

Senate Standing Committee
for the
Scrutiny of Bills

Alert Digest No.2 of 2013

27 February 2012

ISSN 1329-668X

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.

TABLE OF CONTENTS

Commentary on bills

Appropriation Bill (No.3) 2012-2013	1
Appropriation Bill (No.4) 2012-2013	2
Australian Capital Territory (Self-Government) Amendment Bill 2013	3
• Australian Sports Anti-Doping Authority Amendment Bill 2013	4
• Aviation Laws Amendment (Australian Ownership and Operation) Bill 2013	12
Broadcasting Legislation Amendment (Digital Dividend) Bill 2013	13
Completion of Kakadu National Park (Koongarra Project Area Repeal) Bill 2013	14
Customs Amendment (Anti-Dumping Commission Bill 2013	15
• Dairy Industry (Drinking Milk) Bill 2013	16
• Environment Protection and Biodiversity Conservation Amendment (Moratorium on Aquifer Drilling Connected with Coal Seam Gas Extraction) Bill 2013	17
Export Finance and Insurance Corporation Amendment (Finance) Bill 2013	18
Export Market Development Grants Amendment Bill 2013	19
• Fair Work Amendment (Arbitration) Bill 2013	20
• Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2013	21
Family Assistance and Other Legislation Amendment Bill 2013	23
Higher Education Support Amendment (Asian Century) Bill 2013	24
Higher Education Support Amendment (Further Streamlining and Other Measures) Bill 2013	25

Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2013	26
• Migration Amendment (Reinstatement of Temporary Protection Visas) Amendment Bill 2013	27
• Minerals Resource Rent Tax Amendment (Protecting Revenue) Bill 2013	30
Royal Commissions Amendment Bill 2013	31
Social Security and Other Legislation Amendment (Income Support Bonus) Bill 2012	32
Social Security Legislation Amendment (Caring for People on Newstart) Bill 2013	33
Superannuation Legislation Amendment (Reform of Self Managed Superannuation Funds Supervisory Levy Arrangements) Bill 2013	34
• Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013	35
Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013	37
Commentary on amendments to bills	38
- Federal Circuit Court of Australia (Consequential Amendments) Bill 2012	
- Parliamentary Service Amendment Bill 2012	
Scrutiny of standing appropriations	39

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.

Appropriation Bill (No.3) 2012-2013

Introduced into the House of Representatives on 7 February 2013

Portfolios: Finance and Deregulation

Background

This bill appropriates \$6 million from the Consolidated Revenue Fund to meet payments for the ordinary annual services of the Federal Government, in addition to those provided in the 2012-2013 Budget.

The Committee has no comment on this bill.

Appropriation Bill (No.4) 2012-2013

Introduced into the House of Representatives on 7 February 2013

Portfolios: Finance and Deregulation

Background

This bill appropriates \$6.6 million from the Consolidated Revenue Fund to meet payments for the ordinary annual services of the Federal Government, in addition to those provided in the 2012-2013 Budget.

The Committee has no comment on this bill.

Australian Capital Territory (Self-Government) Amendment Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolios: Regional Australia, Local Government, Arts and Sport

Background

This bill amends the *Australian Capital Territory (Self-Government) Act 1988* to grant the Australian Capital Territory Legislative Assembly (the Assembly) the power to determine its own numbers without requiring the Commonwealth to amend its legislation to enact any changes to the size of the Assembly.

The Committee has no comment on this bill.

Australian Sports Anti-Doping Authority Amendment Bill 2013

Introduced into the Senate on 6 February 2013

Portfolios: Sport

Background

This bill amends the *Australian Sports Anti-Doping Authority Act 2006* (the Act) to amend the Australian Sports Anti-Doping Authority's investigation functions and to the information sharing arrangements with other government agencies. The bill also:

- clarifies certain definitions in the Act;
- clarifies conflict of interest provisions for members of anti-doping bodies established under the Act; and
- confirms the statutory period for commencing action against an athlete in relation to possible anti-doping rule violations.

Trespass on personal rights and liberties—privacy

Delegation of legislative power

Schedule 1, item 7 and 9, proposed paragraph 13(1)(ea) and section 13A

Proposed paragraph 13(1)(ea) provides that the National Anti-Doping Scheme (which is provided for by regulation) must provide authority for the CEO to be able to request a specified person to attend an interview, give information and/or produce documents or things. A specified person can be any person, that is, the power extends beyond athletes and athlete support persons. The power is conditioned on the CEO holding a 'reasonable belief' that the requested things may be relevant to the administration of the NAD scheme.

Proposed section 13A provides authority for the NAD Scheme to establish a scheme which provides for the issuing of disclosure notices which require a person to disclose information and or documents if the CEO 'reasonably believes' that the person has information, documents or things that may be relevant to the administration of the NAD scheme.

These powers may require the disclosure of personal information and as such may limit the right to privacy. The statement of compatibility argues, however, that the powers are ‘reasonable, necessary and proportionate to the legitimate aim of catching doping cheats’. The fact that the powers are not arbitrary (ie may only be exercised on the basis of a reasonable belief being formed that the disclosures requested may be relevant to the NAD scheme) and the existence of existing privacy safeguards in the *Australian Sports Anti-Doping Authority Act 2006*, are given emphasis. Section 71 of the Act ‘already provides for the protection of NAD Scheme personal information while section 73 preserves the operation of the *Privacy Act 1988*’ (statement of compatibility at page iii). Additionally, the statement of compatibility notes the objectives being pursued by the legislation are significant, including the protection of integrity of sport and the prevention of harm to an athlete’s health. Finally, it is noted that amendments to the regulations will provide further protections around the issuing of a disclosure notice such as specifying what information must be included in a disclosure note.

In light of the justification provided for the general approach the committee leaves to the Senate as a whole the overall question of whether the powers are appropriate taking into account both the purposes of the legislation and privacy concerns.

Nevertheless, it is not clear to the committee why the ‘further protections’ relating to the privacy interests of persons who may be subject to the disclosure notice powers envisaged by the statement of compatibility (at page (iv)) cannot be included in the primary legislation. The committee expects that important matters will be included in primary legislation unless a sound justification is provided for the use of delegated legislation.

In this instance it is not clear from the explanatory memorandum why the requirements dealing with what information must be included in a disclosure notice and the provision of a minimum time for compliance (14 days is the accepted norm) cannot be included in the bill itself, especially as the bill already includes a requirement for the NAD scheme to provide that a person who receives a disclosure notice has the right to be notified in writing of the possible consequences of a failure to comply with a disclosure notice (proposed subsection 13A(3)). **Given the importance of these additional safeguards the committee seeks an explanation as to whether the protections pertaining to the issuing of disclosure notices can be included in the bill.**

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—privacy and property rights

Schedule 1, item 9, proposed paragraph subsection 13B(2)

This proposed section empowers the CEO to take and retain 'for as long as necessary' documents or things produced in response to a disclosure notice. Where items are seized under search and seizure powers, the power to retain such items is usually subject to a maximum time limit, with the possibility of this limit being extended if necessary. It is also common for legislation to require that seized material be regularly reviewed to ensure its retention remains necessary. These powers provide additional accountability for decisions to retain documents and things disclosed under the NAD scheme.

Given that the power to retain a document for 'as long as necessary' may be subject to differing interpretations and may result in an individual's property or information being retained for lengthy periods of time, **the committee seeks the Minister's advice as to whether consideration has been given to including a maximum time limit and a requirement to review the need to retain disclosed documents and things at regular intervals.**

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—coercive powers

Schedule 1, item 9, proposed paragraph 13C(1)(c)

This paragraph provides that a person fails to comply with a disclosure notice if, inter alia, they do not comply with the notice within the period specified in the notice. *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states the notice to produce or attend powers should allow a person at least 14 days to comply. It may be that this protection is intended to be included in the regulations (see above), however as it is an important protection and the committee prefers that important matters be

included in primary legislation whenever possible, **the committee seeks the Minister's advice as to whether this provision can be included 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—self-incrimination Schedule 1, item 9, proposed section 13D

Proposed subsection 13D(1) abrogates the privilege against self-incrimination, in relation to the obligation on persons to comply with disclosure notices. There is a detailed justification for the necessity of this approach in the explanatory memorandum (at 8) and the SOC (iv). The explanatory memorandum states:

This approach is necessary as anti-doping investigations are often significantly hampered or in some cases completely obstructed by a person's refusal to provide information if the person believes that they may implicate themselves in an anti-doping rule violation. Subsection 13D(1) will ensure that a person with information that may assist in an anti-doping investigation is required to provide that information.

Importantly the proposed new section includes use and derivative use immunities in relation to criminal proceedings (excepting those relating to the provision of false or misleading information and documents) and civil proceedings (excepting those arising under or out of the ASADA Act or regulations). The exception in relation to criminal proceedings is common in Commonwealth legislation that provides for use and derivative use immunity where the privilege against self-incrimination has been abrogated. It is less clear, however, why the exception to the use and derivative use immunities in relation to *civil proceedings* under or arising out of the ASADA Act or regulations is appropriate and the explanatory memorandum does not address this matter. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach in relation to civil proceedings.**

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
Item 9, schedule 1, proposed subsection 13C(2)

This subsection provides for exceptions in relation to the civil penalty provision relating to a disclosure notice which requires a person to give specified information or produce documents or things. In relation to the exceptions, the person bears an evidential burden to establish relevant matters, namely, that the person does not possess the information, document or thing or that the person has taken all reasonable steps available to the person to obtain the information, document or thing and has been unable to obtain it.

The statement of compatibility (at page v) argues that it:

...is appropriate for the burden of proof to be placed on a defendant in this case as it will be within the knowledge of the defendant as to whether they have what is being requested. Imposing the burden of proof on ASADA would be extremely difficult or expensive whereas it could readily and cheaply [be] provided by the recipient of the disclosure note. In practical terms, [the] evidential burden may be satisfied if the person signs a document of legal standing that they do not have the required material (e.g. [a] statutory declaration).

The committee notes that it is often not easy to establish what is not in one's knowledge or possession and it appears that this has been recognised in the explanatory memorandum by the statement that a statutory declaration would be sufficient for these purposes. **However, the committee is concerned to ensure that this option would be effective in practice and therefore seeks the Minister's advice as to whether the view expressed in the that a statutory declaration would be sufficient for these purposes has been accepted by the courts and, if not, whether consideration has been given to making it clear in the bill that such evidence would be sufficient to discharge the evidential burden imposed on a person under proposed subsection 13C(2).**

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—fair trial
Schedule 1, item 13, proposed section 73G and section 73K**

The failure to comply with a disclosure notice gives rise to a civil penalty of up to 30 penalty units (see proposed section 13C). Proposed section 73G provides that the rules of evidence and procedure for civil matters apply during proceedings for a civil penalty. Section 73K provides that criminal proceedings may be commenced after civil proceedings.

The committee is aware that the distinction between civil and criminal proceedings does not depend merely on the legislative designation of a contravention of the law being a civil penalty provision (see, for example, the Parliamentary Joint Committee on Human Rights' *First Report of 2013*). Given that the relationship between civil penalty orders and criminal offences may not be clear cut, the committee is concerned that this provision may raise questions about punishment being twice imposed for the same offence. However, the committee notes the comments the PJCHR made about this bill in its *Second Report of 2013* and its continuing consideration of this issue. **In light of this the committee draws the Senate's attention to the PJCHR's *Second Report of 2013: Australian Sports Anti-Doping Authority Amendment Bill* and leaves the matter 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—infringement notice scheme
Schedule 1, item 15, proposed section 80**

This section authorises the regulations to provide for an infringement notice scheme to be made as an alternative to civil proceedings in relation to a failure to comply with a disclosure notice. In effect the civil penalties associated with the scheme are strict liability offences (proposed section 73P provides that it is not necessary to prove a person's state of mind and proposed section 73Q provides that a person is not liable to have a civil penalty order made against them if mistake of fact (as defined) has been made). However, failure to give information or produce documents as required (proposed subsection 13C(1))

is subject to exceptions, including whether the person has taken all reasonable steps available to obtaining the information or document.

In general, infringement notice schemes are considered most appropriate in relation to relatively minor offences where (i) a high volume of contraventions is expected and (ii) for which assessments of liability are straightforward. The applicable penalties for the proposed scheme are consistent with the approach recommended in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Nevertheless, it is not clear why such a scheme is needed or appropriate as the matter is not addressed in the explanatory memorandum. **In order to assist the committee to assess whether the proposed approach is appropriate, the committee seeks the Minister's advice as to why an infringement notice scheme is necessary and whether it is appropriate for the scheme to be provided for in regulations rather than being included in the primary legislation.**

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—privacy Schedule 2, item 3, proposed subsection 68(5A)

As explained in the explanatory memorandum at page 14, the ASADA may share protected customs information with a number of sporting administration bodies for permitted anti-doping purposes. Subsections 68(2) and 68(5) require the CEO to give written notice to the person to whom the information relates if the information is shared with a sporting administration body. Proposed subsection 68(5A) provides that these notification requirements do not apply if the 'CEO is satisfied that complying with those requirements is likely to prejudice a current investigation into a possible violation of the anti-doping rules'.

Although this provision limits the operation of protections associated with the disclosure of information that may include personal information, the objective being pursued is a legitimate one. Nevertheless, the committee is concerned that power given to the CEO to avoid these protections in some circumstances is a broad power and the committee believes that additional safeguards could apply without undermining the effectiveness of the provision. **The committee**

therefore seeks the Minister's advice as to whether consideration has been given to appropriate limitations on this power (e.g. a requirement that the CEO be satisfied on reasonable grounds) or that the exercise of the power be subject to reporting requirements.

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.

Aviation Laws Amendment (Australian Ownership and Operation) Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Katter

Background

This bill seeks to ensure that Australian airlines have access to domestic flights within Australia and secures this market by establishing a definition of 'Australian' which includes:

- an airline must be 51 per cent owned by Australian citizens or residents (including by ownership of shares in a company);
- an airline conducts at least 80 per cent of its aircraft maintenance in Australia; and
- airline crews are domiciled in Australia.

Inadequate explanatory memorandum

It is noted that neither the explanatory memorandum nor the statement of compatibility with human rights contains sufficient information to adequately explain this bill. The committee recognises the manner in which these documents assist in the interpretation of bills, and ultimately, Acts and therefore **requests that the Private Member provides a comprehensive explanatory memorandum to the bill.**

Broadcasting Legislation Amendment (Digital Dividend) Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolios: Broadband, Communications and the Digital Economy

Background

This bill amends the *Broadcasting Services Act 1992* (the BSA) and the *Radiocommunications Act 1992* (the Radcoms Act) to:

- introduce the concept of 'designated datacasting services';
- empower the Minister to specify, by legislative instrument, other kinds of services that are also designated datacasting services; and
- make a number of minor consequential amendments to the BSA and the Radcoms Act in order to implement changes to the datacasting regime.

The Committee has no comment on this bill.

Completion of Kakadu National Park (Koongarra Project Area Repeal) Bill 2013

Introduced into the House of Representatives on 6 February 2013

Portfolios: Sustainability, Environment, Water, Population and Communities

Background

This bill repeals the *Koongarra Project Area Act 1981* and incorporates Koongarra into Kakadu National Park.

The Committee has no comment on this bill.

Customs Amendment (Anti-Dumping Commission Bill 2013)

Introduced into the House of Representatives on 6 February 2013

Portfolios: Home Affairs

Background

This bill amends the *Customs Act 1901* to establish the Anti-Dumping Commission, including the Commissioner, within the Australian Customs and Border Protection Service.

The Committee has no comment on this bill.

Dairy Industry (Drinking Milk) Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Katter

Background

This bill relates to the price dairy farmers can obtain for providing 'drinking milk' to processors.

Inadequate explanatory memorandum

It is noted that neither the explanatory memorandum nor the statement of compatibility with human rights contains sufficient information to adequately explain this bill. The committee recognises the manner in which these documents assist in the interpretation of bills, and ultimately, Acts and therefore **requests that the Private Member provides a comprehensive explanatory memorandum to the bill.**

Environment Protection and Biodiversity Conservation Amendment (Moratorium on Aquifer Drilling Connected with Coal Seam Gas Extraction) Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Katter

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999*, to place a two year moratorium on aquifer drilling connected with coal seam gas extraction.

Inadequate explanatory memorandum

It is noted that neither the explanatory memorandum nor the statement of compatibility with human rights contains sufficient information to adequately explain this bill. In particular, the level of penalties for the offence introduced by proposed new section 28B are substantial and the appropriateness of the penalties requires justification, particularly taking into account the *Guide to formulating Commonwealth Offences*.

The committee recognises the manner in which these documents assist in the interpretation of bills, and ultimately, Acts and therefore **requests that the Private Member provides a comprehensive explanatory memorandum to the bill.**

Export Finance and Insurance Corporation Amendment (Finance) Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolios: Trade and Competitiveness

Background

This bill amends the *Export Finance and Insurance Corporation Act 1991* to implement financial arrangements of the Export Finance and Insurance Corporation (EFIC) to provide for the payment of special dividends and any adjustments to EFIC's callable capital that may be necessary in the future.

The Bill also includes some minor amendments to correct redundant numbering.

The Committee has no comment on this bill.

Export Market Development Grants Amendment Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolios: Trade

Background

This bill amends the *Export Market Development Grants Act 1997* to:

- increase the maximum number of grants to eight (excluding approved bodies and joint ventures);
- exclude expenses relating to the promotion of sales to the markets of the USA, Canada and the European Union in grant years six, seven and eight for all applicants except approved bodies;
- remove the limit on administrative expenditure from the legislation and introduce a power for the Minister to set the limit on administrative expenditure by determination;
- prevent further approval of joint ventures after 30 June 2013;
- remove event promoters from the Export Market Development Grant (EMDG) scheme;
- prevent the payment of grants to applicants engaging an EMDG consultant assessed to not be a fit and proper person;
- enable a grant to be paid more quickly where a grant is determined before 1 July following the balance distribution; and
- require applicants to acquit claims by individually paying for claimed expenses.

The Committee has no comment on this bill.

Fair Work Amendment (Arbitration) Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Katter

Background

This bill amends the *Fair Work Act 2009* to remove the restrictions that prevent Fair Work Australia from dealing with disputes by arbitration.

Inadequate explanatory memorandum

It is noted that neither the explanatory memorandum nor the statement of compatibility with human rights contains sufficient information to adequately explain this bill. The committee recognises the manner in which these documents assist in the interpretation of bills, and ultimately, Acts and therefore **requests that the Private Member provides a comprehensive explanatory memorandum to the bill.**

Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Abbott

This bill is in identical terms to the bill introduced into the Senate on 27 November 2012 by Senator Abetz. The committee repeats the comments it made about the bill in *Alert Digest No. 1 of 2013*.

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 Schedule 1, item 3

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 a further 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.

Family Assistance and Other Legislation Amendment Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *A New Tax System (Family Assistance) Act 1999* and the *Paid Parental Leave Act 2010* to:

- reduce the baby bonus for the second and subsequent children from 1 July 2013 to \$3,000;
- allow for continued eligibility for family tax benefit until the end of the calendar year for a child who completes secondary school in December; and
- make clarifying and technical amendments.

The Committee has no comment on this bill.

Higher Education Support Amendment (Asian Century) Bill 2013

Introduced into the House of Representatives on 14 February 2013

Portfolio: Tertiary Education, Skills, Science and Research

Background

This bill amends the *Higher Education Support Act 2003* to provide additional assistance through the OS-HELP scheme for university students who wish to undertake part of their study in Asia from 1 January 2014.

The Committee has no comment on this bill.

Higher Education Support Amendment (Further Streamlining and Other Measures) Bill 2013

Introduced into the House of Representatives on 14 February 2013

Portfolio: Tertiary Education, Skills, Science and Research

Background

This bill amends the *Higher Education Support Act 2003* to:

- allow for automatic revocation of approved FEE-HELP and VET FEE-HELP providers in high risk circumstances to protect student and public monies;
- improve provider compliance mechanisms;
- amend administrative arrangements for changes to business entity names;
- amend the calculation of indexation to apply to HELP repayment thresholds;
- amend existing transparency arrangements for the Government to seek information from the tertiary education regulators; and
- align relevant dictionary definitions to incorporate changes to the Australian Qualifications Framework.

The Committee has no comment on this bill.

Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2013

Introduced into the House of Representatives on 6 February 2013

Portfolios: Infrastructure and Transport

Background

This bill amends the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* to ensure that the Australian Maritime Safety Authority (AMSA) as the National Marine Safety Regulator is able to reimburse to the states and Northern Territory amounts collected for infringement notices.

The Committee has no comment on this bill.

Migration Amendment (Reinstatement of Temporary Protection Visas) Amendment Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Morrison

Background

This bill amends the *Migration Act 1958* to restore two classes of temporary protection visas to those who have arrived illegally in Australia or at an excised offshore place and are found to engage Australia's protection obligations under the Refugee Convention.

Delegation of Legislative Power—important matters contained in regulations

Schedule 1, item 4, proposed subsections 76D(2) and 76H(2)

This subsection provides that regulations made for the purposes of providing for access to social security and other benefits, to be prescribed in the regulations as visa conditions (for a temporary protection (offshore entry) visa), 'must ensure that the holder of the visa must participate in a mutual obligation program specified in the regulations in order to access relevant social security benefits'. The same issue arises in proposed subsection 76H(2) in relation to conditions of temporary protection for a 'secondary movement offshore entry' visa.

The committee's long-standing view is that important matters should be included in primary legislation whenever possible. As the explanatory memorandum does not elucidate the nature of the 'mutual obligations' that may be mandated by the regulations **the committee seeks an explanation as to what obligations are envisaged and why it is appropriate that they be provided for in the regulations.**

Pending the Shadow 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.

Rights, Liberties or obligations unduly dependent upon insufficiently defined administrative powers
Schedule 1, item 4, proposed subsections 76E(2) and 76E(7)

Proposed subsection 76E(2) gives the Minister a power to lift the bar (created by subsection 76E(1)) on the grant of a permanent visa for persons holding temporary protection visas. This power may be exercised on the basis of what the Minister thinks is in the public interest. Subsection 76E(7) provides that the Minister ‘does not have a duty to consider whether to exercise the power under subsection (2) in respect of any person who holds a temporary protection (offshore entry) visa, whether the Minister is requested to do so by the visa holder or by any other person, or in any other circumstances’.

The result is that the power is conferred on the basis of broad discretionary considerations and, indeed, the Minister need not even consider whether or not it should be exercised. Although the courts’ judicial review jurisdiction is not ousted by these clauses, the practical result of the combination of a broadly framed power and a ‘no-consideration clause’ (ie subsection 76E(2)) would be that judicial review would not provide any significant control of the exercise of the powers. **As the explanatory memorandum does not specifically address the justification for the proposed approach in these subsections, the committee seeks further advice as to why the power should not be subject to clearer criteria and why the no-consideration clause is considered necessary given that the non-exercise or refusal to exercise this power does not appear to be subject any accountability mechanisms.**

Pending the Shadow 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—Henry VIII clause
Item 5

Henry VIII clauses enable delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government. It is the practice of the committee to comment on so-called when the rationale for their use is not

clear. In this instance, no explanation is provided for the necessity of paragraph (1) of this item which enables the regulations to amend Acts.

The committee accepts that there may be justification for the use of such clauses, but expects the issue to be comprehensively addressed in the explanatory memorandum accompanying the bill. **As the explanatory memorandum does not provide information about item 5(1), the committee seeks advice as to the rationale for including it in the bill.**

Pending the Shadow 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.

Minerals Resource Rent Tax Amendment (Protecting Revenue) Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Bandt

Background

This bill amends the *Minerals Resource Rent Tax Act 2012* to protect the revenue generated from the Minerals Resource Rent Tax from being eroded by state governments increasing royalties.

Possible retrospective effect Schedule 1, item 3

Item 2 of Schedule 1 would introduce a new subsection 60-25(3) into the Act. This proposed provision provides that any increases in royalties after 1 July 2011 should be disregarded when calculating royalty credits for the Minerals Resource Rent Tax. Item 3 is an application provision which states that the amendment made by item 2 applies to royalty credit for the MRRT year that commenced on 1 July 2012 and to later royalty years.

Unfortunately the explanatory memorandum does not contain an explanation for the retrospective application of the item 2 amendment. **The committee therefore seeks advice as to the rationale for the proposed approach.**

Pending the Private Member'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.

Royal Commissions Amendment Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolios: Prime Minister

Background

This bill amends the *Royal Commissions Act 1902* to:

- allow the Chair of the Commission to authorise a fellow commissioner to hold a private session to receive information from victims and others affected by child sexual abuse;
- enable the Chair of the Royal Commission to authorise one or more members to hold a hearing to take evidence and
- make minor amendments to address omissions and improve consistency in the use of terms.

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.

The bill first appeared in *Alert Digest No. 1 of 2013*, tabled on 6 February 2013, but the entry inadvertently contained comments that did not apply to the bill. The committee confirms that it has no comment on this bill and notes that it has already been passed by the Parliament.

The Committee has no comment on this bill.

Social Security Legislation Amendment (Caring for People on Newstart) Bill 2013

Introduced into the Senate on 7 February 2013

By: Senator Siewert

Background

This bill amends the *Social Security Act 1991* to provide additional financial assistance to Newstart and Youth Allowance recipients including:

- increasing the single rates of Newstart by \$50 a week;
- increasing the single independent rates of Youth Allowance by \$50 a week; and
- providing the same indexation arrangements for certain pensions and allowances, being the higher of CPI, MTAWA or pensioner and beneficiary living cost index amount.

The Committee has no comment on this bill.

Superannuation Legislation Amendment (Reform of Self Managed Superannuation Funds Supervisory Levy Arrangements) Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolios: Treasury

Background

This bill amends the *Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991* and the *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987* to reform the self managed superannuation fund (SMSF) supervisory levy arrangements. The changes ensure that the levy is collected from SMSFs in a more timely way, and the Australian Taxation Office's costs of regulating the sector are fully recovered.

The Committee has no comment on this bill.

Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolios: Treasury

Background

This bill amends *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.

Schedule 1 amends Part IVA of the *Income Tax Assessment Act 1936* to ensure its effective operation as the income tax general anti-avoidance provision.

Schedule 2 amends Australia's domestic transfer pricing rules which apply to both tax treaty and non-tax treaty cases.

Retrospective effect

Schedule 1, item 10

Item 10 is an application provision. It provides that the amendments made in the Schedule apply in relation to 'all schemes except schemes that were entered into, or that were commenced to be carried out, on or *before* 15 November 2012'. The effect of this provision is that the amendments will apply from 16 November 2012, the date on which a draft of the amendments was released for public comment (see the explanatory memorandum at paragraph 1.126 and the statement of compatibility at paragraph 1.134).

The reason for the applying the amendments from a date before they become law, is 'to minimize the potential for taxpayers to obtain unintended tax advantages in the period before the amendments become law' (explanatory memorandum 1.127). In the statement of compatibility at paragraph 1.135 it is argued that this approach is 'necessary to ensure that taxpayers are not able to benefit from artificial or contrived tax avoidance schemes entered into in the period between that date and the date of Royal Assent'.

In this respect the committee notes that the bill has been brought before Parliament within 3 months of the exposure draft. The statement of compatibility also provides assurance that application from that date of the

exposure draft (16 November 2012) does not affect the operation of any criminal law.

In the circumstances the committee leaves 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.

Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013

Introduced into the House of Representatives on 13 February 2013

Portfolios: Treasury

Background

This bill amends various taxation laws.

Schedule 1 to this Bill amends the income tax and superannuation law to ensure that income tax is generally not payable on the interest paid by the Commonwealth on unclaimed money from 1 July 2013.

Schedule 2 amends the *Fringe Benefits Tax Assessment Act 1986* to align the special rules for calculating airline transport fringe benefits with the general provisions dealing with in-house property fringe benefits and in-house residual fringe benefits.

Schedule 3 to this Bill amends the *Income Tax Assessment Act 1997* to allow participants in the Sustainable Rural Water Use and Infrastructure Program (SRWUIP) to choose to make payments they derive under the program free of income tax (including capital gains tax), with expenditure relating to the infrastructure improvements required under the program then being non-deductible.

Schedule 4 to this Bill amends the *Superannuation Industry (Supervision) Act 1993* to prescribe requirements for acquisitions and disposals of certain assets between self-managed superannuation funds and related parties.

Schedules 5 and 6 amend the income tax law to allow corporate tax entities that have paid tax in the past, but are now in a tax loss position, to carry their loss back to those past years to obtain a refund of some of the tax they previously paid.

Schedule 7 makes a number of miscellaneous amendments to the taxation laws.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Federal Circuit Court of Australia (Consequential Amendments) Bill 2012

[Digest 1/13 – no comment]

On 6 February 2013 the House of Representatives agreed to nine Government amendments and the Attorney-General (Mr Dreyfus) tabled a supplementary explanatory memorandum and a correction to the explanatory memorandum. The committee has no comment on this additional material.

Parliamentary Service Amendment Bill 2012

[Digest 1/13 – no response required]

On 7 February 2013 the Senate agreed to two amendments moved on behalf of the President of the Senate and the Parliamentary Secretary to the Prime Minister (Senator McLucas) tabled a supplementary explanatory memorandum. The committee has no comment on this additional material.

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 42nd Parliament.

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

Nil

Other relevant appropriation clauses in bills

Nil