indicates at paragraph 82, the provisions that will be subject to this application rule include:

Definitions related to ‘abuse’, ‘family violence’, ‘exposed’ and ‘family member’ (items 1 to 3); [see page 15 for the complete list]

This application provision has retrospective operation insofar as key amendments apply to proceedings which were instituted prior to commencement. There is no guarantee that the application of the amendments to proceedings which pre-date commencement may not have a detrimental effect on an individual. The explanatory memorandum states at page 15 that the ‘application rule prioritises the safety of children over the cost and convenience to the courts, witnesses and parties who may have matters part or fully heard’. Further, ‘to assist the transition process, clause 3 of the Family Violence Bill provides that the measures in Schedule 1 will commence upon a single date to be fixed by Proclamation but no later than 6 months after the Act receives the Royal Assent [allowing] for a delayed commencement and, in turn, help the courts to anticipate new requirements in proceedings during the lead up to commencement’. Although the application of the amendments may have a detrimental affect to a party to family law proceedings commenced before the new law takes effect, in this context (in proceedings in which the best interests of children are required to be a ‘paramount’ consideration) the **Committee leaves the question of the appropriateness of this approach to the Senate as a whole.**

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

‘Henry VIII’ clause Schedule 1, Part 2, item 48

Item 48 enables regulations to be made about the transitional, application or saving provisions set out in Part 2 of Schedule 1. If regulations are made under this item, they prevail over the provisions in Part 2, to the extent of any

inconsistency. As such, this item is a so-called Henry VIII clause, which is a provision which enables a regulation to amend primary legislation. The explanatory memorandum at page 17 states that the purpose of this amendment is to allow the transitional, application and savings provisions to be adjusted to deal with any ‘unexpected’ issues which arise or ‘to take other action such as to carve out proceedings that are part heard or where judgment is reserved if that is considered appropriate’. In order to better evaluate the need for this delegation of legislative power the Committee **seeks the Minister’s further advice as to the general nature of any such unexpected issues and possible reasons why it might be considered appropriate to modify the statutory provisions.**

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

Governance of Australian Government Superannuation Schemes Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Finance and Deregulation

Background

This bill is part of a package of three bills to establish governance arrangements for Commonwealth superannuation schemes. The bill seeks to merge the Australian Reward Investment Alliance, the Military Superannuation and Benefits Board and the Defence Force Retirement and Death Benefits Authority to form a single trustee body, the Commonwealth Superannuation Corporation.

This bill is identical to a bill introduced into the House of Representatives on 4 February 2010. The Committee previously commented on the bill in its *Fifth Report of 2010* and makes some additional comments below.

Delegation of legislative power

Clause 32

Subclause 32(1) provides for exemptions from certain Commonwealth and State and Territory taxes to apply to the CSC, ie the CSC is given an exemption from a number of taxes. Subclause 32(2) enables regulations to be made which reduce the scope of this exemption. The regulations do not enable new taxes to be levied, but may provide that exemptions which are specified from general taxes no longer apply. Thus the regulations may, in effect, increase the taxes payable by removing or reducing an exemption. Unfortunately, the explanatory memorandum does not explain why it is necessary to achieve this result (if it is thought desirable in the future) through regulations rather than by amending the legislation. The Committee **seeks the Minister's advice as to why this is considered an appropriate delegation of legislative power.**

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.

Delegation of legislative power

Clause 33

Subclause 33(1) provides that tax exemptions from certain taxes apply to CSC when it is performing functions and exercising powers in relation to the superannuation schemes and funds that it administers, and to the superannuation funds. Subclause 33(2) raises the same issue as subclause 32(2), as it enables regulations to be made which reduce the scope of the tax exemption provided for in subclause 33(1). (Subclause 33(3) enables the regulations made in relation to subclause 33(1) to specify different laws for different superannuation funds administered by the CSC.) Unfortunately, the explanatory memorandum does not explain why it is necessary to achieve this result (if it is thought desirable in the future) through regulations rather than by amending the legislation. **The Committee seeks the Minister's advice as to why this is considered an appropriate delegation of legislative power.**

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.

'Henry VIII' clause

Subclauses 33(4) and 34(3)

Subclause 33(4) provides that the regulations may modify the proposed new section 33 in relation to the PSSAP and the PSSAP Fund and that the section ceases to have effect at a specified time. The explanatory memorandum states at page 20 that 'this regulation-making power gives flexibility to allow the PSSAP to in future operate on the same basis as other superannuation schemes in relation to taxation'. The same issue arises in relation to subclause 34(3).

Given that the regulations made under these subclauses can amend the primary legislation, the Committee **seeks the Minister's further advice as to why this flexibility is required and why it is appropriate to enable the regulations to modify the primary legislation.**

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.

Home Insulation Program (Commission of Inquiry) Bill 2011

Introduced into the House of Representatives on 21 March 2011

By: Mr Hunt

Background

This bill establishes the Commission of Inquiry into the Home Insulation Program and for the Commission to inquire and report to the Parliament by 1 November 2011.

Poor explanatory memorandum

The explanatory memorandum accompanying this bill was brief and does little more than state the effect of the main provisions of the bill. If this bill proceeds to further stages of debate, it is requested that a more detailed explanatory memorandum be provided.

The explanatory memorandum should pay particular regard to the provision of justifications for the approach taken in relation to the abrogation of the privilege against self-incrimination (clause 14), the question of whether the various penalties prescribed are consistent with those related similar Commonwealth offences, and whether or not the 'reasonable excuse' defence for the offence in clause 20 for failing to attend a hearing or produce documents is sufficiently specified (see *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, at 28).

Inspector-General of Intelligence and Security Amendment Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Special Minister of State for the Public Service and Integrity

Background

This bill amends the *Inspector-General of Intelligence and Security Act 1986*. The amendments in the bill will:

- recognise expressly the role of the Inspector-General of Intelligence and Security (IGIS) in assisting the Government to provide the Parliament and the public with assurances that the use of special powers and capabilities by the Australian Intelligence Community (AIC) is subject to scrutiny;
- provide the IGIS with the capacity to undertake own-motion preliminary inquiries;
- extend the capacity of the IGIS to undertake own-motion full inquiries;
- provide the IGIS with the capacity to delegate the powers of the Office of the IGIS, subject to Ministerial approval;
- provide the IGIS with the capacity to release material to Royal Commissions, at the discretion of the Government, to assist Royal Commissions, while ensuring the effective operation of limitations on any unauthorised release of sensitive or classified material by current or former IGIS officers to a court, coronial inquiry or Royal Commission; and
- update and modernise a number of provisions of the Act, while not changing substantively the role, powers or functions of the IGIS.

The Committee has no comment on this bill.

Intelligence Services Legislation Amendment Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Attorney-General

Background

This bill amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Intelligence Services Act 2001* (IS Act) and the *Criminal Code Act 1995*.

The bill will make amendments to:

- align the definition of 'foreign intelligence' and the collection of foreign intelligence un the ASIO Act with the IS act and *Telecommunications (Interception and Access) Act 1979*;
- clarify that a computer access warrant authorises access to data held in the target computer at any time while the warrant is in force;
- exclude the communication of information concerning the engagement or proposed engagement of staff within the Australian Intelligence Community from the security assessment provisions in the ASIO Act;
- provide the Defence Imagery and Geospatial Organisation (DIGO) with a function to specifically allow DIGO to provide assistance to the Australian Defence Force (ADF) in support of military operations and to cooperate with the ADF on intelligence matters;
- provide a new ground for obtaining a Ministerial Authorisation for the purpose of producing intelligence on an Australian person;
- clarify that the immunity provision in section 14 of the IS Act is intended to have effect unless another law of the Commonwealth, a State or Territory expressly overrides it;
- place existing exemptions from the *Legislative Instruments Act 2004* in the IS Act rather than in the Legislative Instruments Regulations 2004; and

- clarify that the provision in Part 10.7 of the Criminal Code is intended to have effect unless another law of the Commonwealth, a State or Territory expressly overrides it.

Trespass on personal rights and liberties

Schedule 1, item 18

Item 18 of Schedule 1 proposes to insert a new subsection 36(c) into the *Australian Security Intelligence Organisation Act 1979*. The effect of the amendment would be to exclude the communication of information concerning the engagement or proposed engagement of staff within the Australian Intelligence Community (AIC) from the security assessment provisions in the ASIO Act, including notification and review rights. The provision would enable ASIO to share information about employment decisions with other members of the AIC and would place ‘ASIO on the same footing as other AIC agencies when it comes to sharing information relating to employment within the AIC’. The explanatory memorandum at page 7 states that the information to be exempted by the proposed amendment from the operation of Part IV of the ASIO Act ‘will only impact on a small group of persons’ and that employment decisions within the AIC ‘need to be made carefully, and necessarily the processes takes quite some time compared to other Government employment processes in order to ensure suitability of applicants and minimise risk of compromising national security’. The Committee notes the advice that the proposed provision is consistent with arrangements for other organisations, but in order to better evaluate the provision against Standing Order 24 seeks the Attorney-General's advice **as to what, if any, detriment the provision will cause to individuals (e.g. existing or potential AIC staff members) and particularly whether or not these provisions unduly diminish the rights of persons to be notified of, and seek review of, security assessments.**

Pending the Attorney-General'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.

**Retrospective effect
Schedule 1, item 27**

Item 27 of Schedule 1 proposes to insert a new subsection 15(7) into the *Intelligence Services Act 2001*. The new subsection would expressly state that rules made under subsection 15(1) (rules which relate to the protection of privacy) are not legislative instruments. These rules are currently exempt from the *Legislative Instruments Act* (LIA), by virtue of a provision in the *Legislative Instruments Regulations 2004*. The purpose of the amendment is to expressly provide for such exemptions in line with the recommendations of the 2008 review into the LIA. The amendment does not therefore change the law. However, item 32 (an application provision) states that the amendment applies with retrospective effect. The reason for this is that rules made under subsection 15(1) of the *Intelligence Services Act 2001* have only been expressly exempted from the LIA since 2010, when an amendment to this effect was made to the *Legislative Instruments Regulations 2004*. The explanatory memorandum explains at page 11 that ‘retrospective operation is necessary to ensure the validity of actions done in reliance on the existing rules made under subsection 15(1).’ It is unlikely that a provision designed to ensure the validity of rules which must be made having regard to ensuring that the privacy of persons is preserved as far as is consistent with the proper performance by the agencies of their functions (subsection 15(2) *Intelligence Services Act 2001*) would have a detrimental effect on any person. Nevertheless, as the explanatory memorandum does not confirm that this is indeed the case, and the Committee therefore **seeks the Attorney-General’s advice as to whether giving subsection 15(7) retrospective application could have any possible detrimental effect on a person.**

Pending the Attorney-General’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.

International Tax Agreements Amendment Bill (No.1) 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Treasury

Background

The bill amends the *International Tax Agreements Act 1953* in two ways:

- Schedule 1 modifies and streamlines the structure, and removes the majority of the existing Schedules to that Act.
- Schedule 2 gives the force of law in Australia to new bilateral taxation agreements, with Aruba, Chile, the Cook Islands, Guernsey, Malaysia, Samoa and Turkey.

Incorporating material by reference

Various

This bill amends the *International Tax Agreements Act 1953* in two ways. First, it modifies and streamlines the Act's structure. The current law incorporates the text of the relevant international tax treaties and agreements into Schedules to the Act, whereas the new law will give the force of law to the agreements specified in the legislation but will not incorporate them into the legislation. However, as the explanatory memorandum at page 13 makes clear, the specified 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 indicates at page 13 that the bill is '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 is to present the law in a less unwieldy and more convenient manner. As there is no difficulty for the public or legal profession to access the text of the specified international taxation agreements specified in this bill, the Committee has no further comment on this issue.

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

National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Treasury

Background

This bill amends the *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

Provisions within Part 3-2A of the bill introduces a requirement for lenders to provide a Key Facts Sheet for standard home loans. Provisions within Part 3-2B of the bill will:

- restrict approval of the use of credit cards above the credit limit;
- specify an allocation hierarchy for payments made under credit card contracts;
- restrict credit providers from making unsolicited invitations to borrowers to increase the credit limit of their credit card; and
- introduce a requirement for lenders to provide a Key Facts Sheet for credit card contracts.

Poor explanatory memorandum

The Committee considers that an explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including the scrutiny undertaken by this Committee) as an explanatory memorandum greatly assists those whose rights may be affected by a bill to understand the legislative proposal and it may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

In the Committee's view particular care should be taken to ensure that an explanatory memorandum which adopts a narrative style (rather than a more traditional structure in which each item in a bill is referred to in numerical order) includes an index that is accurate and cross-references every provision in the bill. Unfortunately, the explanatory memorandum to this bill did not

include an index. The Committee therefore **seeks the Treasurer's advice as to whether an amended explanatory memorandum that includes an index can be issued.**

Strict liability

Various

There are a number of strict liability offences which have been included in the bill. The general justification offered in relation to the various offences is to emphasise the importance of the objectives sought to be achieved by the proposed legislation. In light of the level of the penalties (which are within the acceptable limits for strict liability offences set out in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*) the justifications offered appear to be satisfactory. The Committee therefore **leaves the question of whether the approach in each provision is appropriate to the consideration of the Senate as a whole.**

Provision Reference	Penalty Units	Justification	EM
subclause 133AC(5)	10	The importance of the objective of ensuring consumers can compare different products through information in the Key Facts Sheets.	2.16
subclause 133BD(4)	10	The importance of the objective of ensuring consumers have access to key information relevant to their decision whether or not to obtain a particular credit card, and the straightforward nature of the requirements.	3.19
subclause 133BE(4)	10	To encourage strict compliance with the prohibition on sending out credit limit increase invitations, given the potentially adverse consequences for consumers.	3.29
subclause 133BH(4)	10	The regulations will deal with situations where compliance is impractical, eg where electronic communications between the supplier	3.46

		and the credit provider are not operating and it is not possible for the credit provider to ascertain whether a customer has reached their credit limit: EM 3.44. Strict liability reflects the importance of credit providers ensuring that they have systems in place to avoid approving transactions in excess of the default buffer.	
subclause 133BO(4)	10	The importance of credit providers ensuring that they have systems in place to attribute payments in the required order and to give effect to agreements with the consumer.	3.73

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.

Reversal of onus Various

The bill also includes a number of civil penalty and offence provisions. In some instances, for the purposes of applying these provisions, defences are specified and an evidential burden is placed on a defendant in relation to the relevant matters. The general justification offered for these provisions is that the credit provider will be in a better position to address the issue through the adoption of appropriate compliance systems or that the matters are within their knowledge or control. As these are grounds recognised in the *Guide to Framing Commonwealth Offences* in relation to all but one of these provisions the Committee therefore **leaves the question of whether the approach in each provision is appropriate to the consideration of the Senate as a whole**. However, subclause 133BL(2) provides that the matters for which the defendant bears an evidential burden are to be prescribed in the regulations. No explanation for this approach is provided in the explanatory memorandum. The Committee therefore **seeks the Treasurer's advice about the justification for delegating these matters rather than including them in the primary legislation**.

Provision	Justification	EM Ref
subclause 133AE(4)	The credit provider will be in a better position to address this issue through the adoption of appropriate compliance systems.	2.21
subclause 133AF(2)	These matters are within the knowledge or control of the credit provider.	3.19
subclause 133BC(4)	No EM reference located but it appears that the matters are within the knowledge of the credit provider.	
subclause 133BF(1)	No EM reference located but it appears that the matters are within the knowledge of the credit provider.	
subclause 133BL(2)	No EM reference located. The matters which the defendant bears an evidential burden in relation to are to be prescribed in the regulations. Further information is requested as to why this approach is appropriate.	

Delegation of legislative power

Clause 30B

Clause 30B is a power to make regulations in relation to specified matters relating to interest charges under credit card contracts. Subclause 30B(2) states that the regulations made for this purpose may provide for offences and for civil penalties. In relation to penalties for offences, subclause 30B(3) states that the penalties must not be more than 50 penalty units for individuals and 250 penalty units for a body corporate. In relation to civil penalties, the limits are 500 penalty units for an individual and 2500 units for a body corporate (these limits are well over the appropriate limits for penalties to be imposed by offences created by regulations set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (at 43)).

The explanatory memorandum states at page 28 that ‘specific provision is made for the imposition of penalties through the regulations as these reforms are intended to provide greater consistency between different credit card products’ allowing consumers to make efficient choices. It is also stated that it

is 'important that these objectives can be enforced through appropriate sanctions'.

The penalties which may be imposed by regulation are significant and it is unclear why the offences and requirements cannot adequately be specified in the legislation which will be considered in detail by Parliament. The explanatory memorandum notes, at 3.81, that the intention is to introduce reforms that will provide greater consistency in relation to annual percentage rates and will allow better comparisons between products to be made. What is not explained, however, is why these reforms must be achieved through regulations made by the executive.

In order to better evaluate whether these provisions breach Standing Order 24 the Committee **seeks the Treasurer's further advice as to why it is necessary to provide for offences and civil penalties in relation to the matters referred to in subclause 30B of the bill through regulations rather than primary legislation and also seeks the Treasurer's advice about examples of the conduct for which individuals may be subject to the penalties.**

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

'Henry VIII' clause Subclause 30B(5)

Subclause 30B(5) states 'This Division has effect subject to regulations made for the purpose of subsection (1)'. A reference to this subclause could not be located in the explanatory memorandum. As this appears to allow for regulations to take effect despite the words of the bill under which they are authorised the Committee **seeks the Treasurer's advice as to why this provision is an appropriate delegation of legislative power.**

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

Native Title Amendment (Reform) Bill 2011

Introduced into the Senate on 21 March 2011

By: Senator Siewert

Background

This bill amends the *Native Title Act 1993*. The bill addresses concerns raised in submissions to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Native Title Amendment Bill 2009* and the 2009 Native Title Report from the Aboriginal and Torres Strait Islander Social Justice Commissioner.

The reforms in the bill address two key areas in the interests of native title claimants:

- the barriers claimants face in making the case for a determination of native title rights and interests; and
- procedural issues relating to the future act regime.

The Committee has no comment on this bill.

Product Stewardship Bill 2011

Introduced into the Senate on 23 March 2011

Portfolio: Sustainability, Environment, Water, Population and Communities

Background

This bill establishes a national framework for the management of environmental, health and safety impacts of products, and in particular those impacts associated with the disposal of products.

The National Waste Policy was endorsed by all Australian governments, through both the Environment Protection and Heritage Council (November 2009) and the Council of Australian Governments (August 2010).

Delegation of legislative power

Various

This bill establishes a national framework for the management of the environmental, health and safety impacts of products, particularly those associated with the disposal of products. The explanatory memorandum emphasises at page 3 that the bill is a ‘framework’ bill, ‘in the sense that regulations will determine the products and persons that obligations apply to’. The Committee notes that this approach has been endorsed by all Australian governments and that it is stated at page 3 of the explanatory memorandum that it ‘avoids the need for product-specific legislation and promotes a consistent approach to matters such as reporting, compliance and enforcement’.

It is intrinsic to this approach that important matters concerning which products and parties should be subject to the various regulatory approaches set out in the bill and the nature of the obligations to be imposed will be determined by regulation.

The Committee notes that where regulation making powers in the Bill enable the creation of civil penalty provisions (as in clause 24 and clause 38), this is done in a manner consistent with the appropriate limits set out at page 43 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (see the explanatory memorandum at page 23). Also, where regulations enable the imposition of mandatory obligations, the bill includes a

detailed list of matters to which the regulated actions must relate (subclause 37(2)) and includes an indicative list of the sorts of obligations which may be imposed (subclause 37(3) (see the explanatory memorandum at 29-30)).

Although the Committee prefers in general to see important matters dealt with in primary legislation, the Committee **leaves the question of whether the overall regulatory approach adopted in this bill appropriate to the consideration of the Senate as a whole.**

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.

Merit review

Clause 93

Clause 93 of the bill contains a list of reviewable decisions. As the explanatory memorandum notes at page 50, 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 may 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.

This provision thus has 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 argues at page 50 that this modified approach is warranted 'because of the particular policy and statutory context'. In relation to each reviewable decision, the explanatory memorandum at pages 50 to 52 gives a detailed explanation of this general point.

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

Remuneration and Other Legislation Amendment Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Prime Minister

Background

This bill amends the jurisdiction of the Remuneration Tribunal in determining the base salary of parliamentarians and the remuneration of Departmental Secretaries and other offices established under the *Public Service Act 1999*.

The Committee has no comment on this bill.

Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Safety, Rehabilitation and Compensation Act 1988* to:

- enable Comcare to access the Consolidated Revenue Fund (CRF) to pay compensation claims in respect of diseases with a long latency period (such as asbestos related diseases) where the employment period was pre-1 December 1988 but where the condition did not manifest itself until after that date;
- allow for continuous workers' compensation coverage for employees while overseas and who are in a declared place, or who belong to a declared class of employee. An example of the latter might be members of the Australian Civilian Corps;
- re-instate claims arising from off-site recess injuries;
- allow compensation for medical expenses to be paid, where payment of other compensation is suspended; and
- allow for time limits for claim determination;

The bill also makes a number of minor technical amendments to the *Occupational Health and Safety (Maritime Industry) Act 1993* and the *Seafarers Rehabilitation and Compensation Act 1992*.

Standing appropriation

Item 8 of Schedule 1 would insert a new paragraph 90B(ab) into the *Safety, Rehabilitation and Compensation Act 1988*. The effect of this provision is to reinstate Comcare's access to the Consolidated Revenue Fund to pay compensation for claims in respect of diseases with a long latency period, where the relevant employment period was prior to the enactment of the *Safety, Rehabilitation and Compensation Act 1988*. The explanatory

memorandum states at page 5 that this access was 'closed off' as an indirect result of the decision in *Comcare v Etheridge* [2006] FCAFC 27.

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

Standing appropriation

Item 12 of Schedule 2 is a savings provision relating to amounts accessed by Comcare from the CRF, purportedly under section 90B of the *Safety, Rehabilitation and Compensation Act 1988*, but which the Federal Court has held were not authorised (ie amounts to pay for liabilities arising from disease claims attributable to employment before 1 December 1988—see the explanatory memorandum at page 5. The purpose of item 12 is to establish a mechanism to address the effect of the Federal Court case by enabling the Commonwealth to recover as a debt the wrongly appropriated funds but proposing also that Comcare is entitled to an equal amount (and that the Commonwealth may off-set the debt against Comcare's entitlement). Given that there is no possible adverse effect for any person and that Parliament has the opportunity to scrutinise the appropriation of the CRF for the purposes of this savings provisions the Committee makes no further comment.

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

Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Attorney-General

Background

This bill will establish a framework for the provision of financial assistance for Australians who are injured overseas as a result of terrorist acts and for close family members of Australians who are killed overseas as a result of terrorist acts.

In particular, the Bill will:

- enable Australians who are victims of a declared overseas terrorist incident to claim financial support of up to \$75,000;
- enable the Prime Minister to declare that a relevant overseas terrorist incident is one to which the Scheme applies;
- establish eligibility criteria so that payments can be made to either long-term Australian residents who are victims of a relevant overseas terrorist act, or in the event of the death of a victim, close family members;
- ensure that victims are not required to repay or deduct Medicare or other benefits from any payment received under the Scheme; and
- enable the enactment of legislative instruments to provide further guidance on the amount of assistance that each victim, or close family member, should receive.

Delegation of legislative power

Subsection 1061PAF(1)

This bill proposes to amend the social security legislation so as to provide for payments to Australian victims of overseas terrorist acts. The payments are capped at \$75000 per claim, and in determining the amount payable to a person, the Secretary must make a determination in accordance with the AVTOP principles. Proposed subsection 1061PAF(1) of the *Social Security Act*, requires the Minister to determine these principles by legislative

instrument. These principles are of considerable importance to the overall operation of this new scheme and the Committee is concerned to ensure that as much important information as possible is contained in primary legislation. Nevertheless, it is the case that the proposed subsection 1061PAF(2) sets out a long indicative list of factors that the AVTOP principles may provide are to be taken into account in determining the payment. Although this list does not limit the Minister's power under subsection 1061PAF(1), it does provide a level of legislative guidance. Further, although the explanatory memorandum does not emphasise the point in relation to the AVTOP being made by legislative instrument, the Minister has an obligation to consult a number of representative and community groups prior to the determination of the principles and each year after the principles commence. This continuing obligation to consult as to the appropriateness of the principles provides a reason for flexibly developing the principles over time and based on experience in their application. In the circumstances the Committee **leaves the question of whether the approach is appropriate to the consideration of the Senate as a whole.**

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.

Social Security Legislation Amendment (Job Seeker Compliance) Bill 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Social Security (Administration) Act 1999* to introduce a suspension of payment for job seekers following an initial failure to attend an appointment or, in some circumstances, an activity such as training or Work for the Dole.

The Committee has no comment on this bill.

Statute Stocktake Bill (No.1) 2011

Introduced into the House of Representatives on 23 March 2011

Portfolio: Finance and Deregulation

Background

This bill repeals 39 redundant special appropriations relating to the Commonwealth's financial framework. This is consistent with the Government's response on 9 December 2008 to former Senator Andrew Murray's report, *Operation Sunlight – Overhauling Budgetary Transparency* (specifically recommendation 12).

The Committee has no comment on this bill.

Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Finance and Deregulation

Background

This bill is part of a package of three bills to establish governance arrangements for Commonwealth superannuation schemes. The bill makes consequential amendments to a range of Commonwealth Acts to take account of the changes to governance arrangements for the schemes.

Retrospective application

Schedule 2, item 20

Item 20 of Schedule 2 allows for retrospective amendments to instruments to be made. The explanation for this in the explanatory memorandum at page 42 is that: ‘The retrospective application of instruments made in accordance with the authority included in this item will not disadvantage the rights of any person or impose any liabilities on any person...it is intended to allow time for references in instruments to be updated’ to reflect the new entities established by the relevant legislation.

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

Tax Laws Amendment (2011 Measures No.2) Bill 2011

Introduced into the House of Representatives on 24 March 2011

Portfolio: Treasury

Background

This bill amends various taxation laws. These amendments include:

- Schedule 1 amending the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients (DGRs) to make two entities DGRs, and change the name of another entity.
- Schedule 2 amending the *Superannuation Industry (Supervision) Act 1993* to permit the regulations to impose rules on self managed superannuation fund trustees that make, hold or realise investments involving collectables or personal use assets.
- Schedule 3 amending the *Superannuation Industry (Supervision) Act 1993* and the *Retirement Savings Accounts Act 1997* to allow superannuation fund trustees and retirement savings account providers to use tax file numbers (TFNs):
 - as a method of locating member accounts; and
 - to facilitate the consolidation of multiple member accounts.
- Schedule 4 amending:
 - the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to replace the current mechanism for ensuring Australian taxes, and certain Australian fees and charges are not subject to the goods and services tax with specific legislative exemptions;
 - the GST Act to allow for the making of regulations to treat an Australian tax, or an Australian fee or charge in a particular way; and
 - the *A New Tax System (Luxury Car Tax) Act 1999* to account for changes being made to the GST Act.
- Schedule 5 makes technical corrections and other minor and miscellaneous amendments to the taxation laws.

Delegation of legislative power Schedule 3

Schedule 3 of the bill makes amendments which allow superannuation funds providers to use tax file numbers to locate member accounts and to facilitate the consolidation of multiple member accounts. Overall, the explanatory memorandum at pages 20 and 21 provides a detailed and satisfactory account of the privacy issues raised by the amendments and why they are consistent with the National Privacy Principles. In particular, it is noted that:

- superannuation funds will not be able to use TFNs to replace member account numbers;
- use of TFNs for the purposes outlined in the legislation is a limited extension of the current TFN use rather than a new application;
- the increased use of TFNs has been authorised by amending the superannuation law as referenced under the TFN Guidelines (which were issued under the *Privacy Act*);
- the increased use of TFNs will be safeguarded by regulations (see p 21-22 of the explanatory memorandum) that ensure member identity is protected and member consent is obtained where appropriate;
- the law does not alter an individual's right to choose not to quote a TFN; and
- superannuation funds are not obliged to increase their TFN use.

However, it is also proposed that it will be left to the regulations to 'contain necessary safeguards and processes' (see the explanatory memorandum at page 22). The Committee is concerned that as much important information as possible is contained in primary legislation so the Committee **seeks the Treasurer's advice as to why these safeguards and processes cannot be included in the primary legislation.**

Pending the Treasurer'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.

**Retrospective effect
Schedule 4, section 81-25**

Schedule 4 of the bill replaces the current mechanism for ensuring Australian taxes and certain fees are not subject to the GST with specific legislative exemptions. The taxes, fees or charges are excluded from the GST by the proposed new Division 81 or by regulations. Regulations may also prescribe that the GST does apply to certain taxes, fees and charges. The proposed section 81-25 states that regulations made for the these purposes ‘may be expressed to take effect from a date before the regulations are registered under’ the *Legislative Instruments Act 2003*. (This subsection thus departs from the normal rule stated in subsection 12(2) of the *Legislative Instruments Act*, concerning the date at which instruments take effect.)

The explanatory memorandum at page 33 notes that the operation of section 81-25 will allow:

...for the desired GST treatment for a payment, or discharging of the liability to make such a payment, to be achieved where a new Australian tax of Australian fee or charge is imposed under an Australian law before regulations can be made to provide for the desired treatment.

Given the importance of people knowing in advance their legal rights and liabilities to facilitate planning their affairs, the Committee **seeks the Treasurer's advice as to why it is necessary to adopt this approach and the extent of any detriment that may be suffered by overriding the operation of subsection 12(2) of the *Legislative Instruments Act 2003*.**

Pending the Treasurer'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.

Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011

Introduced into the House of Representatives on 18 March 2010 and reintroduced on 23 March 2011

Portfolio: Broadband, Communications and the Digital Economy

This bill is substantially similar to a bill introduced in the previous Parliament. This *Digest* deals with any comments on the new provisions.

Background

The bill amends the *Telecommunications Act 1997* to provide a legislative framework for the installation of optical fibre and fibre-ready telecommunications infrastructure in new developments in Australia.

Delegation of legislative power

Various

This bill is similar to a bill introduced in March 2010 which lapsed when the last Parliament was dissolved. This new version of the bill continues to include provisions which delegate significant legislative power in relation to the scheme being introduced. This general issue was commented on by the Committee in *Alert Digest No. 5 of 2010*. A response from the Minister was included in the Committee's *Eighth Report of 2010* at pages 306-7. In the circumstances the Committee has no further comment.

In the circumstances, the Committee makes no further comment.

Tertiary Education Quality and Standards Agency Bill 2011

Introduced into the Senate on 23 March 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill establishes the Tertiary Education Quality and Standards Agency and a new national regulatory and quality assurance environment for Australian higher education.

Possible delayed commencement

Clause 2

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3.

In this bill, clause 9 of Part 1; Parts 2, 3 and 4; Division 2 of Part 5; Parts 6 and 7; and Part 11 are to commence on the later of 1 January 2012 and the day after the end of the 7 month period that begins on the day this Bill receives Royal Assent. In this case no information about the rationale of the commencement provision is included in the explanatory memorandum. The Committee therefore **seeks the Minister's advice about the reason for the proposed commencement date.**

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.

Incorporating material by reference

Subclause 58(5)

The Minister for Tertiary Education and the Research Minister are required to make standards under clause 58 in relation to a number of matters. Subclause 58(5) provides for the incorporation of instruments as in force or existing from time to time in relation to legislative instruments. This is an issue of interest to the Committee because of the prospect of changes being made to the law in

the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. However, given the justification outlined in the explanatory memorandum at page 34 that the provision allows the various parts of a framework (the Higher Education Standards Framework) to intersect the Committee has no further comment.

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

Privilege against self-incrimination Clauses 69 and 76

Clause 69 of the bill abrogates the privilege against self-incrimination in relation to the giving of information or producing of a document which is required by section 63 (as part of the investigative powers set out in Part 6 of the bill). However, subclause 69(2) provides that the evidence thus obtained as a result of these powers cannot be used directly or indirectly in civil proceedings for the recovery of a penalty or in criminal proceedings. There are standard exceptions which relate to an offence set out in clause 64 of the bill for failing to provide information or produce documents (as required by clause 63) to Criminal Code provisions concerning the provision of false or misleading information or documents to Commonwealth officials. The explanatory memorandum at page 39 gives detailed consideration to the appropriateness of this approach.

The same issue also arises in relation to clause 76 relating to answering questions or producing a document as required under clause 75(2). The explanatory memorandum at page 45 again gives detailed consideration to the appropriateness of this approach.

In considering the abrogation of the privilege against self-incrimination, the Committee looks to see whether the public benefit which is to be achieved will decisively outweigh the resultant harm to the maintenance of civil rights. In this instance, the explanatory memorandum states at page 39 that TEQESA will ‘necessarily rely on information provided by persons who are, or were, connected with current or former registered higher education providers in undertaking its regulatory and quality assurance functions’ and that these are ultimately aimed at protecting students of these bodies. The provisions abrogating self-incrimination are balanced somewhat by the provision of use

and derivative use immunity and the explanatory memorandum does provide a justification for the approach adopted in each instance.

In the circumstances the Committee **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

Reversal of onus

Clause 120

Clause 120 provides, in relation to the civil penalty provisions, that mistake of fact is a defence. Subclause 120(3) indicates that a defendant bears an evidential burden in relation to this defence. The explanatory memorandum states that this is appropriate as mistake of fact is a matter which is 'peculiarly within the defendant's knowledge and not available to the prosecution' (at 66).

In the circumstances, the Committee makes no further comment about the proposed approach.

Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011

Introduced into the Senate on 23 March 2011

Portfolio: Education, Employment and Workplace Relations

Background

This bill provides for amendments to Commonwealth legislation consequential to the establishment of the Tertiary Education Quality and Standards Agency.

The Committee has no comment on this bill.

Therapeutic Goods Amendment (2011 Measures No.1)

Introduced into the House of Representatives on 23 March 2011

Portfolio: Health and Ageing

Background

This bill amends the *Therapeutic Goods Act 1989*. These amendments include:

- amendments to section 9D of the Act and subsections 31(1B) and (1C) relating to the new procedures for the processing of prescription medicines;
- changes in the way that evaluation fees for applications for registration of prescription medicines are payable with the effect that an applicant will be required to pay the entire evaluation fee up front (ie at the time that the application is accepted for evaluation) but will be entitled to a refund of 25% of that fee if the evaluation is not completed within the period prescribed by the regulations; and
- transitional provisions providing for the removal of old standard conditions when the first legislative instrument made under subsection 28(2) of the Act takes effect and to enable the Minister, in an instrument made under subsection 28(2), to provide that particular standard conditions only apply to future entries of goods in the Australian Register of Therapeutic Goods.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Australian Civilian Corps Bill 2010

[Digest 8/10 and response in 3/11 Report]

On 21 March 2011 nine government amendments were agreed to and a supplementary explanatory memorandum and correction to the explanatory memorandum was tabled in the Senate. On the 22 March 2011 the House of Representatives agreed to the Senate amendments and the bill was passed. The Committee thanks the Minister for responding to the issues it raised in relation to this bill.

Civil Dispute Resolution Bill 2010

[Digest 8/10 - no comment]

On 23 March 2011 three government amendments were agreed to and a supplementary explanatory memorandum tabled in the Senate. On 24 March 2011 the House of Representatives agreed to the Senate amendments and the bill was passed. None of the amendments fall within the Committee's terms of reference contained in Standing Order 24.

Combating the Financing of People Smuggling and Other Measures Bill 2011

[Digest 2/11 and response in 3/11 Report]

On 22 March 2011 a correction to the explanatory memorandum was tabled in the House of Representatives.

Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011

[Digest 2/11 and response in 3/11 Report]

On 21 March 2011 a replacement explanatory memorandum was tabled in the House of Representatives. The Committee thanks the Minister for responding to the issues it raised about the bill.

Defence Legislation Amendment (Security of Defence Premises) Bill 2010
[Digest 8/10 and response in 1/11 Report]

On 21 March 2001 a replacement explanatory memorandum was tabled in the Senate. The Committee thanks the Minister for responding to an issue it raised about the bill.

Human Services Legislation Amendment Bill 2010
[Digest 1/11 and response in 3/11 Report]

On 21 March 2011 a replacement explanatory memorandum was tabled in the House of Representatives. On 23 March 2011 the House of Representatives agreed to 55 government amendments and tabled a supplementary explanatory memorandum. None of the amendments fall within the Committee's terms of reference contained in Standing Order 24.

National Broadband Network Companies Bill 2010
[Digest 1/11 and response in 3/11 Report]

On 24 March 2011 the Senate agreed to 18 Government amendments and tabled a supplementary memorandum. On 25 March 2001 the Senate agreed to two government amendments and one Australian Greens amendment. On 28 March 2001 the House of Representatives agreed to the Senate amendments and the Act has received the Royal Assent. In the circumstances the Committee has no comment about these amendments.

National Vocational Education and Training Regulator Bill 2010
[Digest 1/11 and response in 2/11 Report]

On 23 March 2011 a replacement memorandum and addendum to the replacement explanatory memorandum was tabled in the Senate and the bill passed with no amendments. The Committee thanks the Minister for responding to some of the issues it raised.

National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011
[Digest 2/11 and response in 3/11 Report]

On 24 March 2011 an addendum to the explanatory memorandum was tabled in the House of Representatives and the bill passed with no amendments.

National Vocational Education and Training Regulator (Transitional Provisions) Bill 2011

[Digest 1/11 and response in 2/11 Report]

On 23 March 2011 an addendum to the explanatory memorandum was tabled in the Senate and the bill passed with no amendments.

Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011

[Digest 1/11 and response in 3/11 Report]

On 25 March 2011 the Senate agreed to 35 Government amendments, one Australian Greens amendment and 24 Independent (Xenophon) amendments, a supplementary memorandum was also tabled. On 28 March 2011 the House of Representatives agreed to the Senate amendments and the Act has received the Royal Assent. In the circumstances the Committee has no comment about these amendments.

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

The Chairs and Deputy Chairs of Commonwealth, and state and territory Scrutiny Committees have noted (most recently in 2000) difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because ‘national scheme’ bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the identification of national schemes of legislation, the Committee’s practice is to note bills that give effect to such schemes as they come before the Committee for consideration.

Product Stewardship Bill 2011

This bill establishes a national framework for the management of environmental, health and safety impacts of products, and in particular those impacts associated with the disposal of products.

The National Waste Policy was endorsed by all Australian governments, through both the Environment Protection and Heritage Council (November 2009) and the Council of Australian Governments (August 2010).

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*.

Bills introduced with standing appropriation clauses in the 43rd Parliament from the previous *Alert Digest*

Carbon Credits (Carbon Farming Initiative) Bill 2011 — subclause 183(4)
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ComSuper Bill 2011 — clause 21 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)

Governance of Australian Government Superannuation Schemes Bill 2011 – – subparagraphs 34(1)(b), 34(2)(b), 35(3)(a) and subsection 35(4)
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Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2011 — Schedule 2, Part 2, subitem 12(5)
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Other relevant appropriation clauses in bills in the 43rd Parliament from the previous *Alert Digest*

Schools Assistance Amendment (Financial Assistance) Bill 2011 — Schedule 1, item 4: special appropriation clause – for a finite amount and a finite period of time
