

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

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# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator M Fifield (Chair)  
Senator C Brown (Deputy Chair)  
Senator M Bishop  
Senator S Edwards  
Senator G Marshall  
Senator R Siewert

## 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.

## **Banking Amendment (Covered Bonds) Bill 2011**

Introduced into the House of Representatives on 15 September 2011

Portfolio: Treasury

### **Background**

This bill makes amendments to the *Banking Act 1959* to enable Authorised Deposit-taking Institutions, which includes banks, credit unions and building societies, to issue covered bonds

*The Committee has no comment on this bill.*

## Clean Energy Bill 2011

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and Energy Efficiency

### Background

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill sets out the structure of the mechanism and process for its introduction. These include:

- entities and emissions that are covered by the mechanism;
- entities' obligations to surrender eligible emissions units;
- limits on the number of eligible emissions units that will be issued;
- the nature of carbon units;
- the allocation of carbon units, including by auction and the issue of free units;
- mechanisms to contain costs, including the fixed charge period and price floors and ceilings;
- linking to other emissions trading schemes;
- assistance for emissions-intensive, trade-exposed activities and coal-fired electricity generators;
- monitoring, investigation, enforcement and penalties;
- administrative review of decisions; and
- reviews of aspects of the mechanism over time.

## **Possible insufficient Parliamentary Scrutiny Subclause 15(4)**

Subclause 15(4) of the Bill provides that section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to regulations to declare a carbon pollution cap pursuant to clause 14 of the Bill. However, subclause 15(2) provides for the disallowance of such regulations by either House of Parliament. The disallowance provision in the *LIA* states that an instrument or provision of an instrument will be taken to have been disallowed in circumstances where a notice of a motion to disallow has not, after 15 days of the giving of that notice, been disposed of. Subclause 15(3) of the Bill provides that if neither House passes a resolution disallowing the regulations within 15 days of a notice having been given, that ‘the regulations take effect on the day immediately after the last day upon which such a resolution could have been passed if it were assumed that the notice to disallow the regulations was given in each house on the last day’ for issuing a notice after the regulations have been tabled in Parliament. Unfortunately the explanatory memorandum does not outline the reasons for the proposed approach to disallowance, and the Committee therefore **seeks the Minister's advice as to the justification for excluding the usual operation of the disallowance provision in section 42 of the *Legislative Instruments Act*.**

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

## **Retrospective application Clause 29**

Clause 29 of the Bill is an anti-avoidance provision. It enables the Regulator to determine that the sole or dominant purpose of a scheme was to obtain the benefit of one or more threshold provisions in relation to a relevant facility for an eligible financial year by bringing 'facilities or activities below thresholds without reducing emissions from those facilities' (see page 254 of the explanatory memorandum). The effect of this provision is that in these circumstances a person is not entitled to obtain the benefit of the relevant threshold provision.

The provision applies in relation to any scheme entered into after 15 December 2008. Although the explanatory memorandum, at page 254, states that this is the date when the Government first announced the details of the CPRS, it is regrettable that no further justification is offered for this approach. As the anti-avoidance provision can apply to arrangements undertaken prior to it becoming law the Committee **seeks the Minister's further explanation of the justification for its retrospective application.**

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

### **Standing appropriation Clauses 116 and 132**

Clause 116 provides for the buy-back of certain free carbon units. Subclause 116(5) provides that the Consolidated Revenue Fund is appropriated for the purposes of making payments under this section, which establishes a standing appropriation.

In its *Fourteenth Report of 2005*, the Committee stated at page 272 that:

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

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation in the period during which it applies.

In this instance, a formula for determining the buy-back amount is outlined at 116(2) and the explanatory memorandum at paragraph 3.97 states that:

The scope of this standing appropriation is limited in two ways:

- firstly, the amount of the buy-back facility cannot exceed the maximum number of units that can be issued under Parts 7 and 8 for fixed charge years (see Chapters 5 and 6) for which the price is fixed in each year; and
- secondly, it is limited to the fixed charge years (that is from 1 July 2012 to 30 June 2015), and does not carry on indefinitely.

Clause 132 relates to the refund applicable if a liable entity has a positive final surplus surrender number corresponding to a fixed charge year (see paragraph 4.39 of the explanatory memorandum). Subclause 132(3) provides that the Consolidated Revenue Fund is appropriated for the purposes of making payments under this section, which establishes a standing appropriation. By its terms the appropriation is limited to the fixed charge years and a formula for calculating the amount of the refund is outlined at 132(2).

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

## **Retrospective effect**

### **Clause 208**

Clause 208 of the Bill provides that a court may order a person convicted of a criminal offence relating to fraudulent conduct may be ordered to relinquish a specified number of carbon units where carbon units issued to that person were attributable to the commission of the offence. Subclause 208(6) provides that ‘it is immaterial whether the conviction occurred before, at or after the commencement of this section’. Regrettably this provision is not mentioned in the explanatory memorandum and the Committee therefore **seeks the Minister's advice as to the appropriateness of clause 208 applying in relation to convictions that occurred prior to the commencement of the section.**

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

## **Privilege against self-incrimination Clauses 225 and 236**

Clauses 225 and 236 provide that a person cannot refuse to produce information or documents or to answer questions (if required to do so pursuant to clauses 221 of 235) on the grounds that it might incriminate them or expose them to a penalty. However, these provisions provide for both a use and derivative use immunity, which means that anything obtained as a direct or indirect consequence of the information provided is not admissible in evidence against an individual in civil proceedings for the recovery of a penalty (other than the penalty for failing to relinquish units and late payment penalty under this Act) and criminal proceeding (unless the proceedings are for an offence that relates to information-gathering by the Regulator, involving the provision of false or misleading information).

The form of this provision is consistent with those found in a number of other Commonwealth regulatory statutes and is not inconsistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement*. The Committee typically insists that the need for any abrogation of the privilege against self-incrimination is discussed in detail in explanatory memoranda. As the explanatory memorandum does address this issue (see paragraph 7.45) and as both use and derivative use immunity are provided for, the Committee **leaves the question of the appropriateness of this approach to the Senate as a whole.**

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

## **Offence – executive officer responsibility Clauses 248 and 249**

Clause 248 of the Bill provides that executive officers of bodies corporate are liable for a contravention of a civil penalty provision by the body corporate where the executive officer knew or was reckless or negligent as to whether the contravention would occur. Clause 249 provides that executive officers have a defence that they took reasonable steps to prevent the contravention. The explanatory memorandum at page 253 provides a detailed justification of this approach in relation to the liability of an executive officer. The explanatory memorandum notes that the approach is consistent with that taken in other Commonwealth laws, is consistent with the recommendations of the

ALRC in *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*, and that it ensures compliance is treated seriously at a high level within liable entities. The explanatory memorandum (at paragraph 7.130) also notes that liability only applies if there is a degree of blame that can be attributed to the executive office holder and ‘offers some protection to the individuals involved’. In the circumstances the Committee **leaves the question of the adequacy of the justifications for this approach to the consideration of the Senate as a whole.**

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

## **Reversal of onus**

### **Clause 261**

Clause 261 has the effect of placing an evidential burden of proof in relation to establishing that a person is not liable to have a civil penalty order made against them on the basis of having considered the relevant facts and being under a mistaken but reasonable belief about those facts. The explanatory memorandum justifies this approach at page 245 by reference to the matter being peculiarly within the defendant’s knowledge and, to this extent, it is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement*. The Committee notes that this sort of provision appears in other Commonwealth laws and **leaves the question of the appropriateness of the approach to the Senate as a whole.**

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

## **Standing appropriation**

### **Subclause 303A(2) and 303B(3)**

Subclause 303A(2) provides that the Consolidated Revenue Fund is appropriated for the purposes of paying amounts payable by the Commonwealth under a contract or arrangement with a constitutional corporation, authorised by the Treasurer, made for the purpose of protecting energy security.

In its *Fourteenth Report of 2005*, the Committee stated at page 272 that:

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

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation on the period during which it applies. In this instance, the explanatory memorandum at paragraph 6.191 merely repeats the effect of the provision.

The same issue arises in relation to subclause 303B(3).

The Committee therefore **seeks the Minister's advice as to the reasons for including these standing appropriations in the bill, which has the effect of excluding the appropriations from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process.**

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

## **Incorporating material by reference**

### **Clause 309**

Clause 309 enables regulations to be made that apply, adopt or incorporate matters contained in other instruments as in force or existing from time to time. The appropriateness of this approach is comprehensively addressed in the explanatory memorandum and the Regulator will be required to publish documents on an easily accessible webpage (see paragraphs 11.38 to 11.43). In the circumstances 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 this clause.*

## **Clean Energy (Charges – Customs) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and Energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill provides that the charge payable by a person to the Commonwealth for issue of a carbon unit as the result of an auction, or for a fixed charge, or on a unit shortfall, is a duty of customs within the meaning of section 55 of the Constitution.

*The Committee has no comment on this bill.*

## **Clean Energy (Charges – Excise) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and Energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill provides that the charge payable by a person to the Commonwealth for issue of a carbon unit as the result of an auction, or for a fixed charge, or on a unit shortfall, is a duty of excise within the meaning of section 55 of the Constitution.

*The Committee has no comment on this bill.*

## **Clean Energy (Consequential Amendments) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and Energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism. The bill makes consequential amendments to ensure:

- National Greenhouse and Energy Reporting System (NGERS) supports the mechanism;
- the Registry covers the mechanism and the Carbon Farming Initiative (CFI);
- the Regulator covers the mechanism, CFI, the Renewable Energy Target and NGERS;
- the Regulator and Authority are set up as statutory agencies and regulated by public accountability and financial management rules;
- that emissions units and their trading are covered by laws on financial services;
- that activities related to emissions trading are covered by laws on money laundering and fraud;
- synthetic greenhouse gases are subject to an equivalent carbon charge applied through existing regulation of those substances;
- the Regulator can work with other regulatory bodies, including the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Transaction Reporting and Analysis Centre (Austrac);
- the taxation treatment of emissions units for the purposes of GST and income tax is clear; and
- the Conservation Tillage Refundable Tax Offset is established.

## **Henry VIII Schedule 1, item 239**

Item 239 of Schedule 1 of the bill includes a ‘Henry VIII clause’. The proposed subsection 14A(2) provides that regulations made under the proposed subsection 14A(2) have effect despite any other provision of the *Clean Energy Act 2001*. The purpose of the regulation making power is to ensure that Kyoto Protocol rules are applied in relation to the operation of the carbon pricing mechanism. Given this purpose, the reason for the ability of the regulations to have effect despite any provision in the *Clean Energy Act* may be justified, but it is regrettable that the explanatory memorandum at page 87 does not address this question. Given the limited focus of the regulation making power—namely, to ‘provide that, if there is an entry for a Kyoto unit in a specified Commonwealth Registry account, the unit cannot be surrendered under the *Clean Energy Act 2011*—the Committee **leaves the question of the appropriateness of the approach to the Senate as a whole.**

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

## **Delegation of legislative power Schedule 3, items 1 and 5**

Items 1 and 5 of Schedule 3 provide that the Regulator may refuse or approve an application (proposed new subsection 11(2)) or may suspend a registration (proposed subsection 30A(2)) on grounds specified in the regulations. As the explanatory memorandum does not explain the need for the grounds for these decisions to be specified in the regulations the Committee **seeks the Minister's advice as to the need for these proposed delegations of power.**

*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.*

## **Clean Energy (Customs Tariff Amendment) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Home Affairs

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill amends the *Customs Tariff Act 1995* to impose a carbon price on aviation and non-transport gaseous fuels through customs tariff.

*The Committee has no comment on this bill.*

## **Clean Energy (Excise Tariff Legislation Amendment) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Treasury

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill amends the *Excise Tariff Act 1921* to impose a carbon price on aviation and non-transport gaseous fuels.

*The Committee has no comment on this bill.*

## **Clean Energy (Fuel Tax Legislation Amendment) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Treasury

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill amends the *Fuel Tax Act 2006* to reduce the business fuel tax credit entitlement of non-exempted industries for their use of liquefied and gaseous transport fuels.

*The Committee has no comment on this bill.*

## **Clean Energy (Household Assistance Amendments) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill amends relevant legislation to provide increased payments to pensioners, allowees and family payment recipients before the commencement of the carbon pricing scheme.

### **Merits review**

#### **Schedule 8, item 10 and generally**

Proposed sections 65KO and 65KT, to be inserted into *A New Tax System (Family Assistance) Act 1999* by item 10 of Schedule 8 of the bill, require the Secretary to give notice of a determination and variation of a determination which states various matters, including that claimants may apply for review of the determination or variation. The proposed subsections 65KO(2) and 65KT(2) provide that a determination is not ineffective by reason only that a requirement that determinations state various matters has not been complied with. The explanatory memorandum merely repeats the effect of these proposed subsections. The Committee is interested to understand the effect of these provisions and, in particular, **seeks the Minister's advice as to whether they may have any adverse consequences for enabling claimants to exercise their right to seek review of the determination and variation decisions. The Committee also seeks the Minister's advice about the review arrangements in place for all other types of assistance provided for in the Bill.**

*Pending the Minister's advice, 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.*

## **Clean Energy (Income Tax Rates Amendments) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Treasury

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

This bill amends the *Income Tax Rates Act 1986* to provide payment increases for pensioner, allowees and family payment recipients and provide income tax cuts and establish new supplements for low-and middle-income households.

*The Committee has no comment on this bill.*

## **Clean Energy (International Unit Surrender Charge) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and Energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

This bill imposes the charge payable by a person to the Commonwealth for the surrender of an international unit in the years beginning on 1 July of 2015, 2016 and 2017, as a tax within the meaning of section 55 of the Constitution.

*The Committee has no comment on this bill.*

## Clean Energy Regulator Bill 2011

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and Energy Efficiency

### Background

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill will establish the Clean Energy Regulator, a new statutory authority, responsible for administering the carbon price mechanism.

### Reversal of onus

#### Part 3, clauses 43, 49 and 50

Part 3 of this bill deals with the release of information obtained by the Regulator. Clause 43 provides for an offence in relation to the disclosure or use of protected information. Subclause 43(2) provides for exceptions to this offence in circumstances where the disclosure or use of the information is authorised by a provision in Part 3 of the Bill or is in compliance with a requirement under a law of the Commonwealth or a prescribed law of a State or Territory. The defendant, however, bears an evidential burden in relation to the matters relevant to these exceptions. The explanatory memorandum at paragraph 1.66 justifies this approach because 'in many cases it is peculiarly within the defendant's knowledge as to which of the exceptions, if any, apply'. The Committee notes that this approach to the release of protected information is adopted in a number of other regulatory statutes.

The same issue arises in relation to subclauses 49(7) and 50(7) and it receives the same justification in the explanatory memorandum at paragraph 1.70.

In the circumstances the Committee **leaves the question of the appropriateness of these provisions to the consideration of the Senate as a whole.**

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

## **Clean Energy (Tax Laws Amendments) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Treasury

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill contains consequential amendments to offsets and levies in the personal tax system.

*The Committee has no comment on this bill.*

## **Clean Energy (Unit Issue Charge - Auctions) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill imposes as a tax the charges for issue of carbon units (whether fixed fee or auctioned) so far as the charges are taxation, but not duties of customs or duties of excise, within the meaning of section 55 of the Constitution.

*The Committee has no comment on this bill.*

## **Clean Energy (Unit Issue Charge – Fixed Charge) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill imposes fixed charges for issue of carbon units so far as the charges are taxation, but not duties of customs or duties of excise, within the meaning of section 55 of the Constitution.

*The Committee has no comment on this bill.*

## **Clean Energy (Unit Shortfall Charge – General) Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill imposes a charge on unit shortfalls so far as the charges are neither a duty of customs nor a duty of excise, within the meaning of section 55 of the Constitution.

*The Committee has no comment on this bill.*

## **Climate Change Authority Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill establishes the Climate Change Authority which will be responsible for the conduct and completion of major reviews of the carbon pricing mechanism, the Renewable Energy Target Scheme, the Carbon Farming Initiative, the National Greenhouse and Energy Reporting System and other special reviews as requested by the Minister or by both Houses of Parliament.

*The Committee has no comment on this bill.*

## **Constitutional Corporations (Farm Gate to Plate) Bill 2011**

Introduced into the Senate on 13 September 2011

By: Senator Xenophon

### **Background**

This bill requires grocery retailers to display the farm gate price of fresh produce next to the retail price.

*The Committee has no comment on this bill.*

## **Environment Protection and Biodiversity Conservation Amendment (Mining, Petroleum and Water Resources) Bill 2011**

Introduced into the House of Representatives on 12 September 2011

By: Mr Windsor

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to:

- impose penalties for offences relating to mining operations which have a significant impact on water resources; and
- amend provisions relating to mining operations covered by Ministerial declarations and accredited mining authorisation processes.

### **No explanatory memorandum**

#### **Penalties**

#### **Delegation of legislative power**

#### **Reversal of onus**

This bill, introduced as a non-government bill, was not accompanied by an explanatory memorandum. The Committee prefers to see an explanatory memorandum for every bill and recognises the manner in which such documents assist in the interpretation of bills, and ultimately, Acts. If the bill proceeds to further stages of debate the Committee **requests that the Private Member provides an explanatory memorandum**. In particular, the Committee is interested to understand the justification for (1) the level of civil and criminal penalties and how they compare to penalties in other Commonwealth legislation; (2) the test in clause 24D as to what is 'likely to have a significant impact' as it is arguably not a clear test for the prohibition of behaviour and the imposition of a penalty; (3) the meaning of *significant impact* for the purposes of the criminal offences in clause 24G; (4) the imposition of an evidential burden in relation to the defences in clause 24G (i.e. subclause 24G(7)); and (5) the delegation of legislative power to the Minister to make declarations under subdivision B.

## **Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill amends the *Ozone Protection and Synthetic Greenhouse Gas (Import Levy Act 1995* to:

- apply an equivalent carbon charge to the import of synthetic greenhouse gases (SGGs) and equipment which contains SGG. The carbon charge component will be in addition to existing levies; and
- allow the import of SGGs and equipment containing SGGs to be exempted from the levy, or the carbon charge component of the levy by the Minister, in appropriate circumstances.

### **Imposing a levy by regulation**

#### **Schedule 1, items 3 and 8**

The Committee has consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation. This creates a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax. However, the Committee accepts that there are circumstances where the rate of a levy may be more expeditiously determined through amending regulations rather than enabling legislation.

This bill amends the *Ozone Protection and Synthetic Greenhouse Gas (Import Levy Act 1995* to apply an equivalent carbon charge to the import of synthetic greenhouse gases and equipment that contains SGG. The amount of the levy imposed in subsections 3A(7) and 4A(5) is to be determined by a reference a formula which includes a prescribed rate (i.e. a rate to be set in the regulations). In another situation in proposed subsection 4B(1), the levy is imposed by reference to a 'the rate prescribed in the regulations'. However, in

each case the bill provides for a maximum prescribed rate which the explanatory memorandum states at paragraphs 20, 33 and 38 'is consistent with current levy amounts'. In these circumstances the Committee **leaves the question of the appropriateness of the proposed approach to the consideration of the Senate as a whole.**

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

## **Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011**

Introduced into the House of Representatives on 13 September 2011

Portfolio: Climate Change and energy Efficiency

### **Background**

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill amends the *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995* to:

- apply an equivalent carbon charge to the manufacture of synthetic greenhouse gases (SGGs) and equipment which contains SGG. The carbon charge component will be in addition to existing levies; and
- allow the manufacture of SGGs to be exempted from the levy, or the carbon charge component of the levy by the Minister, in appropriate circumstances.

### **Imposing a levy by regulation**

#### **Schedule 1, item 3**

The same issue as that outlined in relation to the Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011 above arises in relation to the proposed new section 3A. In the circumstances the Committee also **leaves the question of the appropriateness of the proposed approach in this item to the consideration of the Senate as a whole.**

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

## Steel Transformation Plan Bill 2011

Introduced into the House of Representatives on 13 September 2011  
Portfolio: Innovation, Industry, Science and Research

### Background

This bill is part of the Clean Energy Legislative Package which sets up the carbon pricing mechanism.

The bill establishes the legislative framework for the Steel Transformation Plan. The bill also enables the Minister of Innovation, Industry, Science and Research to approve an advance of future entitlements under the Plan, as competitiveness assistance advances in the 2011-2012 financial year.

### Delegation of legislative power

#### Part 3, clauses 9 and 10

This bill establishes a framework for the Minister to make, by legislative instrument, a plan providing for the payment of amounts to eligible corporations in the steel industry. The explanatory memorandum argues that it is appropriate for the details of the plan to be included in a legislative instrument as this will reduce the ‘administrative complexity of the legislation’ and provide ‘the flexibility required to deal with changing circumstances in the Australian steel manufacturing industry’ (see the *Outline*). It is also noted that clause 10 of the bill provides that the Plan ‘may’ provide for a number of specified matters and to this extent the legislation gives some guidance to the Minister. The plan to be developed allows applications from corporations in the steel manufacturing industry to apply for financial assistance so it will not have a coercive impact on those regulated by the Plan except to the extent a corporation agrees to conditions which may attach to the payment of an assistance advance under the Plan. In all of these circumstances, the Committee **leaves the general question of whether the delegation of legislative power in the bill is appropriate to the Senate as a whole.**

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

## **Telecommunications Amendment (Mobile Phone Towers) Bill 2011**

Introduced into the Senate on 14 September 2011

By: Senator Bob Brown

### **Background**

This bill seeks to strengthen the requirements for community consultation in relation to the installation of telecommunications facilities and require the precautionary principle to be considered in decisions about the location of such facilities. The bill also removes the exemption of state and territory laws in relation to the installation and maintenance of such facilities.

*The Committee has no comment on this bill.*

## **Wild Rivers (Environmental Management) Bill 2011**

Introduced into the House of Representatives on 15 November 2011 and reintroduced on 12 September 2011

By: The Hon A J Abbott

This *Digest* deals with any comments on the new provisions.

### **Background**

This bill aims to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild river areas, and for related purposes.

### **No explanatory memorandum Delegation of legislative power Clause 6A and clause 8**

This bill, introduced as a non-government bill, was not accompanied by an explanatory memorandum. The Committee prefers to see an explanatory memorandum for every bill and recognises the manner in which such documents assist in the interpretation of bills, and ultimately, Acts. If the bill proceeds to further stages of debate the Committee **requests that the Leader of the Opposition provides an explanatory memorandum, and in particular seeks an explanation of the necessity for the regulation making powers included in clauses 6A and 8.**

## COMMENTARY ON AMENDMENTS TO BILLS

### Auditor-General Amendment Bill 2011

*[Digest 3/11 – no response received]*

On 12 September 2011 the House of Representatives tabled a supplementary explanatory memorandum. On 15 September the House of Representatives agreed to Government amendments and passed the bill.

Proposed amendment number 30 seeks to amend the Auditor-General's information gathering powers to clarify that the power to require the production of documents does not override legal professional privilege. The explanatory memorandum at page 7 states that 'the purpose of the amendment is to make clear that agencies are not able to decline to produce documents because they are subject to legal professional privilege.'

A related amendment, item 31, seeks to insert a new subsection 'which would ensure that the production of a document or the provision of information...would not amount to a waiver of any privilege that might otherwise attached to the document or information.' Section 35 of the *Auditor-General Act 1997* already abrogates the privilege against self-incrimination, but this is subject to *use* and *derivative use* immunities.

The Joint Committee of Public Accounts and Audit *Report 419 Inquiry into the Auditor General Act 1997* recommended these amendments. At paragraph 3.70 of the report the committee expresses the view that in amending the Act as proposed 'no additional powers are being conferred on the Auditor-General' and at paragraph 3.71 that without the amendments 'efficiency is diminished' when officers are 'engaged in time-consuming invalid negotiations about the provision of privileged documents.'

In the circumstances, and particularly noting item 31, the Scrutiny of Bills Committee **leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

**Indigenous Affairs Legislation Amendment Bill (No.2) 2011**

*[Digest 7/11 – no response required]*

On 13 September 2011 the House of Representatives agreed to one Government amendment, tabled a supplementary explanatory memorandum and passed the bill. On 14 September 2011 the Senate tabled a revised explanatory memorandum. None of the supplementary information falls within the Committee's terms of reference.

**Veterans' Entitlements Amendment Bill 2011**

*[Digest 5/11 – no comment]*

On 12 September 2011 the Senate tabled an addendum to the explanatory memorandum and passed the bill without amendment. None of the additional information falls within the Committee's terms of reference.

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

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

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

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

| Bill/Act               | Section/Subsection | Offence  | Penalty            |
|------------------------|--------------------|--|--------------------|
| Clean Energy Bill 2011 | 221                | A person must comply with a requirement to provide information and documents | 2000 penalty units |

## SCRUTINY OF STANDING APPROPRIATIONS

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

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

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

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

**Clean Energy Bill 2011** — subclauses 116(5), 132(3), 303A(2) and 303B(3)

**Clean Energy (Household Assistance Amendments) Bill 2011**—  
Schedule 2, Part 3, subitem 36(5)

**Steel Transformation Bill 2011** — clause 28

### **Other relevant appropriation clauses in bills in the 43<sup>rd</sup> Parliament since the previous *Alert Digest***

Nil