

**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 the Hon I Macdonald (Chair)

Senator C Brown (Deputy Chair)

Senator M Bishop

Senator S Edwards

Senator R Siewert

Senator the Hon L Thorp

## Terms of Reference

Extract from **Standing Order 24**

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



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

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

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- Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012
  - National Gambling Reform Bill 2012
  - National Gambling Reform (Related Matters) Bill (No. 1) 2012
  - Privacy Amendment (Enhancing Privacy Protection) Bill 2012
  - Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012
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### **Senate Standing Legislation Committee Inquiries**

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

- **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.



## **Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012**

Introduced into the House of Representatives on 28 November 2012

Portfolios: Families, Housing, Community Services and Indigenous Affairs/Attorney-General

### **Background**

This bill establishes an Act of Recognition of the Aboriginal and Torres Strait Islander peoples. The bill requires the Minister to cause a review for support for a referendum towards recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

*The Committee has no comment on this bill.*

## **Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012**

Introduced into the House of Representatives on 28 November 2012

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill amends the *Agricultural and Veterinary Chemicals Act 1994*, *Agricultural and Veterinary Chemicals (Administration) Act 1992*, the *Agricultural and Veterinary Chemicals Code Act 1994* and the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* to:

- implement reforms to the approval, registration and reconsideration of agricultural and veterinary chemicals;
- simplify, reorganise and modernise legislation to reduce uncertainty and complexity in the legislation, and improve the operability and understanding of the legislation; and
- remove redundant provisions and amend out of date provisions in all Commonwealth agricultural and veterinary chemical legislation.

### **Trespass on personal rights and liberties—strict liability and reversal of onus**

#### **Schedule 1, items 54 and 58; Schedule 2, item 7**

Items 54 and 58 of schedule 1 introduce new subsections 32(5) and 33(4) of the Code, which are set out in the Schedule of the *Agricultural and Veterinary Chemicals Code Act 1994*. These proposed subsections reinsert the previous strict liability offences for not complying with a notice to provide required information in the circumstances specified in these items. The penalty for each of these items remains unchanged from the previous level (120 penalty units). A defendant will bear an evidential burden in relation to these offences.

The committee notes that the explanatory memorandum emphasises the point that these provisions adopt the approach taken in relation to existing offences, however, it is concerned that no explanation is given for departing from the maximum penalty for strict liability offences recommended in the *Guide to Framing Commonwealth Offences* (60 penalty units). Although there is a

general justification for the offence provisions in the bill which require defendants to carry an evidential or legal burden of proof included in the statement of compatibility, that justification does not specifically address these provisions.

The committee expects that the explanatory memorandum will demonstrate that the considerations relating to the use of strict liability outlined in the *Guide* have been taken into consideration in each instance in which it is sought to be applied. **The committee therefore seeks the minister's advice as to the justification for placing strict liability and an evidential burden of proof on defendants in relation to these specific provisions, particularly in light of the fact that the penalty for the strict liability offence is in excess of that recommended in the *Guide*.**

*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.*

**Trespass on personal rights and liberties—self-incrimination**  
**Schedule 3, item 14 - proposed new section 34**  
**Schedule 3, item 283 - proposed new section 130C**

Proposed new section 34 abrogates the privilege against self-incrimination in relation to notices to produce or attend under the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994*. The explanatory memorandum, at page 57, indicates that this approach aligns with that taken in the Agvet Code and will ensure that the abrogation of this privilege is consistent for regulated entities across *agvet* chemical legislation'.

The statement of compatibility argues, at pages 14 and 15, that abrogation of the privilege is necessary in the context of compliance with *agvet* chemical legislation so that the APVMA can be 'fully informed in circumstances that require them to act in a timely, informed and proportionate manner to protect public health and safety and the environment'. It is also stated that past experience has demonstrated that the regulator has 'had difficulty in obtaining the necessary information from persons because they are concerned that the information may incriminate them or expose them to a penalty or because of a concern about 'brand damage' or a lack of awareness of relevant compliance

requirements in the first place'. It is noted that the approach is also said to be consistent with therapeutic goods legislation.

Both a use and derivative use immunity are provided for those persons who provide information, documents or things in relation to criminal and civil proceedings. While the use and derivative use immunity does not apply in relation to the offence of obstructing Commonwealth officials (section 149.1 of the *Criminal Code*) or offences relating to the provision of false and misleading information (137.1 and 137.2 of the *Criminal Code*) and the explanatory memorandum does not address the point, this is a common exemption from the application of the use and derivative use immunity, at least in relation to the false and misleading information offences.

The same issue arises in relation to proposed 130C, inserted by item 283 of Schedule 3, under notices issued by the Australian Pesticides and Veterinary Medicines Authority in relation to enforcement of the Agvet Code. In this instance the explanatory memorandum, at page 77, expressly addresses the justifiability of exempting the offence of obstructing Commonwealth proceedings from the use and derivative use immunity. **In light of the justification provided in the explanatory memorandum and statement of compatibility for these provisions and the immunities available, the committee leaves the question of whether the proposed 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.*

**Rights and liberties dependent on administrative discretion—  
infringement notices**

**Schedule 3, item 66, proposed subsection 69EKA(3); and item 306,  
proposed subsection 145DB(3)**

This proposed subsection provides that the regulations may provide for a scale of amounts that may apply for alleged contraventions under the infringement notice scheme, so long as the penalty is no more than one fifth of the maximum penalty that a court could impose for the contravention.

As noted in the *Guide to Framing Commonwealth Offences*, this use of a sliding scale can be undesirable (see page 59) as it makes penalties dependent on discretionary judgments. The explanatory memorandum, at page 66, states that providing ‘for a scale is intended to provide for a proportionate response to contraventions based, for example, on the amount of substance concerned or the number of containers implicated in an alleged contravention’.

The same issue arises in relation to proposed subsection 145DB(3), item 306, Schedule 3.

In light of this explanation and the fact that the sliding scale contained in the regulations that will be disallowable by the Parliament, **the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

### **Trespass on personal rights and liberties—reversal of onus Item 120 of Schedule 3, proposed new subsection 45C(4)**

This proposed subsection places a legal burden of proof in relation to a defence provided for the offence of possessing, having custody of or other dealing with a suspended active constituent or chemical product in contravention of the instructions in the notices provided to persons or notices which have been published.

The committee has taken the view that the imposition of legal burdens on defendants should be kept to a minimum given it requires positive proof of the specified matter rather than the less onerous evidential burden, which requires a defendant to demonstrate a reasonable possibility that the matter exists. The use of the higher burden is more difficult to reconcile with the fundamental principle that the prosecution should prove all elements of an offence.

The defence specified in subsection 45C(4) covers circumstances in which the defendant, who has not been given a notice, did not know and could not reasonably be expected to have known of the *Gazette* notice or that the possession etc. was not in accordance with the instructions in the *Gazette* notice. The explanatory memorandum argues that this approach is justified given that the matters relate to what the defendant did not know and could not

reasonably be expected to have known and is therefore information that ‘would be peculiarly within the knowledge of the defendant’ (see page 71). It is also stated that this information would not be likely to be uncovered in the ‘normal course of an investigation’ (also at page 71). Further, the statement of compatibility emphasises that the approach mirrors the existing defence and onus of proof provisions and is ‘considered reasonable, necessary and proportionate and is consistent with the legitimate objective of protecting human health and the environment’ (at page 14).

Although it may be accepted that a case for reversing the burden of proof can be made in these circumstances, it is not clear why a legal burden, as opposed to an evidential burden is necessary. More particularly, given that what a defendant may reasonably be expected to have known is not capable of clear definition, the fairness of requiring defendants to provide positive proof by such a criterion is questionable. **The Committee therefore seeks a further justification of why an evidential burden is not sufficient to support the objectives of promoting human health and the environment in relation to this defence.**

*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.*

### **Trespass on personal rights and liberties—entry powers without warrant**

#### **Schedule 3, item 284, proposed section 131AA**

This section enables monitoring powers to be exercised without consent or a warrant in cases where this is reasonably necessary to prevent imminent risk to persons of death, serious injury or serious illness. A judgment about this must be based on the foundation of ‘reasonable grounds for suspecting’ that the exercise of the powers is reasonably necessary for the specified purposes.

Proposed subsection 131AA(4) states that an inspector is not ‘entitled to exercise monitoring powers’ under this proposed section ‘unless the inspector has been authorised in writing by the APVMA’ to do so.

The explanatory memorandum argues this approach is consistent with the principles set out in the *Guide*. While the *Guide* states that such powers are

only justifiable in rare circumstances, however, the explanatory memorandum argues that in this instance they are ‘necessary to protect the community’ (at 78). The statement of compatibility argues, at page 11, that these ‘powers are necessary as without them there is no practical way for APVMA to monitor or investigate possible offences of human health significance’. It is also notable that the exercise of these powers is subject to rigorous reporting arrangements (see the explanatory memorandum at page 78). **The committee draws this provision to the attention of the Senate, but in light of the explanation provided leaves the question of whether the proposed 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.*

### **Trespass on personal rights and liberties—retrospective validation Schedule 5, item 36**

The explanatory memorandum, at page 98, states that this provision ‘corrects an anomaly’ in relation to the signing of notices of assessment (of levies payable) by staff members of the APMVA on behalf of the APVMA who purported to act as a delegate of the CEO, prior to the commencement of this bill, but did not in fact hold a valid delegation.

The item provides that the staff member is, in these circumstances, ‘taken to have’ signed the notice of assessment ‘as a delegate of the Chief Executive officer’. It appears from the explanatory memorandum that the problem being corrected arose due to a misapprehension as to the reach of delegations under the AGVET Administration Act. As the item also provides that the rights or liabilities arising between parties to proceedings heard and finally determined by a court before the day the item commences are not affected, any adverse detriment is limited to the removing as a ground on which to object to a notice of assessment on the fact that it was not signed-off on by a staff member holding a valid delegation. **In these circumstances the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

**Trespass on personal rights and liberties—retrospective validation  
Schedule 6, item 58**

This item includes provisions that enable regulations dealing with transitional, application and savings measures to take effect before they are registered. Although this may mean that some measures have retrospective application, the bill includes a provision that means a conviction of a person of an offence, or an order that a person pay a penalty, could not be recorded in circumstances where the person contravened a provision because of a retrospective effect of the regulations. **In these circumstances the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

## Australian Education Bill 2012

Introduced into the House of Representatives on 28 November 2012

Portfolio: Education, Employment and Workplace Relations

### Background

This bill sets out a legislative framework for the development of the National Plan for School Improvement. The bill commits the Commonwealth to work collaboratively with states, territories, the non-government sector and other partners to meet these goals through developing and implementing a national plan for school improvement and needs-based funding arrangements.

### Delayed Commencement

This bill does not commence until 1 January 2014. 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. While it is possible that affected parties may need time to prepare for the commencement of the bill, no justification for the delay is provided in the explanatory memorandum. **The committee therefore seeks the Minister's advice about the justification for the delayed commencement.**

*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*

### Exclusion of judicial review

#### Clause 10

The bill sets out a legislative framework for the development of the National Plan for School Improvement, but clause 10 provides that the Act does not create legally enforceable rights and obligations (subclause 10(1)) and, also, that failure to comply with the Act does not affect the validity of any decision, and is not a ground for the review or challenge of any decision (subclause 10(2)).

In addition to subclause 10(1) it can be noted that the substantive provisions of the bill do not, in any event, appear to create rights or obligations. The

various clauses acknowledge matters, express goals and state intentions (about what will be done or achieved). Therefore it is unclear what, if any, legal consequences would flow from these clauses in the absence of subclause 10(1) and it cannot be stated with clarity what rights the subclause is intended to remove.

Subclause 10(2) means that non-compliance with the Act would not affect legal validity of any decision or be a ground for the review or challenge of any decision. Again, however, it is unclear how, if at all, the substantive provisions of the bill impose jurisdictional limits on decision-makers, breach of which would lead to the invalidity of a decision or how the Act imposes any legal obligation on the decision-maker such that the breach may be considered to be a reviewable error of law in judicial review proceedings.

The explanatory memorandum explains the purpose of the bill as enshrining a national commitment to particular outcomes and setting out a national vision for schooling reform. In general courts are loath to enforce aspirational or ‘target’ obligations or ‘public duties’ created by statute on government decision-makers even when they are expressed in terms of what the decision-maker *must* do or an outcome that *must* be achieved. Traditional judicial review remedies are not well suited to the enforcement of such obligations. Given that this Bill does not, by express terms, appear to impose any obligations whatsoever of identifiable decision-makers, it is the committee’s view that clause 10 does not meaningfully oust judicial review as judicial review would, in an event, be very unlikely to provide anything by way of meaningful remedies. **In these circumstances the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

## Biosecurity Bill 2012

Introduced into the Senate on 28 November 2012

Portfolio: Agriculture, Fisheries and Forestry

### Background

This bill replaces the *Quarantine Act 1908* to provide a modern regulatory framework and responds to the Nairn and Beale reviews (described in the explanatory memorandum) to:

- manage biosecurity risks, the risk of contagion of a listed human disease, the risk of listed human disease entering Australian territory, risks related to ballast water, biosecurity emergencies and human biosecurity emergencies; and
- give effect to Australia's international rights and obligations, including the World Health Organization's International Health Regulations and Agreement on the Application of Sanitary and Phytosanitary Measures, and the Convention on Biological Diversity.

### Possible insufficient Parliamentary Scrutiny

#### Clause 9

This clause enables the definitions of 'Biodiversity Convention', 'International Health Regulations' and 'United Nations Convention on the Law of the Sea' to be determined based on the content of the relevant convention specified in the bill as existing from time to time.

While the committee frequently expresses concern about circumstances in which the content of the law can change simply by reference to the content of another document 'from time to time', it has also accepted that in the context of international conventions the approach may be justified.

The committee notes that the text of international conventions to which Australia becomes a party is settled following a process that includes some Parliamentary scrutiny. In addition, the text for each of these definitions notes where the content of the relevant convention can be freely accessed, which should mean that there is no difficulty for the public or legal profession to determine the content of the law. In the circumstances the committee therefore has no further comment on this issue.

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

## **Delegation of legislative power—disallowance Various**

### **Subclauses 41(3), 43(3), 44(3), 48(2) and 49(2)**

The bill includes a number of provisions which provide that certain instruments to be made under the bill are exempt from disallowance pursuant to section 42 of the *Legislative Instruments Act*. There is a general justification in the explanatory memorandum at pages 10 to 11 for this approach. That general justification argues that certain instruments should not be disallowable as it is appropriate for the Parliament to delegate decision-making concerning technical and scientific decisions to decision-makers with appropriate expertise that enables them to manage the risks involved. In some cases the explanatory comments in relation to particular provisions rely only on this general argument, in others further arguments are provided. The relevant provisions are:

**Subclause 41(3)** of the bill provides that legislative instruments made by the Director of Human Biosecurity to determine that a human disease is ‘a listed human disease’ are not disallowable. The explanatory memorandum states that this ‘ensures the Commonwealth will have the continual use of powers and functions...to control serious communicable diseases’ (at 148).

**Subclause 43(3)** provides that a determination of one or more requirements for individuals entering Australia made by the Health Minister is exempt from section 42 of the *Legislative Instruments Act*. The explanatory memorandum, at page 149, indicates that the determinations are designed to enable the ‘Commonwealth to identify human biosecurity risks’ and to ‘establish mitigating measures’.

**Subclause 44(3)** provides that a determination of one or more requirements for individuals exiting Australia made by the Health Minister is exempt from section 42 of the *Legislative Instruments Act*. The explanatory memorandum, at page 149, indicates that the determinations are designed to enable the ‘Commonwealth to identify human biosecurity risks’ and to ‘provide a

spectrum of options to respond to the range and scale of human biosecurity risks’.

**Clause 48** provides that an instrument made by the Director of Human Biosecurity specifying circumstances in which pratique is to be granted by a biosecurity officer (‘negative pratique’) beyond those outlined in clause 47 (‘positive pratique’) and the requirements to be applied is a legislative instrument. Such a legislative instrument will be exempt from section 42 of the *Legislative Instruments Act* (subclause 48(2)). Subclause 48(3) provides that requirements for the purposes of the grant of negative pratique ‘must be consistent with Articles 28.2 and 43 of the International Health Regulations’.

**Subclause 49(2)** provides that an instrument issued by the Director of Human Biosecurity specifying ‘information that is required to be provided by operators of specified outgoing aircraft or vessels’ (subclause 49(1)) is a legislative instrument but exempt from section 42 of the *LIA*.

All of the above provisions rely on the general justification for exemption from disallowance outlined at pages 10 and 11 of the explanatory memorandum relating to the need for decision-makers to be persons with appropriate scientific and technical expertise. **In light of the explanation provided 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 insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.*

#### **Subclause 50(4)**

Subclause 50(4) provides that a determination by the Health Minister that specifies one or more biosecurity measures to be taken by specified persons (the categories of measures which may be specified are listed in subclause 50(2)) are exempt from section 42 of the *LIA*. Biosecurity measures may not be required unless the Minister ‘is satisfied that the biosecurity measure is appropriate and adapted to prevent, or reduce the risk of, the disease entering, or emerging, establishing itself or spreading in, Australian territory or a part of Australian territory’. However, the measures that may be required are broadly framed and may limit important personal rights and liberties. Measures may ban or restrict a ‘behaviour or practice’, require a ‘behaviour or practice’,

require a specified person to provide a report or keep specified records, or to conduct specified tests on specified goods. In relation to this exemption from the normal disallowance provision of the *LIA*, it is noted that determinations are intended to ‘provide temporary management of a human biosecurity risk within a state or territory, until the state or territory is able to create provisions within their own legislation to manage the risk in the long term’ (see the explanatory memorandum at page 151). Determinations have a maximum duration of 12 months (subclause 50(6)). It is also the case that before a determination is made the health Minister must consult with the relevant Minister of each State and Territory and the Director of Biosecurity.

The committee notes that measures may limit important personal rights and liberties, but **in light of the detailed explanation provided 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; and they may also 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.*

### **Subclauses 170(5), 171(5) and clause 178**

Subclause 170(5) and subclause 171(5) provide the power for the Director of Biosecurity and the Director of Human Biosecurity to jointly make determinations relating to prohibited goods. Such determinations will be legislative instruments that are exempt from the operation of the disallowance and sunset provisions of the *Legislative Instruments Act*.

In relation to disallowance the explanatory memorandum contains a detailed justification of the approach based on the technical and scientific nature of the determinations to prohibit goods to provide protection from serious diseases and pests coming into Australia (see the explanatory memorandum at page 188).

In relation to the sunset provisions, it is noted that the list of prohibited goods will be frequently revised as a result of risk-based calculations associated with biosecurity risks and that as a result of the need for day to day

risk based management practices ‘sunsetting is not necessary to maintain the currency of determinations made under these clauses’ (see the explanatory memorandum at page 189).

The same justifications are given in relation to the exemption of determinations pursuant to clause 178 from disallowance and sunsetting provisions.

**In light of the explanations provided the committee leaves the question of whether the approach proposed in each of these clauses 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 insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.*

Further provisions which exempt instruments from the disallowance of the *LIA* include:

- subclause 108(3) (instruments specifying requirements for managing specified classes of human remains after bringing them into Australian Territory)
- subclause 110(3)
- subclause 111(7)
- clause 230
- clause 236
- subclause 258(3)
- subclause 363(4)
- subclause 382(4)
- subclause 393(4)
- subclause 396(2)
- subclause 441(2)

- subclause 442(2)
- subclause 443(2)
- subclause 473(2)
- subclause 474(2)
- subclause 475(2)
- subclause 581(1)

These provisions rely on the general exemption explanation relating to appropriate scientific expertise and **the committee leaves the question of whether the proposed approach is appropriate in each instance 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.*

### **Trespass on personal rights and liberties Clauses 31 and 33 and subclause 445(1)**

These clauses outline a list of factors of which relevant biosecurity officials must be satisfied before exercising powers specified in the bill. These factors, broadly speaking, require decision-makers to be satisfied that measures taken will be effective and proportionate responses to particular risks. However, there is no additional requirement as to the level of belief to be held before the powers can be exercised and many of the decisions involved are significant and can restrict an individual's liberty and movement.

The same issue also arises in relation to the matters the Minister must be satisfied of in subclause 445(1).

**The committee therefore seeks advice as to whether consideration has been given to amending the bill to require the decision-maker to be satisfied *on reasonable grounds* of the various factors. This would make it clear that a measure could only be taken if there is the existence of facts sufficient to induce the mind of a reasonable person to be satisfied of the relevant considerations.**

*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.*

## **Strict Liability**

### **Clause 56**

This provision makes it an offence of strict liability for a person who is required under Chapter 2, Part 2, Division 6 of the bill to answer a question or provide written information to fail to answer the question or provide the information. The information that may be requested must relate to determining the level of risk to human health associated with the individual (subclause 53(2)). In relation to the power under clause 54 to require questions and answers from 'any individual' the requirement to provide answers or written information must be for the purpose of preventing a listed human disease from entering, or emerging, establishing itself or spreading in Australia, preventing such a disease from spreading to another country or determining the level of risk to human health associated with the relevant individual. The explanatory memorandum addresses the justifiability of strict liability offences in the bill in a general sense however, no mention is made of clause 56 (see pages 6 and 7).

The committee notes that strict liability offences are appropriate in certain circumstances including 'for reasons such as public safety and the public interest in ensuring that regulatory schemes are observed'. It is further noted where the application of strict liability to certain offences in the bill has departed from the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* the explanatory memorandum states that these departures have been approved by the Attorney-General. In addition, the committee notes that the penalty of 60 penalty units is consistent with the maximum penalties recommended in the *Guide*.

However, as it is possible that persons subject to requirements to answer questions may have recently arrived in Australia and may also be suffering from an illness, there may be instances where they are not reasonably able to comply with a request to answer questions or provide information as required.

**The Committee therefore seeks a fuller justification of the application of strict liability in this instance.**

*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.*

## **Adequacy of Merits Review**

### **Clause 75**

This clause provides that section 28 of the *Administrative Appeals Tribunal Act* (which gives a right to obtain reasons for decisions which may be reviewed under the AAT Act) will not apply to a direction by the Director of Human Biosecurity to comply with an isolation or traveller movement measure. The explanatory memorandum explains that this is appropriate given that clause 70(7) of the bill provides that the notice requiring an individual to comply with a biosecurity measure must include 'the reasons for the decision to give the notice'. As the terms of section 28 of the AAT Act deal with what is to be included in a statement of reasons with more specificity (that is, the decision-maker is required to set out 'findings on material questions of fact', to refer 'to the evidence or other material on which those findings were based' and to 'give the reasons for the decision'), **the committee seeks the Minister's advice as to why it is not appropriate to use the same statutory formulation as used in the AAT Act in clause 70(7) of the bill.** (The *Note* to clause 75 refers to paragraph 3(a), and this appears to be a typographical error.)

*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.*

## **Delegation of legislative power**

### **Subclause 89(3)**

Subclause 89(2) provides that an individual who has undergone an examination pursuant to section 88 'may be required...to provide...specified body samples for the purpose of determining the presence in the individual of' specified human diseases. Subclause 89(3) provides that the 'regulations must

prescribe requirements for taking, storing, transporting, labelling and using body samples provided under subsection (2)'. The *Note* to this provision states that the regulations may prescribe offences and civil penalties in relation to these requirements concerning body samples. The explanatory memorandum does not indicate why these important and sensitive issues cannot be appropriately dealt with in the primary legislation. It is important that safeguards in relation to these matters should be put in place and it is not clear why these should be dealt with in delegated legislation. **The committee therefore seeks an explanation as to why these issues should not be dealt with expressly in the bill.**

*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.*

## **Trespass on personal rights and liberties—liberty and freedom of movement**

### **Clauses 94 and 95**

Clause 94 provides that an individual may, for no more than 28 days, be required by a human biosecurity officer not to leave Australian territory on an outgoing passenger aircraft or vessel. This clause is said to be necessary to comply with Australia's international health obligations under the International Health Regulations. Clause 95 provides that an individual may be required by a human biosecurity officer to remain isolated at a medical facility.

Obviously these provisions limit individual liberty and freedom of movement. It is equally clear that the purpose of these provisions is to mitigate the risk of spreading communicable diseases by preventing a person suspected of having a listed human disease from travelling on an overseas passenger aircraft or vessel or by restricting such a person's movement within Australia. Although the exercise of these powers does not require consent, the underlying objective being pursued is clearly of importance. It noted in the Regulatory Impact Statement (at page 61) that it is intended that such measures be measures of last resort (see also statement of compatibility at page 94) and they are only expected to be used approximately two to three times per year.

In considering whether the approach is proportionate and justified, the following matters are noted. First, travel movement measures only apply to overseas passenger aircraft and vessels (though there are unlikely to be, in most instances, practical alternatives to such means of leaving Australia). The power can only be exercised by a chief human biosecurity officer or human biosecurity officer (see the explanatory memorandum at page 162), who are officers with medical expertise.

Subclause 99(2) provides that in enforcing a traveller movement measure an ‘officer of Customs must not use more force, or subject the person to greater indignity, than is necessary and reasonable to prevent the individual from boarding the aircraft or vessel’. (In respect of this provision, the statement of compatibility, at page 100, appears to conclude that the approach is consistent with the right to freedom from torture and cruel, inhuman or degrading treatment.)

Clause 100 provides that where a non-citizen is subject to a measure in a human biosecurity control order that requires them to remain at a place or to be isolated under clause 95, or to be detained under clause 101, they must be informed of their right to request consular assistance. Finally, subdivision D of Part 3 of Chapter 2 of the bill provides for appeal rights to the AAT; subdivision E confirms the availability of judicial review under the *Administrative Decisions (Judicial Review) Act* (judicial review would also be available under s 75(v) of the *Constitution* and section 39B of the *Judiciary Act*).

**In these circumstances the committee draws the Senate’s attention to the impact these measures may have on important liberty interests, but leaves to the Senate as a whole consideration as to whether the approach taken reflects an appropriate balance between the competing interests and whether the limits on personal rights is proportionate to the legitimate objectives being pursued.**

*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.*

## **Trespass on personal rights and liberties—privacy**

### **Clause 96**

Subclause 96(1) requires the Director of Human Biosecurity to notify a number of specified agencies or departments that a traveller movement measure has been applied. Further, subclause 96(3) enables the Director to notify any one or more operators of outgoing passenger aircraft or vessels, State or Territory agencies responsible for the administration of health services, and any State Party's national *IHR Focal point* (within the meaning of the International Health Regulations). These powers act 'as an authorisation for sharing protected information that would otherwise be in contravention of the *Privacy Act 1988*' (see the explanatory memorandum at page 163).

In justification of this approach, the statement of compatibility states, at page 84:

To protect an individual's privacy, the alert is restricted to the specified Commonwealth bodies, all of whom have responsibility relating to the movement of conveyances, goods and passengers into and from Australia. In addition, clause 96 restricts the information which can be shared to ensure that only the information necessary to clearly identify the individual subject to the measure, and any known travel details of that individual.

A travel movement measure alert informs the responsible Commonwealth bodies to ensure ill passengers are prevented from boarding a passenger airline or vessel. This manages the risk of contagion to other passengers in the confines of a passenger aircraft or vessel, and the risk of spread of a Listed Human Disease to another country. To protect an individual's privacy and reputation, clause 98 specifies that traveller movement measure alerts must be destroyed within 6 months of no longer being in force.

If an individual has signs or symptoms, or has been exposed to a Listed Human Disease, it may be necessary for that individual to undergo an examination or provide body samples for diagnosis. The test for application of a HBCO, and the principles of general protection ensure that these measures are only used if it is the least intrusive or restrictive measure which may be applied in the circumstances. In addition, clause

89 specifies that samples may only be required for the purpose of diagnosing a Listed Human Disease.

**In light of this explanation the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate.**

*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.*

### **Trespass on personal rights and liberties—detention Clause 101**

Clause 101 provides that a law enforcement officer may detain an individual if they fail to comply with a requirement to remain at a place (clause 66), or if they fail to comply with an isolation measure that has been affirmed after review by the Director of Human Biosecurity. The statement of compatibility notes that law enforcement officers will 'have sufficient training and skills to ensure the power is exercised in line with Commonwealth guidelines'.

A person detained for failing to comply with an isolation measure may only be detained for the purpose of taking the individual to the medical facility referred to in clause 95 (subclause 101(2)). Before detention is authorised a human biosecurity officer or chief human biosecurity officer must be satisfied of the matters in paragraphs 33(2)(a) to (f) (ie the general principles designed to ensure that decision-making is effective and proportionate) and that the detention is necessary because, without detention, the individual may pose a significant risk of contagion (paragraph 101(1)(b)).

It is also important to note that the bill includes a requirement that a person detained must be advised of their right to contact anyone, including a legal representative, and be provided with reasonable facilities to exercise that right (subclauses 102(3) and (4)). The use of force is limited to force which is no more than is necessary and reasonable (subclause 102(1)), and detention must be in a place which affords, in the detaining officer's opinion, adequate individual personal privacy (subclause (102(2))). Further, a person detained for failing to comply with an isolation measure must only be detained for the purpose of moving the ill individual to a specified medical facility so that they may be assessed and treated.

**In these circumstances the committee draws the Senate’s attention to the impact these measures may have on important liberty interests, but leaves to the Senate as a whole consideration as to whether the approach taken reflects an appropriate balance between the interest in individual liberty and the protection of the public from contagious diseases.**

*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.*

**Trespass on personal rights and liberties—reversal of burden of proof**

**Subclauses 118(4), 146(3) and 193(3)**

Subclause 118(4) provides that the regulations may prescribe exceptions to the requirement to give a notice under clause 118 (of goods to be unloaded in Australian territory). The details to be included in the notice are also to be prescribed in the regulations, and failure to comply is a fault based offence (penalty: 2 years imprisonment or 120 penalty units). The *Note* to subclause 118(4) states that a defendant bears an evidential burden in relation to any exceptions prescribed for the purposes of this subsection. It is difficult to assess the appropriateness of placing an evidential burden without more information about the nature of the exceptions.

A similar issue arises in relation to subclauses 146(3) and 193(3).

**As such the committee seeks further information about whether the exceptions to be prescribed will be consistent with defendants bearing an evidential burden according to the principles set out in the *Guide to Framing Commonwealth Offences*.**

*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.*

## Delegation of legislative power

### Clause 166

Pursuant to paragraph 166(1)(a) a Biosecurity Import Risk Analysis (BIRA) must be conducted in accordance with a process prescribed in the regulations. Further, paragraph 166(1)(b) provides that a BIRA must be conducted ‘taking into account the matters set out in the guidelines (if any) made by the Director of Biosecurity under subclause 166(2)’. Such guidelines are deemed not be legislative instruments (subsection 166(4)). The explanatory memorandum states that the guidelines are not legislative instruments because they are administrative in their nature. However, it appears to be the case that subclause 166(2) requires that guidelines set out matters that are ‘to be taken into account in conducting a BIRA’. As such, the guidelines can change the legal obligations of the decision-maker.

**The committee therefore seeks the Minister’s advice as to: (1) why the process for conducting a BIRA cannot be contained in the primary legislation (this matter does not appear to be dealt with in the explanatory memorandum), and (2) whether subclause 166(4) is intended as a substantive exemption from the *Legislative Instruments Act* if, as appears to be the case, the guidelines create binding obligations in relation to matters which must be considered by decision-makers undertaking a BIRA.**

*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.*

## Delegation of legislative power

### Clause 167

This clause provides that the regulations are to require the Director of Biosecurity to prepare draft, provisional and final reports as part of the process of conducting a BIRA, and these reports must include information prescribed by the regulations. There is no explanation as to why the reporting obligations associated with the process of conducting a BIRA should be included in the regulations rather than the primary legislation. **The committee therefore seeks an explanation as to why these matters cannot be dealt with in 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.*

### **Trespass on personal rights and liberties—procedural fairness Subclause 181(6)**

Subclause 181(3) provides that the Director of Biosecurity may determine that goods which were, at the time they were brought or imported into Australia, prohibited, conditionally non-prohibited or suspended goods, are forfeited to the Commonwealth. Subclause 181(4) provides that before making such a determination (i.e. under subclause 181(3)), the Director must notify a person in charge of the goods of a number of matters and that a forfeiture determination may be made unless a person in charge of the goods arranges 'for the goods to be destroyed, removed from Australian territory or otherwise dealt with in a way specified by the Director' and arranges for 'any other requirements specified by the Director relating to the goods to be complied with'. However, subclause 181(6) provides that a failure to issue notice under subclause 181(4) does not affect the validity of a determination under subclause (3) or the forfeiture of the goods.

The explanatory memorandum argues (at page 193) that once the Director makes a forfeiture determination, it is important that a biosecurity officer may take possession of the goods and cause them to be sold, destroyed, exported or otherwise disposed of to ensure 'that the Commonwealth can deal with the goods in the most appropriate manner'. This, it is argued, 'reflects that prohibited goods, conditionally non-prohibited goods and suspended goods pose a high level of biosecurity risk and that biosecurity measures will need to be carried out to manage the risks to an acceptable level'.

It is, however, of concern that forfeiture orders may be made in matters in which no notice has been given and where the substantive correctness of decisions may be contested. For example, forfeiture orders can only be made in relation to conditionally non-prohibited goods where an applicable condition in relation to the goods has not been complied with (paragraph 181(1)(c)). Although it may be accepted that there may be circumstances that require the urgent forfeiture of goods so they may be appropriately dealt with to guard against biosecurity risks, it is not clear that notice requirements, and in some cases a right to be heard in relation to such decisions, should not

apply in non-urgent cases. **For this reason the committee seeks the Minister's further advice as to the intended operation of subclause 181(6) and whether it is intended that the flexible common law procedural fairness requirements would apply to decisions made under subclause 181(3).**

*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.*

### **Trespass on personal rights and liberties—reversal of onus Subclauses 185(2) and 186(2)**

These two subclauses provide for exceptions in relation to offences related to the contravention of conditions applying to conditionally non-prohibited goods brought or imported into Australia (the offence under clause 186 relates to circumstances in which the offender obtains, or may obtain, a commercial benefit over competitors as a result of the contravention).

Subclauses 185(2) and 186(2) provide that it will be an exception to the offence if the person who brought or imported the goods into Australian territory:

- did not do the act, or omit to do the act, that constituted the failure to comply with the condition; and
- did not aid, abet, counsel or procure that act or omission; and
- was not in any way, knowingly concerned in, or party to, that act or omission (whether directly or indirectly and whether by any act or omission of the person).

The exceptions relate to broad-ranging matters relevant to the level of involvement, if any, of a defendant with the wrongdoing and do not appear to relate to matters likely to be peculiarly within their knowledge (in accordance with the *Guide to Framing Commonwealth Offences*). In addition, to rely on this exception, a person bears an evidential burden of proof. **In light of these factors the committee seeks the Minister's explanation as to the rationale for the proposed 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.*

## **Trespass on personal rights and liberties—strict liability reversal of onus**

### **Clause 188**

This clause creates a strict liability offence (penalty: 60 penalty units) when a person receives or possesses prohibited goods or suspended goods. It is an exception to the offence if:

- the goods were not brought or imported into Australian territory;
- the defendant brought or imported the goods into Australian territory, but at the time they were brought in they were not prohibited goods or suspended goods; and
- the goods are the progeny of other goods that were legally brought or imported into Australian territory.

In relation to strict liability, the statement of compatibility, at page 92, argues that this offence is necessary to achieve the legitimate objective of deterring conduct posing an unacceptable biosecurity risk and is a reasonable and proportionate response (on account of the penalty being a fine of 60 penalty units and the existence of exceptions additional to the defence of honest and reasonable mistake of fact that is available under section 9.2 of the *Criminal Code*).

In relation to the imposition of an evidential burden on defendants to rely on the exceptions, this is said to be necessary 'in order to achieve the legitimate purpose of ensuring goods in Australian territory that potentially pose a biosecurity risk may be located by biosecurity officials'. The approach is considered 'reasonable and proportionate to the legitimate objective because the information or facts are uniquely within the defendant's knowledge'—more particularly, it is argued that 'under clause 188 if the defendant did not bring or import the goods into Australian territory, they will have peculiar knowledge of how they obtained the goods such as information about where they purchased them'. (See the statement of compatibility at page 90 and the explanatory memorandum at page 198). The explanatory memorandum also

notes that the approach gives effect to the recommendations of the Commonwealth Ombudsman, contained in the report ‘Compliance and investigations activities of the Australian Quarantine and Inspection Service (AQUI) Report One: audit of policies, procedures, systems and processes’ (No. 13, August 2009) (see page 198).

**In light of the detailed justification for use of strict liability and placing an evidential burden on defendants in relation to the exceptions available to this offence (in the statement of compatibility and explanatory memorandum), the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

### **Delegation of legislative power Clauses 257, 287 and 290**

Clause 257 provides for the making of regulations to prescribe a scheme in relation to ship sanitation. Subclause 257(3) provides that the scheme must be appropriate and adapted to give effect to Australia’s rights and obligations in relation to ship sanitation under the International health Regulations. It is not clear, however, why such a scheme cannot be included in the primary legislation.

The same issue arises in relation to clauses 287 and 290 in relation to ballast water management plans for vessels. **The committee prefers that important matters are included in primary legislation whenever possible and unfortunately a rationale for the proposed approach is not provided in the explanatory memorandum. The committee therefore seeks the Minister’s explanation as to the justification for the proposed approach in these clauses.**

*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.*

## **Trespass on personal rights and liberties--penalties**

### **Clause 269**

This clause creates an offence for discharging ballast water by a person in charge of a vessel in Australian seas. The maximum penalty is 2000 penalty units for the fault-based offence and 500 penalty units for a strict liability version of the offence.

The penalties are, as acknowledged in the explanatory memorandum, harsher than those recommended by the *Guide for Framing Commonwealth offences*. It is explained that ‘the primary reason for this departure is that the commission of the offence would result in significant biosecurity risks, which may result in serious damage to plant and animal health, Australia’s local industries, the economy and the environment’. It is further noted that the penalties are consistent with the penalty benchmarks under section 21 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, and as such ‘ensures consistency with other Commonwealth legislation implementing international treaties for the protection of the marine environment’ (at page 235).

The creation of a strict liability offence in relation to the impugned conduct is justified by reference to a strong public interest in the prevention of pollution from ballast water and because ‘the person in charge or the operator of a vessel can be reasonably expected to know about the restrictions imposed on the discharge of ballast water because of their professional expertise. It is also noted that Division 3 of Chapter 5 of the bill contains a number of exceptions.

**In light of the explanation of the approach taken (see also statement of compatibility at pages 92 and 93), the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

### **General note on the level of penalties**

In a number of instances, the explanatory memorandum indicates that the penalties imposed by the provisions in the bill are not consistent with those recommended in the *Guide*. The general justification given in these instances is the severity of potential consequences of the impugned conduct, and the

risk of serious damage to plant and animal health, Australia’s local industries, the economy and the environment. It is argued that the penalties imposed in the bill are ‘intended to reinforce the deterrent effect of the bill and allow courts with capacity to respond meaningfully and proportionally to the worst breaches’. Further, ‘[p]enalties and the possibility of imprisonment in the most serious cases are a key part of achieving and maintaining a credible level of deterrence and complement the other types of enforcement action, such as civil penalties, infringement notices and enforceable undertakings. The maximum penalties provided in the Bill reflect the level of seriousness of the offences and have been set at levels high enough to cover the worst examples of offence’ (at 6). **In light of the explanation of the approach taken (see also statement of compatibility at pages 92 and 93), the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

**Trespass on personal rights and liberties—reversal of onus  
Clauses 270, 276, 277, 279, 282, 283**

These clauses provide for exceptions to the offence of discharging ballast water in Australian seas under clause 269. In order to rely on an exception the defendant bears an evidential burden. The explanatory memorandum indicates that this approach is justified as defendants will have the ‘requisite knowledge to establish the exceptions, such as the vessel’s ballast water records’ (at page 236; also see the statement of compatibility at page 90). **The committee leaves the question of whether the proposed 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—incorporation by reference to instruments as in force from time to time**

### **Clause 274**

This clause enables regulations to incorporate other instruments as in force or existing from time to time in relation to regulations related to ballast water management issues. This approach is justified in the explanatory memorandum on the basis that the regulations incorporate international instruments from the International Maritime Organization (e.g. guidelines issued under the ballast Water Convention that are updated after meetings of ‘the technical committees’). **The committee seeks the Minister’s advice as to whether consideration has been given to making it a legislative requirement that the most recent version of an instrument so incorporated by the regulations be made available on an appropriate website.**

*Pending the Minister’s reply, 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.*

## **Trespass on personal rights and liberties—reversal of onus**

### **Clauses 436 and 437**

Subclauses 436(2), (3), and (4) and subclauses 437(2) and (3) provide for exceptions to civil penalty provisions in relation to the giving of false and misleading information or documents to a biosecurity industry participant. However, it is not clear that matters relate to information which can be said to be peculiarly within the knowledge of a person facing such a penalty (in accordance with the *Guide*). For example, it is an exception to the application of the civil penalty if the biosecurity industry participant did not take reasonable steps to inform the person that the person may be liable to a civil penalty provision. **The committee therefore seeks the Minister’s advice as to the justification for the proposed 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.*

**Trespass on personal rights and liberties—civil proceedings  
Clauses 439 and 670**

Clause 439 provides that no civil proceedings may lie against the Commonwealth or a biosecurity industry participant for anything done or omitted to be done by them in carrying out biosecurity activities in accordance with an approved arrangement or complying with a direction from a biosecurity officer so long as they performed their functions in good faith. The explanatory memorandum offers little explanation as to why this exclusion of private law rights that persons may otherwise have is considered necessary.

A similar issue arises in relation to clause 670.

**The committee seeks the Minister's advice as to the justification for the proposed approach in these clauses.**

*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.*

**Rights and liberties made unduly dependent on insufficiently defined administrative power  
Clauses 441 and 473**

Clause 441 enables the Governor-General to declare a 'biosecurity emergency' if the Agriculture Minister is satisfied (1) that a disease or pest poses a severe and immediate threat or is causing harm to animal or plant health, the environment, or economic activities related to animals, plants or the environment, and (2) that the declaration is necessary to prevent or control the establishment or spread of the disease or pest in Australian territory.

It is noted that this is a very significant power as once exercised it authorises the exercise of a number of 'potentially invasive' powers during the period of the emergency declaration (which may be no longer than is necessary, but in any case not longer than three months). Such powers include the power to enter premises without a warrant or consent (see explanatory memorandum at 308). It is also the case that the operation of some other powers granted under the bill may have a modified operation when an emergency has been declared

(eg merits review is not available in some circumstances where it otherwise would be—see clause 467).

Emergency declarations are not disallowable instruments for the purposes of the *Legislative Instruments Act* (subclause 441(2)) though they are legislative instruments. Subclause 441(3) requires a biosecurity emergency declaration to specify the disease or pest to which the declaration relates and the nature of the emergency and the conditions that gave rise to it. Requiring this information will facilitate a level of parliamentary scrutiny despite the fact that declarations are not subject to disallowance.

A similar issue arises in relation to clause 473 which empowers the Governor-General to declare that a human biosecurity emergency exists.

**In light of the detailed explanations provided, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

### **Inappropriate delegation of legislative power**

#### **Subclauses 443(4) and 444(4), and subclauses 475(5) and 476(4)**

Under clauses 443 and 444 the Agriculture Minister may determine requirements, directions and actions if satisfied that the measure is appropriate and adapted (i.e. proportionate) to the prevention or control of the establishment or spread of the specified disease or pest. These measures are wide-ranging and subclauses 443(4) and 444(4) provide that they are to have effect 'despite any provision of any other Australian law'. The explanatory memorandum explains that this means that a person who acts in accordance with these measures will not be liable for any contravention of any other law. However, these clauses do not 'override any other Australian law', which means that unless a person complying with a measure conflicts with another law, that law will continue to be in force (at 310 and 312).

Although these subclauses enable non-disallowable executive determinations of requirements, directions and actions to modify legal obligations under other

legislation, the committee accepts that whether this is justified depends on balancing the importance of parliamentary scrutiny of changes in legal rights and obligations against the Commonwealth's 'ability to manage nationally significant biosecurity risks by implementing a fast and urgent response to the threat or harm posed to Australia's local industries, economy and the environment' (see the explanatory memorandum at page 310).

The same issue arises in relation to subclauses 475(5) and 476(4).

**In light of the detailed explanations for these provisions the committee leaves the appropriateness of these powers to the consideration of the Senate as a whole.**

*The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

**Insufficiently defined administrative power—delegation  
Subclause 452(1)**

This clause provides that during a biosecurity emergency, the executive head of a national response agency (holding a delegation of functions or powers under a delegation from the Agriculture Minister) may subdelegate to a person performing duties in the agency a power to determine emergency directions and actions during an emergency period, and powers to ask questions and require documents. The explanatory memorandum indicates, at pages 315 to 316, that the executive head of a national response agency can only subdelegate these powers to an agency employee 'if the executive head is specifically authorised by his or her delegation from the Agriculture Minister' to do so.

However, this does not appear to accurately reflect subclause 452(2) which provides that the executive head must not subdelegate if the instrument delegating power to them under section 451 states that the function or power is not to be subdelegated. The default position seems therefore to be that subdelegation to 'a person performing duties in the agency' is allowable unless it has been specifically ruled out by the original delegation of power.

**The committee seeks the Minister's clarification of the position in this respect and also asks whether consideration has been given to whether the power of subdelegation by agency heads may be limited to ensure**

**these significant powers can only be exercised by appropriately trained and qualified agency employees.**

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

## **Trespass on personal rights and liberties—entry without consent or warrant**

### **Clause 468**

This clause allows biosecurity officers and biosecurity enforcement officers to enter any premises for the purposes of exercising a number of specified powers enabling the assessment and management of biosecurity risks during a biosecurity emergency period. The justification for these extraordinary powers is that there exists a 'nationally significant threat of harm being caused by the declaration disease or pest to Australia's plant health, animal health, the environment or related economic activities' (explanatory memorandum at 322). The explanatory memorandum, at page 323, illustrates these risks by citing the costs estimated to be incurred were there to be an outbreak of foot and mouth disease in Australia.

It is noted that entry to premises under this clause would only be authorised if the officers suspected on reasonable grounds that the declaration disease or pest may be present in or on the premises or goods on the premises. It is also a requirement that a biosecurity enforcement officer accompany a biosecurity officer for the purposes of assisting in entering the premises and exercising the associated powers. There is a discussion of the general approach and justification in the explanatory memorandum at pages 9 to 11. **The committee leaves the general issue of whether entry without consent or warrant is justifiable in the context of a biosecurity emergency having been declared, to the consideration of the Senate as a whole.**

Nevertheless, the bill could contain further accountability mechanisms to minimise the likelihood of any abuse of these powers. Although the explanatory memorandum suggests that 'administrative arrangements will be put in place to ensure that senior executive authorisation is given before the power is exercised and there are appropriate reporting requirements', it is of

concern that these requirements are not included in the bill. **As there is no explanation for relegating these important issues to ‘administrative arrangements’, the committee requests that the Minister includes appropriate requirements relating to authorisation and reporting in the bill.**

*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.*

### **Trespass on personal rights and liberties—enforcement powers General**

Chapter 9 of the bill contains a number of enforcement powers including powers to monitor, search and access certain premises. These powers involve various coercive elements. **However, the committee notes that in general they appear consistent with the *Guide* and leaves them to the consideration of the Senate as a whole.**

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

### **Insufficiently defined administrative power Subclause 579(3)**

This subclause provides that the Director of Biosecurity may do anything incidental or conducive to the performance of his or her functions or exercise of his or her powers. The explanatory memorandum, at page 370, indicates that this power is ‘intended to give flexibility to the Director of Biosecurity to ensure that the functions and powers of the Director can be exercised to their full effect’. However, given the broad ranging nature of the Director’s functions and powers it is unclear what additional functions and powers this provision may confer or why it is necessary. To better assess what further powers might be conferred by this subclause and whether it is sufficiently defined in light of the manner in which the Director’s actions and decisions are liable to affect personal rights and liberties, **the committee seeks the Minister’s further advice in relation to the intended operation of the provision. The committee may be assisted if it is possible to give examples**

**of situations in which reliance on this subclause as a source of legal authority for the decisions and actions of the Director may be necessary.**

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

### **Delegation of legislative power—Henry VIII clause Clauses 650 and 651**

These clauses provide for the making of regulations that create exemptions from and modifications to the Act. However, in light of the comprehensive justification for the proposed approach (see the explanatory memorandum at pages 397 to 401), the Committee makes no further comment on these provisions.

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

### **Trespass on personal rights and liberties—privilege against self-incrimination Clause 661**

The privilege against self-incrimination is abrogated in relation to a number of provisions in the bill (listed in subclause 661(1)) that would require a person to answer a question, provide information or produce a document. However, subclause 661(2) provides that information gathered is subject to a use and derivative use immunity, which means that it cannot be used either directly or indirectly as evidence against the person in court proceedings (criminal or civil). (This is subject to a standard exception in relation to prosecution for offences for the provision of false and misleading information or documents.)

The explanatory memorandum sets out a comprehensive justification for the abrogation of the privilege (at 406-7). The importance of timely access to documents and information to manage biosecurity risks and the high risks to human health, the environment and the economy are emphasised. **In light of the use and derivative use immunities and this detailed explanation, the**

**committee leaves the question of whether the proposed 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.*

## **Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012**

Introduced into the House of Representatives on 28 November 2012

Portfolio: Justice

### **Background**

This bill amends the *Proceeds of Crime Act 2002* (the POC Act) and the *Criminal Code Act 1995* to respond to recommendations of the Parliamentary Joint Committee on Law Enforcement report *Inquiry into Commonwealth unexplained wealth legislation and arrangements*.

Schedule 1 will amend the POC Act to:

- ensure that evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- allow the time limit for serving notice of a preliminary unexplained wealth order to be extended by a court in certain circumstances;
- harmonising provisions relating to the payment of legal expenses for unexplained wealth cases;
- allow charges to be created over restrained property to secure wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are satisfied; and
- expand the parliamentary joint committee's oversight of unexplained wealth investigation and litigation.

Schedule 2 will amend Part 9.4 of the Criminal Code to expand existing cross-border firearms trafficking offences to cover firearm parts, and introduce new offences for international firearms trafficking across Australia's national borders. Schedule 2 will also introduce aggravated offences with a maximum penalty of life imprisonment where 50 or more firearms or firearms parts are trafficked within a six month period.

## **Trespass on personal rights and liberties—retrospective application Part 2 of Schedule 1, item 29**

This item relates to the application of amendments in part 1 of schedule 1 of the bill. The explanatory memorandum states that although amendments to sections 20A, 45 and 45A will only apply to restraining orders applied for or made on or after commencement, the operation of the amendments is ‘partially retrospective’. The reason for this is that they relate to unexplained wealth restraining orders and the property relevant to such orders includes property that may have been accumulated prior to the commencement of the amendments. The explanatory memorandum, at page 32, argues that this approach is justified on the basis that unexplained wealth orders are civil asset confiscation orders and do not thus result in any finding of criminal guilt or expose people to criminal sanctions (see). Further, it is argued that it may be difficult, if not impossible, to ascertain specifically when property or wealth was acquired. In this context unexplained wealth orders could be frustrated by requiring the ‘precise point in time at which certain property or wealth was acquired to be established’. It is further argued that the ‘criminal conduct from which a person may have profited or gained property may continue over several years,...may not be discovered immediately, or may not be able to be attributed to a specific date’ (see the explanatory memorandum, also at page 32).

Essentially the same reasons are also given in the explanatory memorandum for the partial retrospectivity of other amendments specified in item 29 and relevant to unexplained wealth orders. **While provisions that have retrospective application are generally of concern to the committee when it involves detriment to any person, in light of the detailed explanation provided the committee leaves the question of whether the proposed 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.*

**Trespass on personal rights and liberties—absolute liability**  
**Schedule 2, item 7, paragraphs 360.2(1)(b), 360.2(2)(b), 360.3(1)(ab), 360.3(1A)(c)**

The statement of compatibility at pages 12 and 13, and the explanatory memorandum, for example at pages 41 and 42, contain detailed explanations of the use of absolute liability in relation a jurisdictional element of offences for cross-border trafficking of firearms. The element of the offences relates to whether or not the conduct occurs in the course of trade and commerce among the States (including the Territories). This element does not relate to the substance of the offence but makes a boundary of Commonwealth legislative authority. The use of absolute liability in these circumstances is consistent with the *Guide*. **In these circumstances the committee notes these provisions and makes no further comment.**

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

**Trespass on personal rights and liberties—absolute liability**  
**Schedule 2, further provisions**

The statement of compatibility, at pages 12 and 13, contains a table of further absolute liability provisions introduced by item 7 of Schedule 2. It also contains a justification for the use of absolute liability in relation to each of these listed provisions. The justification given for the use of absolute liability is, in each case, appropriately detailed and consistent with the principles articulated in the *Guide*. **The committee acknowledges the useful discussion of these provisions in the explanatory memorandum and makes no further comment.**

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

**Trespass on personal rights and liberties—strict liability**  
**Schedule 2, various provisions**

Schedule 2 of the bill also applies strict liability to certain elements of offences to be introduced by the amendments. There is again a detailed justification for the approach in the statement of compatibility, at pages 13 and 14 (and also in the explanatory memorandum for particular provisions).

The essential justification for the use of strict liability in relation to the element of the offences that 50 or more firearms or firearm parts were disposed of or acquired, taken or sent on any occasion or on two or more occasions is that ‘it is reasonable to expect a defendant to take steps to ensure they are aware of the quantity of firearms or firearm parts they are disposing of or acquiring’ and that the defence of mistake of fact remains available.

The further uses of strict liability relate to the physical element of circumstance of the offence that a required approval to dispose of, acquire, take, send, import or export a quantity of firearms had not been obtained. The statement of compatibility, at page 14, justifies this approach on the basis that persons engaged in these activities ‘should be expected to be aware of and comply with approval requirements’ and that it ‘would not be appropriate for the prosecution to have to demonstrate that a person knew the relevant legal requirement’. As with other strict liability elements, the defence of mistake of fact would remain available. **As the explanation provided for the approach is detailed and appears reasonable the committee notes the effect of these provisions and makes no further comment.**

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

### **Trespass on personal rights and liberties—reversal of onus Item 21 of Schedule 2, proposed section 361.4**

This provision provides for a defence to an offence against Division 361 if ‘at the time of the conduct constituting the offence, the person was under a mistaken, but reasonable, belief that the conduct was justified or excused by or under a law of the Commonwealth or of a State or Territory and had the conduct been so justified or excused, the conduct would not have constituted the offence’ (see the explanatory memorandum at page 65). The defences are modelled on those applicable to comparable drug importation and exportation offences in the Criminal Code and ‘are aimed at ensuring administrative errors or misunderstandings occurring in the course of bona fide legitimate business do not result in convictions for offences that are intended only to target those involved in the illicit firearms trade’ (explanatory memorandum at 65).

Defendants bear an evidential burden in relation to the element in proposed paragraph 361.4(a) that ‘at the time of the conduct constituting the offence, the person was under a mistaken but reasonable belief that the conduct was

justified or excused by or under a law of the Commonwealth or of a State or territory’.

The explanatory memorandum argues that this reversal of onus is appropriate as it ‘will generally be much easier for a defendant, rather than the prosecution, to produce evidence showing that the circumstances to which the defence applies do in fact exist because such evidence will be peculiarly within the knowledge of the defendant’. **This justification is consistent with the relevant principles set out in the *Guide* and the committee makes no further comment.**

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

## **Customs Amendment (Miscellaneous Measures) Bill 2012**

Introduced into the House of Representatives on 28 November 2012

Portfolio: Home Affairs

### **Background**

This bill amends the *Customs Act 1901* to introduce a new offence for bringing into Australia a new category of goods known as ‘restricted goods’, and makes a number of technical amendments.

The bill also amends the *A New Tax System (Wine Equalisation) Act 1999*, *Import Processing Charges Act 2001* and *Customs Act 1901* to remove provisions which established the accredited client program.

### **Delegation of legislative power—elements of serious offence included in regulations**

#### **Schedule 1, item 6, proposed section 233BABAE**

This item would insert a provision into the *Customs Act 1901* that creates an offence of strict liability if a person brings ‘restricted goods’ into Australia. The penalty is 1000 penalty units (subsection 233BABAE(1)). The offence does not apply if the goods are brought into Australia in accordance with the Minister’s written permission for this subsection (subsection 233BABAE(2)).

Proposed subsection 233BABAE(3) provides that restricted goods are goods that if imported would be prohibited imports (goods which have been prescribed in the regulations by the Governor-General under section 50 of the *Customs Act*) and that are prescribed as such under the regulations. It is noted that under the current regime prohibited imports cannot be seized in circumstances where there is no intention to import them, such as when they remain among the personal effects of ship crew and have not been ‘landed’.

In general the committee raises concerns about the inclusions of significant elements of a criminal offence in regulations. In addition, concerns about the inclusion of elements of a criminal offence in regulations are amplified in instances in which the offence is significant and one of strict liability.

The explanatory memorandum, at page 5, argues that the approach is justified on the basis that it will give Customs and Border Protection ‘some flexibility in regulating goods consistent with international treaty obligations and matters of international concern without the need for legislative amendment’. It is also noted that proposed subsection 233BABA(4) states that the section creating the new offence ‘has effect only for purposes related to external affairs (including those related to giving effect to an international agreement and for those related to addressing matters of international concern).

The explanatory memorandum also states that, initially, it is intended to make child pornography and child abuse material a restricted good under the new provision. In this context, it is argued that ‘given the nature of the material proposed to be included as restricted goods, 1000 penalty units is appropriately high so as to deter people from bringing into Australia the kinds of goods which will be restricted goods.

Although the committee may accept that the penalty of 1000 penalty units for bringing goods such as child pornography into Australia is ‘appropriately high’, the explanatory memorandum has not provided a sufficiently detailed explanation for prescribing ‘restricted goods’ in regulations rather than including them in primary legislation. **The committee therefore seeks further information about the nature of other goods which may be prescribed as ‘restricted goods’ and the frequency with which the facility to prescribe such goods is likely to be exercised. The committee also seeks advice as to whether consideration has been given to including an obligation to ensure that persons entering Australia are informed of the prohibition on bringing restricted goods into Australia even where there is no intention to import such goods.**

*Pending the Minister’s reply, the Committee draws Senators’ attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee’s terms of reference.*

### **Trespass on personal rights and liberties—strict liability** **Schedule 1, item 6, proposed section 233BABA**

As the explanatory memorandum does not address the appropriateness of strict liability for the offence created, **the committee seeks the Minister’s**

**advice as to the justification for the proposed approach and whether it is consistent with the principles set out in the committee's *Report 6/2002* discussed in the *Guide to Framing Commonwealth Offences*.**

*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.*

## **Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Special Minister of State

### **Background**

This bill amends the *Commonwealth Electoral Act 1918*, the *Referendum (Machinery Provisions) Act 1984* and the *Taxation Administration Act 1953*.

The bill implements various recommendations made by the Joint Standing Committee on Electoral Matters in its *2010 Federal Election: Report on the conduct of the election and related matters*.

The bill contains provisions that:

- set out the procedures to be followed when a ballot-box is opened prematurely, that is, before the close of the poll, other than in accordance with the relevant provisions of the Electoral Act and Referendum Act;
- require ballot papers included in a ballot-box that is opened prematurely to be excluded from scrutiny;
- remove the requirement under the *Electoral Act* and *Referendum Act* for an applicant for a pre-poll ordinary vote to complete and sign a certificate;
- provide that pre-poll voting cannot commence earlier than 4 days after the date fixed for declaration of nominations for any type of election or by-election;
- brings forward the deadline for applications for postal votes by one day from the Thursday before polling day to the Wednesday before polling day;
- provide for further fixed periods of time to be provided to the augmented Electoral Commission (as defined in section 70 of the Electoral Act) to complete its inquiries into objections against proposed redistribution of electoral boundaries;

- amend the *Taxation Administration Act* to allow the Commissioner of Taxation and other taxation officers to provide some forms of taxpayer information to the Australian Electoral Commission for the purposes of administering the *Electoral Act* and *Referendum Act*; and
- make a number of related minor and technical amendments.

*The Committee has no comment on this bill.*

## **Environment Protection and Biodiversity Conservation Amendment (Prohibition of Live Imports of Primates for Research) Bill 2012**

Introduced into the Senate on 22 November 2012

By: Senator Rhiannon

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to ban the import of live primates into Australia for the purposes of research.

*The Committee has no comment on this bill.*

## **Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012**

Introduced into the Senate on 27 November 2012

By: Senator Waters

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to prevent the Commonwealth from handing responsibility for approving proposed actions that significantly impact matters protected by bilateral agreements to a State or a Territory.

*The Committee has no comment on this bill.*

## **Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012**

Introduced into the Senate on 27 November 2012

By: Senator Abetz

### **Background**

This bill amends the *Fair Work (Registered Organisations) Act 2009* to increase penalties for officers of registered organisations who misuse members' funds.

### **Trespass on personal rights and liberties—penalties Item 3, Schedule 1**

This item will insert a new section 288A into the *Fair Work (Registered Organisations) Act*. The provision introduces new offences in relation to officers of registered organisations who do not act in good faith or misuse their position. The offences attract penalties of 5 years imprisonment or 2000 penalty units or both.

The explanatory memorandum argues that these penalties are (1) similar to an 'existing provision in the Corporations Act' (it would have been useful for the explanatory memorandum to identify the provision in the Corporations Act that is said to be similar), and (2) required to serve as an appropriate deterrent for officers who, in some cases handle millions of dollars of members' money. The committee notes that offences related to corruption and abuse of public office in the *Criminal Code* (sections 142.1 and 142.2) attract a penalty of 5 years penalty units and these offences may in some respects be considered similar to those introduced by this item.

**Although further the explanation of the severity of the penalties would be welcome, in light of the information that has been provided the committee leaves the question of whether the proposed 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.*

## **Fair Work Amendment (Tackling Job Insecurity) Bill 2012**

Introduced into the House of Representatives on 26 November 2012

By: Mr Bandt

### **Background**

This bill amends the *Fair Work Act 2009* to:

- enable casual and rolling contract employees or their union representative to request an employer for a secure employment arrangement;
- provide that Fair Work Australia (FWA) can issue a secure employment order if an employee's request is refused and make orders to maintain existing secure employment arrangements;
- enable unions and employer associations to apply directly to FWA for secure employment orders; and
- preserve the right of small businesses to use casual employees.

*The Committee has no comment on this bill.*

## **Federal Circuit Court of Australia (Consequential Amendments) Bill 2012**

Introduced into the House of Representatives on 28 November 2012

Portfolio: Attorney-General

### **Background**

This bill makes consequential amendments to Commonwealth legislation to reflect changes to the name of the Federal Magistrates Court and the title of Federal Magistrates.

*The Committee has no comment on this bill.*

## **Financial Framework Legislation Amendment Bill (No. 4) 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Finance and Deregulation

### **Background**

This bill amends the *Commonwealth Authorities and Companies Act 1997*; the *Environmental Protection and Biodiversity Conservation Act 1999*; the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*; *Papua New Guinea (Staffing Assistance) Act 1973* and the *Public Accounts and Audit Committee Act 1951* to:

- substitute references to 'Commonwealth Procurement Guidelines' with 'guidelines in relation to procurement', given the recent change of name of the guidelines to the Commonwealth Procurement Rules;
- provide the Director of National Parks with greater autonomy to enter into contracts with an increased threshold of \$1,000,000 without seeking the approval of the Minister;
- establish a new special appropriation for the purpose of making remissions or refunds of import levies and manufacture levies, including those related to synthetic greenhouse gas management equipment;
- establish a framework for dealing with overpayments and to address instances where payments are made from an annual appropriation that are not consistent with the requirements or preconditions imposed by the Act and risk breaching section 83 of the Constitution; and
- update labels of defined terms 'the Chairman' and 'the Vice-Chairman' with the gender neutral terms 'Chair' and 'Deputy Chair'.

*The Committee has no comment on this bill.*

## **Foreign Acquisitions and Takeovers Amendment (Cubbie Station) Bill 2012**

Introduced into the House of Representatives on 26 November 2012

By: Mr Katter

### **Background**

This bill amends the *Foreign Acquisitions and Takeovers Act 1975* to ensure that Cubbie Station located near Dirranbandi, Australia remains Australian owned.

*The Committee has no comment on this bill.*

## **Income Tax Rates Amendment (Unlawful Payments from Regulated Superannuation Funds) Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Treasury

### **Background**

This bill amends the *Income Tax Rates Act 1986* to ensure that superannuation benefits received in breach of legislative requirements are taxed at 45 per cent.

*The Committee has no comment on this bill.*

## Inspector-General of Biosecurity Bill 2012

Introduced into the Senate on 28 November 2012

Portfolio: Agriculture, Fisheries and Forestry

### Background

This bill establishes the Inspector-General of Biosecurity (Inspector-General) as a statutory body to review the performance of functions and exercise of powers by the Director of Biosecurity (and biosecurity officers and biosecurity enforcement officers), including a review of the process for conducting Biosecurity Import Risk Analyses.

### Trespass on personal rights and liberties—privacy Clause 10

This clause empowers the Inspector-General to require a person, by written notice, to give information, produce documents or attend to answer questions if the Inspector-General has reason to believe that a person holds information etc. or is capable of giving evidence relevant to a review. Clause 16 provides for a civil penalty (30 penalty units) for failing to comply with such a notice.

The statement of compatibility emphasises that clause 10 powers are subject to a number of protections, including that persons may request that confidential information not be published, and that it will be an offence to disclose protected information. **The committee notes these safeguards, and leaves the general question of whether the approach to requiring information under clause 10 is reasonable and proportionate to the legitimate aim of enabling the Inspector-General to conduct the function of external review of the activities of the Director of Biosecurity to the consideration of the Senate as a whole.**

However, it is unclear whether the threshold test for the exercise of these powers (i.e. that the Inspector General has ‘reason to believe’) means that the relevant belief must be formed ‘on reasonable grounds’. **The committee therefore seeks the Minister’s advice as to whether the belief formed must be conditioned on the existence of reasonable grounds for that belief, and if so, whether this can be specified in the clause.**

*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.*

### **Trespass on personal rights and liberties—self-incrimination Clause 17**

The committee routinely comments on provisions that abrogate the common law privilege against self-incrimination. The committee has, however, accepted that there may be circumstances where the abrogation of the privilege is justified. In particular, it is easier to justify the abrogation of the privilege where the legislation provides for a use and derivative use immunity.

Clause 17 provides that a person is not excused from a clause 10 requirement to provide information or to answer questions on the ground that doing so might tend to incriminate them or make the person liable to a penalty. In this instance, the abrogation of the privilege and the availability of both use and derivative-use immunities is dealt with in detail in the explanatory memorandum at pages 23 and 24 and the statement of compatibility at pages 10 and 11. The principles accepted by the committee as relevant to the abrogation of the privilege have been considered and in light of the detailed justification the matter may appropriately be left to the Senate as a whole.

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

### **Trespass on personal rights and liberties—privacy Clause 20**

This clause provides authority for the Inspector-General to enter any of the following premises:

- Premises owned or controlled by the Commonwealth where functions exercised under the Biosecurity bill are or have been exercised by specified officers.
- Premises at which a biosecurity industry participant carries out biosecurity activities as authorised by an approved arrangement covering their activities.

- Any other premises where functions are or have been performed (or powers exercised) under the Biosecurity bill by specified officers.

Only the third category of premises requires that entry must be by consent or warrant.

It is of concern that the bill does not appear to include a threshold test that sets out the basis for entry under clause 20 and, thus, for the exercise of the powers that then become available under clauses 21 to 24. **The committee therefore seeks the Minister's advice as to whether it is appropriate to limit entry and the exercise of associated coercive powers by reference to an appropriate test, such as where reasonable grounds exist for believing there is evidential material on the premises. In addition, the committee seeks the Minister's advice as to whether reporting requirements might be included in relation to the exercise of powers to enter premises without consent having been given or a warrant having been obtained.**

*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.*

## **International Tax Agreements Amendment Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Treasury

### **Background**

This bill amends the *International Tax Agreements Act 1953* to:

- give legislative effect to bilateral taxation agreements with India, the Marshall Islands and Mauritius; and
- update certain references to existing taxation agreements.

*The Committee has no comment on this bill.*

## **Migration Amendment (Special Protection Scheme for Afghan Coalition Employees) Bill 2012**

Introduced into the Senate on 20 November 2012

By: Senator Hanson-Young

### **Background**

This bill amends the *Migration Act 1958* to:

- create a new class of visas - Special Protection Visas - for persons who have assisted Coalition forces in Afghanistan and are likely to be subject to persecution as a result; and
- extend eligibility to family members of a holder of a special protection visa.

*The Committee has no comment on this bill.*

## **National Disability Insurance Scheme Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

The committee's comments on this bill were also tabled out-of-session on 1 February 2013 in a document titled *Alert Digest relating to the National Disability Insurance Scheme Bill 2012*.

### **Background**

This bill establishes the framework for the National Disability Insurance Scheme and the National Disability Insurance Scheme Launch Transition Agency. This will enable the scheme to be launched, and the Agency to operate the launch, in five sites across Australia from July 2013.

### **Delegation of legislative power—disallowance**

#### **Insufficient parliamentary scrutiny**

##### **Clause 10**

This clause provides that the Minister may, by legislative instrument, specify that a state or territory is a host jurisdiction, with the agreement of that state or territory. A *Note* to the clause indicates that section 42 of the *Legislative Instruments Act*, which provides for the disallowance of legislative instruments (by the Parliament) does not apply. The reason for this is stated to be that 'the establishment of a host jurisdiction is the result of an agreement between the Commonwealth and the relevant state or territory' (explanatory memorandum, p.5), which falls into a category of legislative instruments that is already excluded from disallowance by the operation of subsection 44(1) of the *Legislative Instruments Act*.

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

### **Reversal of burden of proof—evidential burden**

#### **Subclauses 57(2); 84(7) and 189(2)**

As a general principle the *Guide to Framing Commonwealth Offences* cautions against the use of 'reasonable excuse' defences, in part because it is unclear what needs to be established as the language used is 'too open-ended'.

In this bill ‘reasonable excuse’ defences are included in three clauses with no explanation provided in the explanatory memorandum:

- Subclause 57(2) provides for an offence-specific defence in relation to the offence of failing to comply with a requirement under section 55 to give information or produce a document. The defence is where the person ‘has a reasonable excuse’. As an offence-specific defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 25).
- Clause 84 provides for the CEO to require information from a plan nominee in relation to the disposal of money. A person will commit an offence if they refuse to comply with a notice requiring this information (subclause 84(6)) unless the person ‘has a reasonable excuse’ (subclause 84(7)). Again, as an offence-specific defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 35).
- Subclause 189(2) provides for an offence-specific defence in relation to the offence of failing to comply with a requirement under subclause 189(1) to give information or produce a document as required under Division 3. The defence is where the person ‘has a reasonable excuse’. As an offence-specific defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 70).

Although it may be considered that the existence of a reasonable excuse will normally relate to matters peculiarly within the knowledge of the defendant, the Committee expects that the explanatory memorandum specifically addresses the appropriateness of imposing an evidential burden on defendants—especially where the defence relates to a reasonable excuse exception. **The committee therefore seeks the Minister’s advice as to the justification for the proposed inclusion of ‘reasonable excuse’ defences in**

relation to these clauses, with reference to the principles outlined in the *Guide to Framing Commonwealth Offences*.

*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.*

## **Delegation of Legislative Power**

### **Insufficiently defined administrative power**

#### **Paragraph 118(2)(a)**

This clause provides that in performing its functions the Agency must use its best endeavours to 'act in accordance with any relevant intergovernmental agreements'. Two scrutiny issues arise in relation to this paragraph. First, will this requirement have the effect of modifying any other obligation placed on the Agency? If so, it appears that this may be achieved by reference to documents (intergovernmental agreements) which are not subject to parliamentary scrutiny. **The committee seeks the Minister's advice as to the expected impact of paragraph 118(2)(a). In particular, the seeks advice as to whether consideration has been given to requiring that any modifications to any Agency obligations arising from the operation of this paragraph be reflected in delegated legislation (and therefore subject to Parliamentary scrutiny, even if section 42 (disallowance) of the *Legislative Instruments Act* does not apply). If not, the committee seeks advice as to whether alternative mechanisms for ensuring parliamentary oversight of the impact of paragraph 118(2)(a) could be included in the bill.**

The second issue arising is uncertainty over what is intended by requiring the agency to 'use its best endeavours' to 'act in accordance' with relevant intergovernmental agreements. **As the explanatory memorandum does not indicate what level of compliance with such agreements is required or what legal consequences may follow from a failure of the Agency to use its best endeavours to achieve compliance, the Committee seeks the Minister's advice as to the intended operation of the obligation imposed by this paragraph.**

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the*

*Committee's terms of reference and they may also 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 – inappropriate delegation Clause 209**

If enacted, the Bill will be supplemented by the NDIS rules, to be made as disallowable legislative instruments. A number of the envisaged rules relate to 'significant policy matters' (explanatory memorandum, p.75). As a general proposition, the Committee is concerned to ensure that significant questions of policy be dealt with in primary legislation. The explanatory memorandum does not explain why 'significant policy matters' cannot appropriately be dealt with in primary legislation.

The committee is aware that the NDIS involves a cooperative venture between the Commonwealth and State and territory governments. Nevertheless, the committee is not persuaded that this, in and of itself, is sufficient to justify the use of delegated legislation for significant policy matters. Where the use of legislative instruments to achieve important policy outcomes is proposed, the committee expects that the provisions to this effect will be accompanied by a detailed explanation to assist consideration of the appropriateness of the approach. **The committee therefore seeks the Minister's advice as to the justification for the proposed use of delegated legislation for significant policy matters.**

*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.*

### **Delegation of legislative power – incorporating material by reference Insufficient parliamentary scrutiny Clause 209**

In addition to the clause 209 concern outlined above, subclause 209(2) provides that the rules may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in another instrument as in force or existing from time to time.

The committee 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. **As there is no explanation or justification of this subclause the committee seeks the Minister's advice as to:**

- **why it is necessary to rely on material incorporated by reference to other instruments as in force from time-to-time; and**
- **if the approach is considered necessary, has consideration has been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **how relevant changes will be notified to affected persons.**

*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 and 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.*

## **Undue Trespass on personal rights and liberties—privacy Various**

The collection, use, storage and sharing of personal information pursuant to relevant provisions in the bill will engage the right to privacy (see chapter 4 of the bill). The statement of compatibility emphasises that the bill, if enacted, will create significant offences for unauthorised access or use, for soliciting disclosure and for offering to supply protected information. These provisions are said to apply standard penalties by Commonwealth legislation for breaches of privacy in relation to protected personal information (see the statement of compatibility at page 16).

It is also argued that the CEO's powers to compel the production of information from participants and other persons are designed to ensure the integrity of the NDIS and are thus 'necessary to achieve a legitimate aim, and

are appropriately limited so as to ensure they are a proportionate means by which to achieve this aim' (see the statement of compatibility at page 16).

**However, given the nature of the sensitive medical and personal information that is in issue, the committee seeks the Minister's advice as to whether consideration has been given to provisions clarifying the interaction of the legislation with the *Privacy Act*, and role of the Information Commissioner in relation to the receipt and investigation of acts and practices pursuant to the *Privacy Act*. In this respect it is noted that such provisions exist in other Commonwealth legislation which deal with sensitive health information (see for example, sections 28 and 29 of the *Healthcare Identifiers Act 2010*).**

*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.*

### **Note on non-discrimination**

The committee notes that the scheme will not, initially at least, have universal coverage such that all persons with a disability will be covered. It is also noted that access to the scheme will be limited based on age requirements. These matters are dealt with in the statement of compatibility, where it is argued that the differential treatment is aimed at achieving a legitimate purpose and the approach is reasonable and proportionate to this purpose. In light of the principle of non-discrimination under the *Convention on the Rights of Persons with Disabilities* and *International Convention on Civil and Political Rights* the committee will therefore draw this matter to the attention of the Parliamentary Joint Committee on Human Rights.

## Native Title Amendment Bill 2012

Introduced into the House of Representatives on 28 November 2012

Portfolio: Attorney-General

### Background

This bill amends the *Native Title Act 1993* to:

- clarify the meaning of good faith and make associated amendments to the right to negotiate provisions;
- enable parties to agree to disregard historical extinguishment of native title in areas set aside, or where an interest is vested for the purpose of preserving the natural environment such as parks and reserves; and
- amend processes for Indigenous Land Use Agreements.

### Trespass on personal rights and liberties—retrospective application Schedule 2, item 11

This item provides that the amendments made by Schedule 2 of the bill commence on or after 1 January 2013 and are still on foot on the day this Act receives the Royal Assent. This means that the good faith negotiation requirements may apply to negotiations that commence prior to the commencement of the bill.

The Committee believes that the requirement that persons arrange their affairs in accordance with potential law, rather than in accordance with the law once it has been made, tends to undermine the principle that the law is made by Parliament, not by the Executive. The committee also has a long-standing concern about provisions which could have a retrospective and possibly detrimental effect on a person and usually requests an explanation of the justification for any such provisions. The explanatory memorandum merely repeats the effect of the provision with no explanation as to its justification. **In the circumstances the committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach.**

*Pending the Attorney-General'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.*

## **Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012**

Introduced into the House of Representatives on 28 November 2012

Portfolio: Resources and Energy

### **Background**

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) in relation to:

- the compliance, monitoring, investigation and enforcement powers of the national offshore petroleum regulator; and
- enforcement measures for contraventions of the Act in the context of a high-hazard industry.

### **Trespass on personal rights and liberties—exercise of monitoring powers without warrant**

#### **Part 2, Schedule 1**

This bill will extend the monitoring powers without warrant in Schedule 3 of the Act. Currently, these powers apply only to the monitoring of compliance with OHS obligations. This bill will make these powers available for the purpose of monitoring compliance with obligations of petroleum titleholders under environmental management laws, at certain offshore vessels and structures and at onshore premises of the titleholder.

There is a detailed and comprehensive justification of these amendments in the explanatory memorandum at pages 17 and 18. The case for the necessity of powers to monitor compliance with environmental laws is made by reference to an analogy with OHS laws (compliance both with obligations and with plans submitted to describe how associated objectives will be achieved is considered as being akin to conditions on a licence to carry out a high risk activity), the high risk nature of the regulated industry to health and the environment, the high regard (nationally and internationally) in which the regulator is held, and the argument that a process of obtaining a warrant may impede the regulator's ability to rapidly respond to emergencies (the example of the Montara incident is given to demonstrate the need for urgent action to contain an emergency situation). **In light of the arguments made in the**

**explanatory memorandum the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

### **Trespass on personal rights and liberties—evidential burden Part 2, Schedule 1**

It is noted that the amendments place an evidential burden on defendants in relation to a number of offences where a reasonable excuse defence is available (see e.g. clause 7 of Part 2, Division 2 of Schedule 1). The reasonable excuse defence is justified on the basis that ‘there would otherwise be too many potential circumstances constituting a defence to set out in the provision’, and the burden of proof is reversed on the basis that the ‘circumstances are likely to be exclusively within the knowledge of the defendant’ (see the explanatory memorandum at page 27). **Although the reasonable excuse defences are open-ended and thus what must be established is not described with clarity, in light of the explanation provided the committee leaves the question of whether the proposed 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.*

### **Trespass on personal rights and liberties—self-incrimination Subclause 8(8) and (9) of Part 2, Division 2 of Schedule 1**

These subclauses abrogate the privilege against self-incrimination in relation to a requirement to answer questions or produce documents and things (subclauses 8(1) and (3)), but also provide for a use and derivative use immunity. There is a detailed and comprehensive justification for the approach in the explanatory memorandum at page 28. The high-risk nature of the industry and the difficulties faced in monitoring compliance and investigating incidents on offshore operations are given emphasis. This issue is also dealt with in the statement of compatibility at pages 14 and 15. **In light of the comprehensive justifications provided the committee leaves the**

**question of whether the proposed 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.*

## **Trespass on personal rights and liberties—criminal penalties Schedule 2**

This schedule increases the criminal penalties that apply to certain occupational health and safety and environmental offences and also introduces civil penalties for contraventions of certain provisions.

The explanatory memorandum explains the decision to increase criminal penalties as an outcome of a legislative review that concluded that existing penalties are 'too low to provide an effective and meaningful deterrent and do not adequately reflect the high-hazard nature of the offshore petroleum industry, in particular when compared with the penalties that apply for similar conduct under comparable high hazard Australian legislation' (31-32). The explanatory memorandum continues:

Given the potentially severity and/or extent of OHS and environmental consequences of an offshore petroleum incident, and in order to encourage compliance in order to reduce the risk of such an incident occurring, it is appropriate that level of criminal penalties that may be sought for non-compliance with regulatory requirements are at least equivalent, if not greater, with the penalties that apply for similar offences under other high hazard legislation.

**In light of the comprehensive justifications provided the committee leaves the question of whether the penalty increases proposed in this Schedule are 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.*

## **Trespass on personal rights and liberties—civil penalties Schedule 2**

This schedule introduces a civil penalty regime that is designed to provide the regulator with a more flexible range of enforcement options and was developed in accordance with the ALRC's report on principled regulation and after a consideration of similar high-hazard Australian legislation (see the explanatory memorandum discussion at page 32). The explanatory memorandum provides a comprehensive explanation of the overall design and implementation of the scheme and a general justification for the approach to setting civil penalties under the new regime.

The committee notes that item 33 (proposed new section 576), would establish a new fault based offence (in addition to an existing strict liability offence of 100 penalty units) with a penalty of 5 years imprisonment or 2000 penalty units or both. As the explanatory memorandum indicates, the penalty thus departs from the standard fine/imprisonment ratio (set out in section 4B of the Crimes Act). This means that the pecuniary penalty is greater than would normally be associated with a penalty of 5 years imprisonment.

The explanatory memorandum justifies this departure from the standard approach by reference to three reasons: (1) that a person's failure to comply with a direction could have potentially severe consequences in the context of the offshore petroleum industry, (2) that most breaches will be attributed to a body corporate and as such that 'a term of imprisonment would not be applied and instead ordinarily the imprisonment term is converted into penalty units to apply as a financial penalty to the body corporate' and (3) that the approach and penalty is consistent with the penalty applied for breach of an equivalent provision in the *Protection of the Sea (Powers of Intervention) Act 1981*. (It is noted that the new section 576 also continues the existing strict liability offence and penalty.) The explanatory memorandum argues that the penalty of 100 units is warranted despite the fact that the *Guide to Framing Commonwealth Offences* recommends a maximum 60 penalty units for offences of strict liability. The reason given is that levels of expenditure involved in offshore resource activities mean that a smaller penalty would not provide an adequate deterrent (at 39).

Some of these issues also arise in relation to items 36 and 37.

**In light of the detailed justification provided the committee leaves the question of whether the proposed approach in new section 576 is appropriate to the Senate as a whole.**

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

**Trespass on personal rights and liberties—use of recklessness for conduct element of offence**

**Item 93 of Schedule 2, proposed subsection 16B(3)**

The usual fault element used in the Criminal Code for elements of an offence involving conduct is intention. However, proposed subsection 16B(3) instead applies recklessness to the conduct element of the offence. The offence in question is established where a person omits to do an act and this omission breaches a health and safety requirement to which the person is subject. The explanatory memorandum, at page 47, justifies the use of recklessness as the fault standard for the conduct element of the offence on the basis that it is desirable that persons are held responsible when they are ‘reckless in relation to their conduct and the result of that conduct, given the potentially severe consequences of a failure to comply with a health and safety duty’. The approach also achieves ‘consistency with the provisions of the *Work Health and Safety Act*. **In light of the justification provided the committee leaves the question of whether the proposed 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.*

**Trespass on personal rights and liberties—privacy**  
**Schedule 3**

Schedule 3 would introduce amendments to enable the sharing of information within the regulator (NOPSEMA), between entities with regulatory functions and powers under the Act and between NOPSEMA and relevant Commonwealth, State and Northern Territory Agencies.

A comprehensive justification for the amendments is provided in the statement of compatibility. Also, the explanatory memorandum, at pages 54 and 55, provides useful background information justifying the need for information sharing given a change to the distribution of regulatory functions between NOPSEMA and the Titles Administrator. In particular, the committee notes that it is not intended that the new sharing of information provisions will apply retrospectively with respect to any personal information, meaning that the amendments will not apply to information disclosed under the existing law.

**In light of the detailed justification provided (including the rationale provided in the statement of compatibility at pages 10 to 12) the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

### **Evidential burden**

#### **Schedule 1, Division 2, clauses 14 to 18**

The explanatory memorandum does not appear to contain material that explains the effect of clauses 14 to 18 of Part 2, Division 2 of Schedule 1. These clauses deal with important matters concerning the circumstances in which offences are taken to be established, including a provision which places an evidential burden of proof on defendants (clause 18). **The committee therefore seeks the Minister's advice as to the rationale for the proposed approach in these clauses and whether they are consistent with the *Guide to Framing Commonwealth Offences*.**

*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.*

### **Possible retrospective effect**

#### **Schedule 1, Part 5**

Part 5 of schedule 1 relates to transitional, application and savings provisions. There does not appear to be an explanation for these provisions in the

explanatory memorandum and they raise issues of potential concern under the committee's scrutiny principles outlined in Senate Standing Order 24(1)(a). **The committee therefore seeks the Minister's advice as to the rationale for these provisions, and in particular, an explanation for item 155 given that it is possible this provision will have retrospective effect. Item 155 states that the amendments made by Schedule 1 apply on and after the commencement in relation to 'acts or omissions of persons, whether occurring before, on or after that commencement'.**

*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.*

## Parliamentary Service Amendment Bill 2012

Introduced into the Senate on 28 November 2012

By: President of the Senate

### Background

This bill amends the *Parliamentary Service Act 1999* (the Act) to reflect proposed changes to the *Public Service Act 1999* contained in the Public Service Amendment Bill 2012.

The bill amends the Act to:

- strengthen the Parliamentary Service Values and Parliamentary Service Code of Conduct (Code of Conduct) and establish Employment Principles for the Parliamentary Service;
- add a statement about the role of the Parliamentary Service;
- establish procedures for making, and dealing with, a whistleblower report in the Australian Parliamentary Service;
- clarify when reviews of action may be undertaken by the Parliamentary Service Merit Protection Commissioner (the MPC);
- amend the provisions relating to the Senior Executive Service to, among other things, revise the role of the Senior Executive Service in the Parliamentary Service;
- expand the roles and responsibilities of a Secretary in the Parliamentary Service;
- broaden the provisions for the use of "confidential information" by the Parliamentary Service Commissioner (the Commissioner) and the MPC, and provide protections for a Secretary or Parliamentary Service employee who provides information to the Commissioner or the MPC;
- move the provisions relating to immunity from suit from delegated legislation to the Act;
- amend relevant provisions to reflect the requirements of the *Legislative Instruments Act 2003*; and

- make a number of miscellaneous amendments to update, clarify and strengthen existing provisions, and remove ambiguity.

The bill also proposes other amendments not directly related to the Act which include:

- enabling the Commissioner and MPC to delegate their powers and functions;
- enabling the determinations to vary the scope and application of the Values and Employment Principles; and
- revising provisions dealing with acting arrangements for statutory office-holder positions to align them with the *Acts Interpretation Act 1901*.

### **Trespass on personal rights and liberties—retrospective application Item 30, proposed subsection 15(2A)**

The Code of Conduct is amended in such a way that conduct that did not amount to a breach of the Code at the time of a person's engagement as a Parliamentary Service employee, may by operation of subsection 15(2A), be taken to be a breach of the Code. There is a detailed explanation (at pages 18 and 19 of the explanatory memorandum and in the statement of compatibility at pages 5 and 6) in which the element of retrospectivity is expressly considered and justified. **In light of the explanation provided the committee leaves the question of whether the proposed 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—important matters not in primary legislation**

#### **Proposed subsection 65AE**

This provision provides that determinations made by the Presiding Officer may specify the circumstances in which personal information may be used or disclosed. The explanatory memorandum, at page 29, argues that although the

use and disclosure of personal information is ‘a serious issue’ there are reasons why the framework for the handling of personal information may be set out in delegated legislation. The fact that workplace issues give rise to great complexity, making it ‘difficult to predict every situation in which it may be necessary or desirable to use the personal information of an employee’ is emphasised. In this context the flexibility of delegated legislation is thought to be an advantage. This approach is also consistent with that taken in the Public Service legislation. **In light of the explanation provided the committee leaves the question of whether the proposed approach is appropriate to 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.*

## **Private Health Insurance Amendment (Lifetime Health Cover Loading and Other Measures) Bill 2012**

Introduced into the House of Representatives on 28 November 2012

Portfolio: Health and Ageing

### **Background**

The bill amends the *Private Health Insurance Act 2007* (the PHI Act) and makes consequential amendments to the PHI Act, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.

The bill amends the PHI Act to:

- remove the rebate on private health insurance from the Lifetime Health Cover loading part of affected premiums; and
- cease the Incentive Payments Scheme with effect from 1 July 2013.

*The Committee has no comment on this bill.*

## Protection of Cultural Objects on Loan Bill 2012

Introduced into the House of Representatives on 28 November 2012

Portfolio: Regional Australia, Local Government, Arts and Sport

### Background

This bill provides for the establishment of a scheme to provide protection for cultural objects on loan. While the objects are in Australia the legislation limits the circumstances in which lenders, exhibition facilitators, exhibiting institutions and people working for them can lose ownership, physical possession, custody or control of the objects because of:

- legal proceedings in Australian or foreign courts;
- the exercise of certain powers (such as powers of seizure) under Commonwealth, State and Territory laws; or
- the operation of such laws.

### Delegation of legislative power—important matters to be dealt with in regulations

#### Paragraphs 9(4)(b), 10(4)(b), 11(2)(b) and 12(2)(b)

Clause 9 establishes a protection from legal action while an object is on temporary loan. Paragraph 9(4)(b) provides that the protection from suit provided by subclauses 9(1) and (2), will not apply to proceedings prescribed by regulation for the purposes of subclause 9(4). Paragraph 9(4)(a) provides that proceedings under the *Proceeds of Crime Act 2002* are specifically exempted from the operation of subclause 9(1) and (2).

The explanatory memorandum indicates, at page 16, that it is necessary that further exceptions also be able to be prescribed by regulation, as this ‘provides a mechanism to enable proceedings to be excluded following the commencement of the Bill’ and ‘recognised the possibility of the enactment of future laws to which the Commonwealth may not want subclause 9(1) and (2) to apply’.

Given that the possible need for further exceptions relates to proceedings under future legislation, it is not clear why it would not be appropriate for the

issue to be dealt with at the time such legislation is enacted in primary legislation. What exceptions are appropriate to the application of this bill clearly raises important questions of policy and do not appear to be matters of detail or matters which require the greater flexibility provided by the process of delegated legislation.

The same issue arises in relation to paragraphs 10(4)(b), 11(2)(b) and 12(2)(b).

**The committee is concerned that the explanatory memorandum has not adequately explained why it is appropriate for such questions to be determined by regulation on the basis of policy decisions made by the government rather than on the basis of legislative decisions made by the Parliament. The committee therefore seeks the Minister's further advice as to why it is appropriate to determine exceptions through regulation.**

*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.*

### **Trespass on personal rights and liberties—access to courts Clauses 9 and 10**

The bill would establish a temporary limitation on the right of a person to commence legal proceedings through the Australian legal system (clause 9) and to enforce a judgement or order of a federal Court or a court of a State, Territory or foreign country (clause 10) in relation to an object protected under Part 2 of the bill while that object is in Australia. The bill also limits the circumstances in which action can be taken to seize such an object or whereby such an object be forfeited pursuant to the law of the Commonwealth, a State or a Territory (see clauses 11 and 12).

The statement of compatibility, at page 4, deals with this limitation on effective access to Australian courts to settle legal claims through a consideration of whether the limit on the right to an effective legal remedy is justified. It is claimed that the objective of the legislation—namely, encouraging the loan of objects from overseas for temporary public exhibition—is legitimate and that the limits on the right to an effective legal remedy are 'reasonable, necessary and proportionate' and are 'not arbitrary'.

It is emphasised that the limit on starting proceedings and acting to enforce a judgment in Australia are temporary (lasting only so long as an object is on loan in Australia, typically no longer than 24 months), does not apply to significant Australian cultural heritage material defined as such under the *Protection of Movable Cultural Heritage Act 1986* (this material includes ‘particularly sensitive and culturally important’ Aboriginal and Torres Strait Islander cultural material), and that the limitation is necessary to enhance access to cultural objects for the benefit of the Australian public given that the lack of such limitations may deter significant cultural objects being loaned to Australian institutions for public exhibition. The explanatory memorandum states that the absence of legislation dealing with the proposed limits ‘has made it increasingly difficult for [Australian] institutions to secure foreign loans’ (at 1). Finally, the statement of compatibility identifies a number of transparency and consultation requirements that may be made in the regulations that will provide affected persons opportunities to identify and raise any concerns they may have with proposed loans.

Subject to a concern about the use of regulations to provide for transparency and consultation requirements (see below), **the committee leaves the question of whether the balance struck between the public interest of the significant social, economic and cultural benefits delivered as a result of the loan of cultural objects and the limits on the ability to bring proceedings and take action through the Australian legal system for the duration of the loan of an object 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—important matters to be dealt with in regulations**

### **Clause 21**

This clause enables the Governor-General to make regulations prescribing matters required or permitted by the Bill and, in particular, provides that regulations dealing (among other things) with consultation requirements, publications requirements, and reporting requirements, may be made. The committee prefers that matters of importance are included in primary legislation whenever possible. Given that the intended existence of such

requirements is part of the justification for the conclusion that the interest of individual's access to the courts has been adequately balanced against the public interest in the cultural outcomes facilitated by the bill, it is unclear why these matters should not be dealt with in the primary legislation. **The committee therefore seeks the Minister's advice as to whether these matters can be included 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.*

## **Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2012**

Introduced into the Senate on 26 November 2012

By: Senator Di Natale

### **Background**

This bill repeals the *Euthanasia Laws Act 1997* which amended the Acts regarding self-government in the Northern Territory, Australian Capital Territory and Norfolk Island to prevent the legislative assemblies in those territories from making laws providing for voluntary euthanasia in their respective jurisdictions.

*The Committee has no comment on this bill.*

## **Social Security and Other Legislation Amendment (Income Support Bonus) Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Farm Household Support Act 1992* and the *Income Tax Assessment Act 1997* to create a new Income Support Bonus to be paid to recipients of ABSTUDY Living Allowance, Austudy, Newstart Allowance, Parenting Payment, Sickness Allowance, Special Benefit, Youth Allowance, Transitional Farm Family Relief Payment, and Exceptional Circumstances Payment.

### **Retrospective effect Schedules 3 and 7**

The committee is concerned about whether Schedule 3, which commences on 1 January 2013, will have a detrimental effect on any person and the explanatory memorandum does not address this issue.

The committee is also concerned about whether schedule 7 will have a detrimental effect on any person and again the explanatory memorandum does not address this issue.

**The committee therefore seeks the Minister's advice as to why a retrospective commencement date is necessary for these schedules, and the Minister's advice on the nature of any disadvantage that may result.**

*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.*

## **Superannuation Legislation Amendment (Reducing Illegal Early Release and Other Measures) Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Treasury

### **Background**

This bill amends the *Superannuation Industry (Supervision) Act 1993* and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to:

- introduce civil and criminal penalties for a person who promotes a scheme that has resulted, or is likely to result, in illegal early release of superannuation benefits; and
- require that superannuation benefits that are rolled over into self managed superannuation funds are captured as a designated service.

*The Committee has no comment on this bill.*

## **Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Treasury

### **Background**

This bill amends the *Superannuation Industry (Supervision) Act 1993*, the *Corporations Act 2001*, the *Superannuation (Resolution of Complaints) Act 1993* and the *First Home Saver Accounts Act 2008* to:

- provide APRA with the authority to impose infringement notices as an alternative to criminal prosecution;
- ensure people have a right to obtain information from trustees in relation to decisions that affect them;
- require trustees to provide reasons for decisions in relation to death benefits complaints;
- provide more time for members and beneficiaries to lodge complaints with the Tribunal in respect of total and permanent disability claims;
- insert a requirement for persons seeking to take legal action against a director for a breach of their duties to first seek leave from the Court; and
- extend the availability of a defence for directors and trustees if their breach was due to reasonable mistake.

### **Trespass on personal rights and liberties—strict liability**

#### **Various**

The bill contains a number of strict liability offences, discussed below.

**Schedule 1, item 47, proposed subsection 29WB(3)**

This provision creates a strict liability offence (50 penalty units) for failing to comply with an obligation to place a member's contributions in the MySuper product tailored for their benefit, unless the member has directed the trustee in writing pursuant to paragraph 29WB(d). The statement of compatibility justifies this approach on the basis of the importance of ensuring that all subsets of employees receive equal treatment in the placement of their contributions and thus reflects the 'importance of protecting member's interests' (at 51ab). This offence appears to be consistent with the principles stated in the *Guide*. In addition, although it is not emphasised in the explanatory memorandum, the offence is one for which it may be considered reasonable that large employers be placed on guard to ensure there is not contravention and the penalty falls below the maximum recommended for strict liability offences in the *Guide*.

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

**Schedule 1, item 49, proposed subsections 35A(7), 35AB(3), 35AE(4)**

The offences relate to the contravention of various requirements to keep accounting records and to notify regulators of the place where these documents are kept. There is a comprehensive discussion of these provisions in the statement of compatibility at pages 50 and 51. The statement of compatibility and explanatory memorandum emphasise that it is a reasonable expectation that records are kept in a manner which enables them to be audited to protect the beneficiaries of superannuation funds. **In light of the fact that the penalties for each of the offences do not exceed the maximum level recommended for strict liability offences and the argument that it is reasonable that superannuation funds be placed on notice that they must comply with obligations designed to ensure that records are kept in an appropriate manner for audit, the Committee makes no further comment on these provisions.**

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

## **Tax Laws Amendment (2012 Measures No. 6) Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Treasury

### **Background**

This bill amends various taxation laws.

Schedule 1 amends the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* to clarify that native title benefits are not subject to income tax (including capital gains tax).

Schedule 2 amends *Income Tax Assessment Act 1997* to update the list of deductible gift recipients (DGRs) by adding two entities as DGRs and extending the listing of another three entities.

Schedule 3 amends the *Income Tax Assessment Act 1997* to extend the immediate deductibility of exploration expenditure provided to mining and petroleum explorers to geothermal energy explorers.

Schedule 4 amends Schedule 2 of the *Tax Laws Amendment (2011 Measures No. 5) Act 2011* to extend the interim streaming rules for managed investment trusts until the commencement of the new tax system for managed investment trusts.

Schedule 5 amends the *Income Tax Assessment Act 1936* to apply an income test to the rebate for medical expenses from 1 July 2012.

Schedule 6 amends Division 243 of the *Income Tax Assessment Act 1997* to clarify that the definition of 'limited recourse debt' includes arrangements where, in substance or effect, the debtor is not fully at risk in relation to the debt.

Schedule 7 amends the *Fringe Benefits Assessment Act 1986* to remove the concessional fringe benefits tax treatment for in-house fringe benefits accessed by way of salary packaging arrangements.

Schedule 8 provides for miscellaneous amendments to the taxation laws and regulations as part of the Government's commitment to uphold the integrity of the taxation system.

### **Trespass on rights and liberties—retrospective effect Schedule 7**

Amendments relating to FBT laws to remove the concessional FBT treatment for in-house fringe benefits accessed by way of salary packaging arrangements will apply from the date the proposal was announced, namely, 22 October 2012. Benefits under an in-house benefits salary sacrificing arrangement that predate 22 October 2012 will be dealt with under the terms of the old law, until 1 April 2014.

This issue is considered in the statement of compatibility, at pages 90 and 91. The committee notes that: (1) it is common and necessary for some tax measures to apply from the date of announcement 'to ensure that entities do not change their arrangements or behaviour to take advantage of a timing gap between the announcement of a new tax treatment and the existing law which will undermine the integrity of the tax system'; (2) the measure has been introduced within 6 months of the announcement, in line with Senate Resolution No. 40 of 8 November 1988; and (3) 'entities affected by these amendments were provided with sufficient detail about the proposed changes on the day of announcement in order to manage their affairs' and 'those entities that have pre-existing arrangements affected by these amendments have been given a sufficient transitional period to bring those arrangements to a close'. **In light of this explanation the committee leaves the question of whether the proposed 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.*

## **Water Amendment (Save the Murray-Darling Basin) Bill 2012**

Introduced into the Senate on 27 November 2012

By: Senator Hanson-Young

### **Background**

This bill amends the *Water Act 2007* (the Act) to supplement and clarify the requirement of ‘best available science’ currently in the Act and establish minimum environmental outcomes which the *Basin Plan* must achieve.

*The Committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Fair Work Amendment (Transfer of Business) Bill 2012**

*[Digest 13/12 – response in 1/13 Report]*

On 26 November 2012 the Senate agreed to 21 Government amendments and the Parliamentary Secretary for School Education and Workplace Relations (Senator Collins) tabled a supplementary explanatory memorandum. On 27 November 2012 the House of Representatives agreed to the Senate amendments and the bill was passed. In the circumstances the committee has no comment on these amendments.

### **Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012**

*[Digest 13/12 – no response required]*

On 22 November 2012 the Minister (Senator Conroy) tabled a replacement explanatory memorandum in the Senate and the bill was read a third time. The committee has no comment on the additional material.

### **Higher Education Support Amendment (Streamlining and Other Measures) Bill 2012**

*[Digest 12/12 – no comment]*

On 21 November 2012 the Senate agreed to two Government amendments and the Parliamentary Secretary (Senator Collins) tabled a supplementary explanatory memorandum. On 26 November 2012 the House of Representatives agreed to the Senate amendments and the bill was passed. In the circumstances the committee has no comment on these amendments.

### **Law Enforcement Integrity Legislation Amendment Bill 2012**

*[Digest 12/12 – response in 13/12 Report]*

On 26 November 2012 the Parliamentary Secretary for Defence (Senator Feeney) tabled a replacement explanatory memorandum. On 27 November 2012 the Senate passed the bill without amendment. In the circumstances the committee has no comment on these amendments.

**Low Aromatic Fuel Bill 2012**

*[Digest 3/12 – response in 8/12 Report]*

On 27 November 2012 the Senate agreed to 25 Government and two Australian Greens amendments, Senator McLucas tabled a supplementary explanatory memorandum and the bill was read a third time. The committee has no comment on the additional material.

**Maritime Powers Bill 2012**

*[Digest 6/12 – response in 8/12 Report]*

On 29 November 2012 the Minister (Senator Wong) tabled a replacement explanatory memorandum. As requested by the committee, additional information has now been included in the explanatory memorandum in relation to the operational procedures that apply to the exercise of maritime powers. **The committee thanks the Minister for including this important information in the explanatory memorandum.**

**Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012**

*[Digest 14/12 – awaiting response]*

On 27 November 2012 the House of Representatives agreed to one Independent (Mr Oakeshott) amendment and the bill was read a third time. The committee has no comment on the additional material.

**National Gambling Reform Bill 2012**

*[Digest 14/12 – awaiting response]*

On 29 November 2012 the House of Representatives agreed to 20 Government and 13 Independent (Mr Windsor) amendments and the Minister (Ms Macklin) tabled a supplementary explanatory memorandum. On the same day the Senate passed the bill without amendment. In the circumstances the committee has no comment on these amendments.

**National Gambling Reform (Related Matters) Bill (No. 1) 2012**

*[Digest 14/12 – no comment]*

On 29 November 2012 the House of Representatives agreed to two Government amendments and the Minister (Ms Macklin) tabled a supplementary explanatory memorandum. On the same day the Senate passed

the bill without amendment. In the circumstances the committee has no comment on these amendments.

**Privacy Amendment (Enhancing Privacy Protection) Bill 2012**

*[Digest 6/12 – response in 10/12 Report]*

On 22 November 2012 the Minister (Senator Wong) tabled an addendum to the explanatory memorandum in the Senate. On 27 November 2012 the Senate agreed to 40 Government and one Australian Greens amendments and the Minister (Senator Ludwig) tabled a supplementary explanatory memorandum. On 29 November 2012 the House of Representatives agreed to the Senate amendments and the bill was passed. In the circumstances the committee has no comment on these amendments.

**Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012**

*[Digest 14/11 – no response required]*

On 28 November 2012 the House of Representatives agreed to 17 Government amendments and the Minister (Mr Shorten) tabled a supplementary explanatory memorandum. On 29 November the Senate passed the bill without amendment. The committee has no comment on the additional material.

**Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2012**

*[Digest 14/11 – no response required]*

On 22 November 2012 the Senate agreed to two Government amendments and the Minister (Senator Wong) tabled a supplementary explanatory memorandum. On 26 November 2012 the House of Representatives agreed to the Senate amendments and the bill was passed. The committee has no comment on the additional material.

**Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012**

*[Digest 14/12 – no comment]*

On 27 November 2012 the House of Representatives agreed to seven Government amendments and the Parliamentary Secretary to the Treasurer (Mr Ripoll) tabled a supplementary explanatory memorandum. On

29 November the Senate passed the bill without amendment. The committee has no comment on the additional material.

**Water Amendment (Water for the Environment Special Account) Bill 2012**

*[Digest 14/12 – no comment]*

On 28 November 2012 the House of Representatives agreed to seven Government amendments and the Minister (Mr A.S. Burke) tabled a supplementary explanatory memorandum. The committee has no comment on the additional material.

**Wheat Export Marketing Amendment Bill 2012**

*[Digest 6/12 & 14/12 (amendments) – response in 10/12 Report]*

On 29 November 2012 the Senate agreed to four Australian Greens amendments and the bill was read a third time. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed. The committee has no comment on the additional material.

## **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.

### **National Disability Insurance Scheme Bill 2012**

## 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***

**Financial Framework Legislation Amendment Bill (No. 4) 2012** —  
Schedule 1, item 5, section 69AD

### **Other relevant appropriation clauses in bills**

Nil