

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

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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 Land Rights and Other Legislation Amendment Bill 2013**

Introduced into the House of Representatives on 21 March 2013

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill amends the *Aboriginal Land Rights (Northern Territory) Act 1976* to:

- enable the town of Jabiru and two adjacent portions of Northern Territory land to be granted as Aboriginal land to the Kakadu Aboriginal Land Trust; and
- and enable Northern Territory Portion 7021 in Patta to also be granted as Aboriginal land;

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

- provide that world heritage, natural and cultural values of Kakadu National Park continue to be protected in relation to Jabiru; and
- amend existing management plan and town plan requirements for the development of towns in Commonwealth reserves.

*The committee has no comment on this bill.*

## **Aged Care (Bond Security) Amendment Bill 2013**

Introduced into the House of Representatives on 13 March 2013

Portfolio: Health and Ageing

### **Background**

This bill is part of a package of five bills. The bill amends the existing *Aged Care (Bond Security) Act 2006* to:

- change the name of the Act to the *Aged Care (Accommodation Payment Security) Act 2006*; and
- extend the existing Accommodation Bond Guarantee Scheme for bond balances to refundable accommodation deposits and refundable accommodation contributions, which will be new types of lump sum accommodation payments from 1 July 2014.

*The committee has no comment on this bill.*

## **Aged Care (Bond Security) Levy Amendment Bill 2013**

Introduced into the House of Representatives on 13 March 2013

Portfolio: Health and Ageing

### **Background**

This bill is part of a package of five bills. The bill amends the *Aged Care (Bond Security) Levy Act 2006* to:

- change the name of the Act to the *Aged Care (Accommodation Payment Security) Levy Act 2006*; and
- ensure that if the Accommodation Bond Guarantee Scheme is triggered and the Commonwealth repays accommodation bonds or the new types of payments (collectively known as accommodation payment balances), the Commonwealth is able to recover its costs, via a levy, from approved providers.

*The committee has no comment on this bill.*

## **Aged Care (Living Longer Living Better) Bill 2013**

Introduced into the House of Representatives on 13 March 2013

Portfolio: Health and Ageing

### **Background**

This bill is part of a package of five bills. The bill amends the *Aged Care Act 1997* and related legislation to implement reforms in four key areas including:

- changes to residential care including the removal of the distinction between low level and high level residential care;
- amendments to calculations of residential care subsidies and fees for care recipients who enter residential care on or after 1 July 2014;
- additional dementia supplement and a new veterans' mental health supplement payable to providers who care for eligible care recipients;
- the establishment of a new type of care (home care);
- establishing a new Aged Care Pricing Commissioner;
- providing for an independent review of the reforms to commence in 2016 with a report to be tabled in both Houses of Parliament by 30 June 2017; and
- making minor, consequential and technical amendments.

### **Delayed Commencement**

#### **Clause 2**

There is no explanation for some of the amendments commencing from 1 July 2014 in the explanatory memorandum. However, the Minister observed in the second reading speech that the ‘graduated introduction’ of the reforms ‘will ensure that aged care providers and consumers are able to prepare for, and become familiar with, the changes. It will also give certainty to the industry to assist in business planning knowing well in advance the changes that will take effect in mid-2014’. **It would have been helpful for this explanation to appear in the explanatory memorandum, however, in the circumstances committee leaves the matter to the Senate as a whole.**

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

### **Strict liability, item of Schedule 3, proposed subsection 52N-2(3)**

There is no explanation for applying strict liability to some of the elements of an offence relating to refundable deposits and accommodation bonds being used for non-permitted purposes. However, while the explanatory memorandum does not address this question the approach is consistent with the existing offences in relation to the same basic offences already included in section 57.17B of the *Aged Care Act 1997* (see the explanatory memorandum at page 93.) While the committee prefers that the application of strict liability is addressed in the explanatory memorandum after taking the *Guide* into account, in light of the limited number, and the nature, of the elements to which strict liability is applied and the fact that the approach mirrors that taken in the existing offence, **in the circumstances committee leaves the matter to the Senate as a whole.**

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

### **Delegation of legislative power**

#### **Various**

The bill includes numerous provisions allowing determinations to be made by way of legislative instruments. Unfortunately, however, the explanatory memorandum does not contain sufficient information to enable a consideration of the appropriateness of these delegations of legislative power. **The committee is interested in assessing whether the proposed delegations of legislative power are appropriate, including whether important matters are being included in subordinate legislation rather than in primary legislation. The committee therefore seeks the Minister's advice as to the rationale for the provisions which provide for the making of determinations.**

*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.*

## **Asbestos Safety and Eradication Agency Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill provides for the establishment of a national agency, known as the Asbestos Safety and Eradication Agency, as recommended in the *Asbestos Management Review Report* released in June 2012.

*The committee has no comment on this bill.*

## **Australia Council Bill 2013**

Introduced into the House of Representatives on 20 March 2013  
Portfolio: Regional Australia, Local Government, Arts and Sport

### **Background**

This bill will replace the *Australia Council Act 1975*, as recommended in the report of the *Review of the Australia Council*, which was publicly released on 15 May 2012.

The bill will:

- provide the Council the flexibility to establish committees, including for the purposes of awarding grants based on peer assessment; and
- introduce a skills-based governing board consisting of a Chair, Deputy Chair, and between five and nine other members with arts or corporate knowledge or expertise, and the CEO as an ex-officio Board member.

*The committee has no comment on this bill.*

## **Australia Council (Consequential and Transitional Provisions) Bill 2013**

Introduced into the House of Representatives on 20 March 2013  
Portfolio: Regional Australia, Local Government, Arts and Sport

### **Background**

This bill contains consequential amendments and transitional provisions related to the replacement of the *Australia Council Act 1975* by the Australia Council Bill 2013, as recommended in the report of the *Review of the Australia Council*, which was publicly released on 15 May 2012.

Schedule 1 of the bill provides for the repeal of the *Australia Council Act 1975*.

Schedule 2 of the bill contains transitional provisions which allow for the continued operation of the Council during the transition period.

### **Trespass on personal rights and liberties—reversal of onus of proof** **Schedule 2, subitem 14(3)**

Item 13 of Schedule 2 imposes obligations on the members of the new Board to prepare, on behalf of the previous Board, an annual report in accordance with Schedule 1 of the *CAC Act* for the transitional reporting period. Item 14 is included to ensure compliance with these obligations. Subitem 14(2) provides that a breach of these obligations will be a civil penalty provision for the purpose of the *CAC Act*, though a pecuniary penalty order can only be made in respect of a serious contravention (this is the effect of paragraph 14(2)(a) - see the explanatory memorandum at page 11).

Subitem 14(3) provides that in circumstances in which a contravention of the final annual reporting obligations (pursuant to item 13) consists of an omission from the financial statements that ‘it is a defence if the defendant proves that the information omitted was immaterial and did not affect the giving of a true and fair view of the matters required by the Finance Minister’s orders to be included in the statements’.

The statement of compatibility argues that any contravention of reporting obligations required by item 13, as detailed in item 14, is a civil penalty and not a criminal charge (see pages 3 and 4). Nevertheless, contraventions may result in the imposition of a pecuniary penalty. The explanatory memorandum does not address why the proposed approach, in which the defendant will be required to prove the matters referred to in subitem 14(3) is appropriate. **The committee therefore seeks the Minister's advice as to the rationale because it is not clear that they are matters which would be peculiarly within the defendant's knowledge.**

*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.*

## **Australian Aged Care Quality Agency Bill 2013**

Introduced into the House of Representatives on 13 March 2013

Portfolio: Health and Ageing

### **Background**

This bill establishes a new Australian Aged Care Quality Agency under the *Financial Management and Accountability Act 1997* in line with the recommendations of the Uhrig Review. This body will replace the existing Aged Care Standards and Accreditation Agency from 1 January 2014.

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

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

##### **Part 7**

This Part of the bill limits the use of personal information by creating an offence with a penalty of 2 years imprisonment for recording, disclosing or otherwise using ‘protected information’ that was acquired in the course of administering the Act (Clause 48). (Protected information means information acquired performing the functions of the CEO or the Council and is personal information or relates to the affairs of an approved provider.) This offence, however, is subject to a number of exceptions, though a defendant bears an evidential burden of proof in establishing the relevant matters (subclause 48(2)). For example, the CEO of the Quality Agency is permitted to disclose personal information in the circumstances specified in clause 49.

The Statement of Compatibility appears to conclude that the overall approach to personal information does limit the human right to protection against arbitrary interference with privacy but that any limitations ‘are reasonable, necessary and proportionate’. However, it appears to the committee that there is insufficient information included in the explanatory memorandum (at pages 15 to 17) to adequately assess this conclusion. In particular, the defences available to the offence for disclosing protected information in clause 48 are not explained. Similarly, the necessity of authorising the disclosure of protected information for other purposes pursuant to clause 48 is not elaborated. In addition, the bill envisages that important matters, in the form of further instances of authorised disclosure, will be able to be included in delegated legislation rather than being included in the primary act.

The committee therefore requests additional information from the Minister's about these matters and, in particular, about the appropriateness of allowing for the creation of further instances of authorised disclosure of personal information through the Quality Agency Principles (ie regulations) as envisaged by paragraph 49(j).

*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—important matters in regulations Clause 53**

The functions of the CEO (set out in clause 12 of the bill) include a number of functions which are to be undertaken in accordance with the Quality Agency Principles. For example subclause 12(a) provides that it is a function of the CEO to accredit residential care services in accordance with the Quality Agency Principles. Clause 53 provides that the Minister may, by legislative instrument, make quality Agency Principles providing for matters required or permitted by the Act or necessary or convenient to be provided in order to implement the Act.

The justification for including important matters in delegated legislation rather than in the primary act is not addressed in the explanatory memorandum. **The committee therefore seeks the Minister's advice as to the rationale for the proposed approach and whether it is appropriate to include the Quality Agency Principles in the primary legislation rather than in delegated 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.*

## **Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013**

Introduced into the House of Representatives on 13 March 2013  
Portfolio: Health and Ageing

### **Background**

This bill sets out arrangements for the transfer of assets and liabilities from the Aged Care Standards and Accreditation Agency Limited to the Australian Aged Care Quality Agency.

#### **Delegation of legislative power—Henry VIII Subitem 18(3) of Schedule 1**

This subitem enables the Governor General to make regulations which ‘may provide that the provisions of this Schedule are taken to be modified as set out in the regulations’ such that those ‘regulations then have effect as if they were so modified’. Although this is a so-called Henry VIII clause (which enables regulations to amend primary legislation) the explanatory memorandum contains a detailed explanation of its necessity. The explanatory memorandum states (at page 10):

This subitem has been included because of the complexity of the transitional matters associated with the transfer of functions from ACSAA Limited to the Quality Agency. Its purpose is to provide a means of varying the operation of the Schedule in a timely way to avoid any results that were not intended, with the aim of preventing any disruption to the oversight of aged care services quality.

**In light of the explanation provided, 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.*

# **Aviation Transport Security Amendment (Inbound Cargo Security Enhancement Bill 2013)**

Introduced into the House of Representatives on 21 March 2013

Portfolio: Infrastructure and Transport

## **Background**

This bill amends the *Aviation Transport Security Act 2004* to enable the minister to prohibit the carriage of certain air cargo into Australian territory on an aircraft and also make a technical amendment.

**Undue trespass on personal rights and liberties—strict liability; Delegation of legislative power—content of offence to be defined by regulation**

### **Schedule 1, item 5**

Proposed subsection 65B(1) empowers the Minister to prohibit, by legislative instrument, the entry of specified kinds of cargo into Australian territory on aircraft. The power must be ‘for the purposes of safeguarding against unlawful interferences with aviation’. Before making an instrument the Minister must consult the Foreign Affairs Minister and the Trade Minister (proposed subsection 65B(3)). Proposed section 65C makes failure to comply with such an instrument an offence of strict liability, with a penalty of 200 units for an aircraft operator and 100 penalty units for any other aviation industry participant. Two interrelated scrutiny issues arise in relation to these provisions in relation to strict liability and the delegation of power

First, the committee expects that strict liability will only be introduced after careful consideration and that the justification for its use will be addressed in detail in explanatory memoranda. Further, in relation to strict liability offences, the committee has expressed the view that a penalty for an individual of 60 penalty units is a reasonable maximum (and this is consistent with the Commonwealth *Guide to drafting Commonwealth Offences*).

The explanatory memorandum and statement of compatibility do provide a justification for the imposition of strict liability and for setting penalties in excess of 60 penalty units for individuals. Strict liability is justified on the basis that an effective mechanism to respond to the serious threat caused by certain types of inbound air cargo. The explanatory memorandum (at page 1)

argues that existing mechanisms to regulate security threats presented by inbound air cargo have proved cumbersome or are ill-suited to threats which extend beyond the ‘short term’. It is argued that a ‘strict liability offence is an appropriate deterrent against acts or omissions committed by aviation industry participants that may contribute to the success of [a ‘catastrophic’] attack’ (statement of compatibility, 2). The level of risk is said to justify the conclusion that non-intentional lack of compliance should also be punished (explanatory memorandum, 5). In addition to pointing to the serious risks associated with failure to comply with an instrument prohibiting specified cargo, it is argued that it would be difficult to prove fault in most instances as:

- extensive documentation regarding examination, handling and treatment of cargo is required to establish the fault element of the applicable business’; and
- ‘significant resources would be needed for enforcement and this will significantly impact on the resources available to ensure the security of the air cargo supply chain’ (explanatory memorandum, 5).

Finally, it is argued that aviation industry participants are ‘familiar with the regulatory landscape to know their compliance requirements’ (explanatory memorandum, 5) and thus ‘can be reasonably expected to know their duties and obligations under the Act’ (statement of compatibility, 2).

Although it should be emphasised that, considered alone, costs savings would not be sufficient to justify the imposition of strict liability, they may be relevant when combined with other considerations. It may be accepted that the risks to be avoided by the creation of these offences and the other factors mentioned in justifying strict liability are relevant considerations.

On the other hand, it may be considered that the appropriateness of strict liability attaching to prohibitions of the entry of specified kinds of cargo will depend upon how that cargo is specified. Without knowing the nature of how prohibited cargo is specified<sup>1</sup> it is difficult to know how likely it is that reasonable and non-intentional errors in allowing prohibited cargo into Australian territory may be made or the extent to which it is reasonable to expect industry participants to put in place systems that can effectively minimise the risk of contravention.

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<sup>1</sup> It should be noted that proposed subsection 65B(2) does, without limiting the generality of the power to make a legislative instrument, provide that an instrument may relate to all or any of a number of criteria.

This gives rise to an additional scrutiny concern, which arises through the principle that important matters should not generally be included in regulations rather than primary legislation. More particularly, the committee has previously taken the view that, as a general rule, strict liability should be provided for by primary legislation, with regulations used only for genuine administrative detail.

Given that the appropriateness of strict liability may depend on how prohibited cargo is specified in the regulations, in this instance it does not appear that the use of regulations is limited to what may be considered genuine administrative details. In light of the use of regulations and, as it is difficult to assess the appropriateness of strict liability without knowing how prohibited cargo is to be specified, the committee is concerned about the proposed provision. **The committee therefore seeks the Minister's further justification of the proposed approach. In particular, the committee is interested in whether consideration has been given to expressing limits on the regulation-making power that will better ensure that the use of strict liability is appropriate.**

*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 and it may also be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## **Undue trespass on personal rights and liberties—penalties**

### **Schedule 1, item 5**

In relation to strict liability offences, the committee has expressed the view that a penalty for an individual of 60 penalty units is usually a reasonable maximum (and this is consistent with the Commonwealth *Guide to drafting Commonwealth Offences*). The explanatory memorandum argues that although the offences are ones of strict liability it is appropriate that a penalty greater than 60 penalty units (200 units) be applied regardless of whether the offender is an individual person or a business on the grounds of the seriousness of the potential risks associated with non-compliance and the penalties being ‘consistent with similar existing penalties for strict liability offences committed by aircraft operators or any other aviation industry participant under the Act’ (at 5). While this argument might be acceptable in

some circumstances, **in light of the committee's request to the Minister in relation to the justification of the use of strict liability, the committee defers its consideration of the level of penalty until it has had the opportunity to consider any response from the Minister.**

*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.*

## **Broadcasting Services Amendment (Material of Local Significance) Bill 2013**

Introduced into the Senate on 12 March 2013

By: Senator Xenophon

### **Background**

This bill amends the *Broadcasting Services Bill 1992* to include regional South Australia so that it is covered by the provisions relating to regional aggregated commercial television broadcasting licences.

*The committee has no comment on this bill.*

## **Citizen Initiated Referendum Bill 2013**

Introduced into the Senate on 12 March 2013  
By: Senator Madigan

### **Background**

This bill enables the citizens of Australia to initiate the introduction of legislation into Parliament that provides for the holding of a referendum to alter the Constitution.

*The committee has no comment on this bill.*

## **Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013**

Introduced into the House of Representatives on 20 March 2013  
Portfolio: Treasury

### **Background**

This bill amends the *Corporations Act 2001* to:

- require bodies corporate to issue a two-part simple corporate bonds prospectus when certain bond issuances occur;
- enable simple corporate bonds to be traded using simple retail corporate bonds depository interests;
- provide that directors have liability for any misinformation in a disclosure document in certain circumstances; and
- provide that the use of the terms ‘financial planner’ and ‘financial adviser’ are restricted to those with licences to provide advice on designated financial products.

### **Delegation of legislative power**

#### **Schedule 1, item 8**

This item provides for a regulation making power to allow for a specified offer of debentures or class of offers of debentures to be exempted from the requirement that the body must enter into a trust deed and appoint a trustee (in compliance with sections 283AB and 283AC respectively). The explanatory memorandum (at 10 and 11) states that:

...this regulation making power has been inserted to ensure that regulation can be made, if after future consultation with stakeholders it is considered appropriate, to remove an offer of simple corporate bonds depository interests from Chapter 2L and provided appropriate consumer protections remain in place.

**The committee seeks the Minister's advice as to how he will be able to determine that appropriate consumer protections remain in place and**

**further information as to the extent (if any) to which this regulation making power may compromise consumer protections.**

*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**

#### **Schedule 1, item 22, proposed subsections 713A(24)-(27)**

Proposed section 713A provides for conditions to be satisfied for an offer to be considered to be an offer of simple corporate bonds. Subsections 713A(24)-(27) provide that additional conditions can be specified in the regulations. These conditions must be complied with by, respectively, the securities, the offer of the securities, the body issuing the securities, and if the issuing body is a wholly-owned subsidiary of a body corporate which has continuously quoted securities, that body corporate. The committee prefers that important matters usually be included in primary legislation and that regulations are used for genuine administrative detail. **Unfortunately the explanatory memorandum does not address the reasons why it is necessary to allow for additional conditions in regulations and the committee therefore seeks the Minister's advice 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

# **Corporations and Financial Sector Legislation Amendment Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Treasury

## **Background**

This bill amends the *Corporations Act 2001*, the *Payment Systems and Netting Act 1998*, the *Mutual Assistance in Business Regulation Act 1992*, the *Australian Securities and Investments Commission Act 2001*, the *Reserve Bank Act 1959*, the *Clean Energy Regulator Act 2011* and the *Carbon Credits (Carbon Farming Initiative) Act 2011* to:

- provide that client positions and associated collateral of a defaulting participant in a clearing facility may be ported to another solvent participant despite legislative impediments;
- enable the Australian Securities Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) to determine how often they assess compliance by particular Australian market licence and clearing and settlement facility licence holders with their legal obligations; and make consequential amendments;
- extend the powers of the Parliamentary Joint Committee on Corporations and Financial Services to inquire into and report on the operation of any foreign business law which may affect the operation of the corporations law; require ASIC to report annually on the use of its information gathering powers and on additional information if required by the minister; and make consequential amendments;
- authorise ASIC to disclose protected information to international business regulators;
- enable the RBA to disclose protected information to external persons and bodies; and
- enable the Clean Energy Regulator to share protected information with licensed and prescribed trade repositories.

**Trespass on personal rights and liberties—privacy**  
**Part 3, schedule 1, items 18 and 23**

This item proposes to insert new paragraph 127(4)(ca) into the *Australian Securities and Investments Commission Act 2001*. The effect of this paragraph is to authorise ASIC to disclose protected information (which may include personal information) to an international business regulator ‘to perform its functions or exercise its powers’. The Act already enables the disclosure of confidential or protected information to ‘a foreign body’ to perform a regulatory function, but it is unclear whether or not disclosure is authorised to ‘multi-jurisdictional regulators, for example pan-European regulators’ (explanatory memorandum at 25). According to the explanatory memorandum (at page 11):

...the ability of ASIC to share supervisory information with individual foreign regulators but not a group of multi-jurisdictional regulators, limits its ability to play a full part in international supervisory cooperation and coordination among the authorities responsible for and involved in the supervision of the different components of cross-border groups, specifically large groups.

The scope of this provision, enabling disclosure of protected information, is clarified by item 17 which inserts a definition of ‘international business regulator’. The explanatory memorandum notes that (at page 25):

...by limiting the disclosure of protected information and documents to assist regulatory functions authorised by a foreign law or treaty, the intention is to safeguard against the disclosure and the potential misuse of protected information for private commercial ends.

The statement of compatibility concludes that this amendment pursues a legitimate objective (ie the effective regulation of financial market in the context of the increasing complexity and globalisation of financial markets) and the limitations imposed on the right to privacy are not arbitrary. It is noted that ‘regulators generally have strict conditions imposed on them through their enabling legislation with respect to the use and disclosure of protected information, including appropriate penalties for breaches of those conditions’ (at 32). However, the explanatory memorandum is unclear as to the nature and extent of any risk that information that may be disclosed under the new provisions may lead to the disclosure of personal information by international business regulators.

Part 3, schedule 1, item 23 raises a similar issue.

**The committee therefore seeks the Minister's advice as to whether the claim (in the statement of compatibility) that 'regulators *generally* have strict conditions imposed on them through their enabling legislation with respect to the use and disclosure of protected information, including appropriate penalties for breaches of those conditions' applies equally in relation to international business regulators (as defined) and whether the extension of authority to disclose protected information to such bodies carries with it additional risks that the right to privacy may in practice be breached.**

*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 Part 5, schedule 1, items 29, 31 and 32**

Item 25 introduces paragraph 79A(4)(b) into the *Reserve Bank Act 1959*. The effect of this provision is to enable the RBA to share protected information and documents on an ongoing basis with other persons or bodies (whether in or outside Australia) if those persons or bodies are prescribed by the regulations. The explanatory memorandum argues that the sharing of information for regulatory purposes is becoming an increasingly important part of the RBA's work (at page 12):

...in particular in collaborating with other regulators, both domestically and internationally, especially for purposes of crisis prevention and management.

The explanatory memorandum states that this approach to providing authority to share protected information is more transparent and is preferable for ongoing or regular disclosures than is the alternative of the Governor approving, in writing, the disclosure or production of protected information or production of protected documents to a person or body. The power is proposed to be inserted by item 31, subsection 79A(5) of the bill.

In justifying the new powers to disclose information, the explanatory memorandum emphasises the importance of domestic and international financial regulators being able to share information (at 12-13) and that the amendments in this part of the bill are modelled on powers and provisions

available to the Australian Prudential Regulation Authority. Second, it is noted that Australian financial regulators are subject to strict confidentiality requirements which prevent the regulator's staff and persons working for them from disclosing protected information. Thirdly, it is noted that item 32 of the bill will introduce subsection 79A(7), which will give the RBA the power (already enjoyed by ASIC and APRA) to impose conditions when information is shared with external entities. The explanatory memorandum explains that '...this power is used by regulators to ensure that confidential information entrusted to them by private entities is appropriately protected when it is provided to external entities' and it is noted that breach of these conditions is an offence subject to a penalty of 2 years imprisonment.

In response to this justification for the expanded powers to disclose information to external bodies in this bill, it may be argued that the primary legislation could impose conditions on external entities with whom information is shared, rather than conferring a discretionary power on the regulator (in this case the RBA) to impose conditions to be complied with in relation to the information disclosed. In relation to this issue, the explanatory memorandum argues that 'the wide range of circumstances in which information may be shared' means that it is preferable for regulators to be 'able to tailor the conditions they need to impose on a case-by case basis'. It is therefore concluded (at 14) that it is 'not appropriate to include general provisions in the legislation that would place limits on the types of conditions or the manner in which they could be imposed'.

The committee acknowledges the detailed explanation outlined in the explanatory memorandum and generally leaves the question of whether item 29 is appropriate to the consideration of the Senate as whole.

**However, as an additional safeguard the committee seeks the Minister's advice as to whether consideration has been given to including mechanisms in the bill that would require the regulator to consider the appropriateness of imposing conditions (pursuant to proposed subsection 79A(7), inserted by item 32) in relation to information disclosed or documents produced pursuant to proposed paragraph 79A(4) or subsection 79A(5).**

In addition, in relation to proposed subsection 79A(5), it is not clear why, given the insertion of paragraph 79A(4), it is considered necessary to empower the Governor to authorise particular disclosures to a person or body.

The explanatory memorandum does not give examples or indicate why the power to prescribe persons or bodies in the regulations to enable disclosure is not adequate to deal with the need for the RBA to share information for regulatory purposes. The explanatory memorandum notes that proposed subsection 79A(5) is similar to a power in APRA's legislation and that such a power was 'previously in the RB Act but was automatically repealed under a sunset provision' (at 12). **Nevertheless, it remains unclear why this power is necessary and the committee therefore seeks further information in relation to this issue.**

*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.*

## **Court Security Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Attorney-General

### **Background**

This bill creates a new framework for court security arrangements for federal courts and tribunals. The bill replaces the current security framework for federal courts and tribunals under Part IIA of the *Public Order (Protection of Persons and Property) Act 1971*.

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

#### **Various**

The bill includes a number of powers given to security officers, authorised court officers and court members that may be considered to trespass on personal rights and freedoms. The statement of compatibility considers the impact on the right to access to justice, the right to liberty of movement, the right to privacy, the right to liberty and security of the person, the right to a presumption of innocence, and the right to enjoy and benefit from culture. Where these rights are considered to be limited, it is argued that these limitations pursue legitimate objectives and constitute necessary, reasonable and proportionate limitation. Subject to the specific comments below, **the committee generally leaves to the Senate as a whole the question of whether the powers and the balance struck between limitations on specified rights and the pursuit of the underlying objectives of the bill are appropriate.** In this regard it is noted that the bill requires the establishment of a complaints mechanism in relation to the actions of security officers and authorised court officers, and requires the administrative head of a court to report to the Ombudsman on the number of complaints received and how each was dealt with (see clauses 35 and 36).

### **Delegation of legislative power—important matters in regulations**

#### **Clause 9 and paragraph 33(1)(b)**

This clause enables the administrative head of a court to appoint security officers. Security officers may exercise a number of broad powers which risk trespass on personal rights and liberties. For example, security officers may conduct a security screening procedure using electronic equipment (clause 14)

or a frisk search (clause 19). As noted in the explanatory memorandum, these powers are ‘supported by the use of reasonable and necessary force (Division 4)’. Clause 9 also provides that a person may only be appointed as security officers if the person has ‘qualifications prescribed by the regulations as a security officer for court premises generally or for specified court premises’ (see further the comment in relation to clause 33 below).

Given the nature of the powers exercisable by security officers it is important that such officers have the appropriate training and experience. Unfortunately the explanatory memorandum does not indicate why qualification requirements for security officers cannot be dealt with in the primary legislation.

It should be noted that paragraph 33(1)(b) provides an additional requirement that a person may only exercise the powers of a security officer if the person is licensed under a law of the State or Territory to guard property. However, this provision also provides that this requirement is not essential if the person is prescribed by the regulations. The explanatory memorandum (at 29) argues that this is appropriate as it is ‘necessary to ensure that persons who hold qualifications and training equivalent in nature to those held by licensed guards are not prevented from being appointed as security officers’. However, there appears to be no legislative requirement to ensure that persons prescribed under paragraph 33(1)(b) must hold such equivalent qualifications and training.

**The committee therefore seeks the Attorney-General's advice as to whether consideration has been given to providing more legislative guidance on the appropriate qualifications of security officers and which non-licensed persons may be prescribed by the regulations as being entitled to exercise the powers of a security officer.**

*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.*

## **Trespass on personal rights and liberties—frisk searches**

### **Clause 19**

This clause authorises a security officer to request a person seeking to enter, or who is on, court premises to undergo a frisk search. Subclause 19(2) provides that any frisk search may be conducted only by (a) a security officer of the same sex as the person, or (if such an officer is not available) (b) a member of the staff of a court who is of the same sex as the person who agrees to a request from a security officer to conduct the search under their direction and in the presence of a security officer. Nevertheless paragraph 19(2)(c) provides that if a search is not able to be conducted in either of these circumstances, a frisk search may be conducted by any security officer, including one of the opposite sex to the person.

The statement of compatibility concludes that the frisk search provisions strike an appropriate balance between a person's right to privacy and the right of others to security of the person (at 8). It is argued that:

- (1) the objective of the provision is to ensure the safety of all persons on court premises by preventing dangerous items being brought on to court premises; and
- (2) frisk searches are narrowly defined to mean 'a search of a person by quickly running hands over the person's outer garments and examining anything worn or carried by the person that is voluntarily removed by the person' (see clause 5).

Further, the explanatory memorandum emphasises that a person is not required to undergo a frisk search, though if they refuse they may be refused entry or directed to leave the court premises.

The arguments justifying the provision do raise matters relevant to the assessment of the appropriateness of the powers. Nevertheless, it is not sufficiently clear that frisk searches are necessary given the existence of other powers in the bill to screen persons for dangerous items (clause 14) and given that a frisk search can be conducted by a staff member of the same sex (19(2)(b)). **The committee therefore seeks the Attorney-General's further advice as to the necessity for including paragraph 19(2)(c). If it is intended that it be retained, the committee requests the Minister's advice as to whether it should not operate unless reasonable efforts have been made to utilise provisions 19(2)(a) and (b).**

*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.*

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

### **Part 3**

Clause 38 creates an offence of possession of a weapon on court premises, penalty 12 months imprisonment. Subsection 38(2) lists three defences and a defendant bears an evidential burden in relation to establishing the matters relevant to these defences. The explanatory memorandum notes the importance of ensuring that weapons are not brought to court and indicates that the matters in relation to which defendants will bear an evidential burden relate to ‘facts which are readily provable by the defendant’ (at 31; see also statement of compatibility at 9). **In light of the explanation provided the committee leaves the appropriateness of this approach to the Senate as a whole.**

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

Subclause 39 creates an offence for making an unauthorised recording or transmission on court premises, penalty 30 penalty units. Again, a number of defences are listed in relation to which defendants bear an evidential burden (subclauses (2) and (3) list the defences). Placing an evidential burden on defendants is justified on the basis that the penalty is at the lower end of the scale, and because the burden relates to facts which are readily provable by the defendant as matters within their own knowledge or to which they have ready access. **Again, in light of the explanation provided the Committee leaves the appropriateness of this approach to the Senate as a whole.**

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

**Trespass on personal rights and liberties—natural justice**  
**Clause 47**

This clause provides that the maker of a court security order need not disqualify himself or herself from hearing other proceedings to which the person is or later becomes a party. The explanatory memorandum simply repeats the terms of the clause.

**In the absence of detail in relation to whether it is intended that this clause abrogate that aspect of the rules of natural justice requiring that judicial decision-makers neither be nor appear to be biased, the committee seeks the Attorney-General's advice on this matter. If the clause is intended to affect the operation of the rule against bias, the committee would expect a strong justification given that the rules of natural justice are considered to be fundamental common law principles.**

*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.*

## **Court Security (Consequential Amendments) Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Attorney-General

### **Background**

This bill amends the *Public Order (Protection of Persons and Property) Act 1971* to remove provisions which overlap with the proposed Court Security Act 2013.

*The committee has no comment on this bill.*

## **Customs Amendment (Prohibition of Certain Coal Exports) Bill 2013**

Introduced into the House of Representatives on 18 March 2013

By: Mr Craig Thomson

### **Background**

This bill amends the *Customs Act 1901* to:

- prohibit the export of coal mined in the water catchment valleys and district of the Wyong Shire Council; and
- enable the minister to prohibit the export of coal mined in other areas.

### **Delegation of Legislative power**

#### **Schedule 1, item 1, proposed paragraph 112(2AD)(b)**

This paragraph allows the Minister by legislative instrument to designate an area for the purpose of prohibiting the export of coal mined from that area.

Unfortunately the explanatory memorandum does not indicate why it is appropriate to give the Minister a delegated power to limit the export of coal in this way. It is noted that the Act does not indicate the criteria which may be relevant in reaching such decisions, nor why such decisions should not be made by the legislature through primary legislation. **The committee seeks the Private Member's advice as to the rationale for the proposed approach.**

*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.*

# **Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Home Affairs

## **Background**

This bill amends the *Customs Act 1901*, the *AusCheck Act 2007* and the *Law Enforcement Integrity Commissioner Act 2006* to:

- place obligations on cargo terminal operators and handlers that load and unload cargo;
- create new offences for using information from the Integrated Cargo System to aid a criminal organisation;
- enable the Chief Executive Officer of Customs and Border Protection to consider the refusal, suspension or cancellation of aviation and maritime security identification cards;
- align aspects of the customs broker licensing scheme with that of depots and warehouses, and adjust controls and sanctions;
- enable the secretary to suspend, or suspend processing of an application for, an aviation or maritime security identification card; and
- to provide that the Deputy Speaker of the House of Representatives and the Deputy President and Chair of Committees of the Senate are eligible for appointment to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity.

## **Trespass on personal rights and liberties—capacity to comply with legal obligations**

### **Schedule 1, subitem 42(3)**

Part 1 of Schedule 1 makes a range of amendments to the Customs Act related to requirements that certain persons be considered ‘fit and proper’ persons. Among the requirements that are affected are requirements that the CEO be notified (by, for example, a warehouse licence holder) of a refusal,

cancellation or suspension of an ASIC or MSIC (i.e. an aviation or maritime security identification card).

Subitem 42(2) is an application provision which provides that the amendments made in Part 1 will, subject to subitem 42(3), apply in relation to a refusal, suspension or cancellation of a transport security identification card whether the refusal, suspension or cancellation occurs before, on or after the commencement of this item. Given that the notification requirements may relate to refusal, suspension and cancellation decisions that occur before commencement, subitem 42(3) provides that a person under a notification obligation will have 90 days in which to comply with the obligation.

Although the timeframe of 90 days may be accepted as reasonable, an obligation under the bill requiring notification of past events raises questions about whether appropriate records will exist to enable the obligation to be fulfilled. In addition, it is not clear whether it is intended that measures will be taken to ensure those under the obligations will be aware of precisely what information must be notified. **The committee therefore seeks the Minister's advice on these matters.**

*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.*

## **Broad discretionary power**

### **Schedule 1, item 43, proposed paragraph 102CJ(c)**

Proposed section 102CJ provides that the CEO ‘may, by legislative instrument impose additional obligations on cargo terminal operators generally if the CEO considers the obligations to be necessary or desirable:

- (a) for the protection of the revenue; or
- (b) for the purpose of ensuring compliance with the Customs Acts, any other law of the Commonwealth prescribed by the regulations or a law of a State or Territory prescribed by the regulations; or
- (c) for any other purpose’.

The explanatory memorandum states that this section will ‘provide Customs greater flexibility in dealing with new and emerging threats in this domain’ (at 23). The explanatory memorandum adds that the reference to ‘any other

purpose is ‘limited to purposes of the Customs Act’. While it is true that discretionary powers are read in the context of the scope, purposes and structure of the legislation, the broader the discretionary power the more difficult it is to do this. In the context of the Customs Act it might be difficult to identify a clear set of unifying purposes which would limit broad discretionary power. **Given that ‘any other purpose’ is capable of being read broadly, the committee therefore seeks the Minister’s advice as to whether the intended limited meaning of this phrase can be expressly incorporated into paragraph 102CJ(c) to better reflect the intended limitations on the exercise of this discretionary power. It is desirable to clearly circumscribe the limits of the discretion to impose additional obligations given that breach of these obligations will be (pursuant to proposed section 102CK) an offence of strict liability.**

*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 43, proposed subsection 102CK(2) and 102DE(2)**

This subsection creates a strict liability offence where a CTO fails to comply with an obligation or requirement set out in the new Division 2 or in a legislative instrument made under new section 102CJ. The explanatory memorandum notes the following:

- in developing the offence, consideration was given to the Committee’s Sixth Report of 2002 on Application of Absolute and Strict Liability Offences and A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers;
- the regulatory nature of the offence; and
- the fact that the penalty is 60 penalty units (which is the maximum recommended for strict liability offences committed by individuals by the *Guide*).

The statement of compatibility makes similar points in relation to this new offence, and adds that this and other strict liability penalties ‘significantly

enhance the effectiveness of the enforcement regime in deterring conduct that undermines the integrity of the Australian border and collection of revenue' (at 9).

The same issue and approach can be taken in relation to proposed subsection 102DE(2).

**While these factors are relevant to considering whether an offence of strict liability is appropriate, in light of the committee's request to the Minister in relation to appropriately confining the discretionary power to add further obligations or requirements by legislative instrument under new section 102CJ (see item above), the committee defers its consideration of whether strict liability is appropriate until a reply is received.**

*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—search without warrant  
Schedule 1, item 43, proposed section 102E**

This sections confers powers on an authorised officer to enter a cargo terminal to inspect documents, take extracts or copies from such documents and to access electronic equipment and use storage devices at a terminal if the officer has reasonable grounds for suspecting that the electronic equipment or storage device is, or contains, information relating to specified matters. These provisions allow authorised customs officers to enter, search and access information without a warrant.

The explanatory memorandum includes a detailed justification for this approach, as is expected in relation to provisions that confer entry and search powers in the absence of a warrant. The explanatory memorandum (at 25) accepts that the committee has stated that entry without consent or warrant should only be allowed in limited circumstances. It is stated that 'one of these circumstances is if a person obtains a licence or registration for the premises, which can be taken to accept entry by an inspector for the purpose of ensuring compliance with licence or registration conditions'. The argument made is that 'while the proposed provisions do not establish a licensing scheme for

cargo terminal operators..., the obligations imposed on these parties are of a similar nature to a licence including those imposed under customs licensing arrangements for depots and warehouses'. Further, it is argued that 'section 102DC could be taken to be a requirement for cargo terminals to register with Customs'. That provision requires cargo handlers to use 'his, her or its correct establishment identification for the port, airport or wharf' when 'communicating electronically with Customs about activities undertaken at a port, airport or wharf'.

In light of the explanation, the overall appropriateness of these powers may be left to the Senate as a whole.

However, it is a matter of concern that the safeguards that may attend the exercise of these powers are not explained in the explanatory memorandum. For example, it is not clear whether there are general restrictions on the manner in which the powers are exercised, such as restrictions on the times at which an authorised officer may enter premises to exercise these power or limitations on the use of the powers. Nor does the explanatory memorandum identify the availability of any accountability mechanisms (eg reporting requirements) or what measures are in place to ensure that the powers will be exercised in a mature and proportionate way by officers with the appropriate qualifications and experience. The committee, and the Senate, will be better able to assess the case made in support of the entry and search powers if these issues are addressed in detail. **The committee therefore seeks the Minister's further information about these matters.**

*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—time to respond Schedule 1, item 43, proposed section 102EA**

This provision empowers authorised officers to make requests to CTOs and cargo handlers for documentation and records to be provided and for information relevant to the question of whether the operator or handler is a fit and proper person. As noted in the explanatory memorandum, the provision does not 'provide a minimum timeframe a CTO will have to comply with a request made by an authorised officer'. The basis for not providing the

standard 14 days minimum time for responding to requests for information is to ‘allow the maximum amount of flexibility in the provision’.

Although the explanatory memorandum asserts that authorised officer will, when issuing a notice, ‘have regard to what a reasonable timeframe to provide the requested information is in the circumstances’, there is no explanation as to why ‘maximum’ flexibility is required in the context of these powers. **The committee therefore seeks further information from the Minister’s as to the justification for this approach.**

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

### **Trespass on personal rights and liberties—strict liability Schedule 1, item 43, proposed subsection 102FA(2)**

This subsection creates a strict liability offence for failing to comply with a direction under new section 102F. A section 102F direction may prohibit the involvement of cargo terminal operator or handler in the operations of a cargo terminal, either indefinitely or for a specified period.

The explanatory memorandum notes the following:

- in developing the offence, consideration was given to the Committee’s Sixth Report of 2002 on Application of Absolute and Strict Liability Offences and A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers; and
- the regulatory nature of the offence.

The penalty is 100 penalty units (the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* recommends a maximum penalty for strict liability offences committed by individuals of 60 penalty units). The explanatory memorandum argues that this penalty is justified ‘given the serious nature of the direction and the possible consequences for security, community safety, and revenue for failing to comply’. It is also noted that, as a safeguard, item 44 will insert paragraph 273GA(b), which provides for the right to apply to the Administrative Appeals Tribunal of a decision under section 102F is give a direction.

**In light of the explanation provided and the ability to appeal to the AAT, the committee leaves to the consideration of the Senate the questions as to whether the application of strict liability, and the level of the penalty, are appropriate.**

*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**

#### **Items 59 and 60**

There are currently 3 similar offences in the Customs Act relating to requirements for 'boarding stations' for ships and aircraft, but they are treated slightly differently, as summarised below:

- 60(1) relates to ships: the whole offence attracts strict liability and the penalty is 100 units;
- 60(2) relates to aircraft landing in Australia from another country: strict liability applies only to the physical elements of the offence, a defence for stress of weather or other cause is available and the penalty is 100 units; and
- 60(3) relates to aircraft on a service from Australia to another country: no elements of strict liability apply, a defence for stress of weather or other cause is available and the penalty is also 100 units.

Items 59 and 60 of the bill propose making all 3 offences of strict liability with the same penalty of 100 units. The arguments in the explanatory memorandum in support of this approach are that:

- it will 'ensure consistency across the like offences in section 60 of the Customs Act' (though, note that the defence relating to weather does not apply to ships (60(1));
- an additional defence balances the higher than usual penalty (though not for ships – but this is not changing the status quo); and
- the matters are peculiarly within the knowledge of the defendant.

It is clear that in seeking to apply strict liability some consideration has been given to matters in the *Guide*, however, the explanatory memorandum does not clearly explain why strict liability is appropriate for these offences. While the committee can appreciate that an offence in these terms might arise in situations in which it would be difficult for the prosecution to prove relevant matters because they are peculiarly within the knowledge of the defendant, the committee expects a clear justification for the application of strict liability. **The committee therefore seeks the Minister's advice as to why strict liability is appropriate for these offences and why the weather defence does not, and will not, apply to ships.**

*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**

### **Items 105 to 120**

The bill seeks to apply strict liability to the ‘owner of goods’ to keep commercial documents to enable customs to verify information on the basis that a person who communicates with customs is required to keep a record verifying the contents of the communication (ss 240 and 240AB). The explanatory memorandum notes that the definition of ‘owner’ is very broad, but argues that strict liability will improve the effectiveness of the enforcement regime and notes that offences are regulatory and penalties don’t exceed 30 penalty units. **The committee notes the arguments made in the explanatory memorandum, which are consistent with the *Guide*, and 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.*

## **Strict liability**

### **Items 121, 122 and 123**

The bill seeks to apply strict liability to a failure to answer a question from an officer or monitoring officer. The explanatory memorandum again argues that this is required to improve the effectiveness of the enforcement regime. The committee notes that the offences are described as regulatory, that penalties don't exceed 30 penalty units, and that s243SC of the Customs Act will apply and it explicitly preserves the privilege against self-incrimination.

A similar situation applies to items 122 and 123 in relation to producing documents.

**The committee notes the arguments made in the explanatory memorandum, which are consistent with the *Guide*, and 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.*

## **Penalties—Infringement notice scheme**

### **Part 4, Schedule 1**

According to the explanatory memorandum, this Part will ‘improve the utility of the Customs Act infringement notice scheme by increasing penalties to encourage greater compliance and to move some aspects of the scheme into subordinate legislation to provide some flexibility and simplification’ (28). It should be noted, however, that proposed subsection 243X(2) provides for maximum penalties under the scheme which exceed the maximum penalties recommended in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Subsection 243X(2) provides that the maximum penalty under the scheme must not exceed either:

- (a) one-quarter of the maximum penalty a court could impose on a person for that penalty (whereas one fifth is recommended in the *Guide*); or

(b) either 15 penalty units for a natural person or 75 for a body corporate (whereas 12 penalty units and 60 penalty units are the recommendations for each category in the *Guide*).

The explanatory memorandum argues that the increase in penalties will increase the deterrence effect of the infringement notice scheme, and is a response to an ANAO report which suggested that improvements to the scheme be made to improve compliance. It is also noted that:

- the maximum penalties are consistent with some other Commonwealth legislation; and
- where the maximum penalty a court can impose for a strict or absolute liability offence is determined by reference to the amount of duty or value of goods, proposed subsection 243(3) provides that the amount payable under an ‘infringement notice will be limited to 1/5 of the maximum penalty a court could impose’ (at 28-29).

**In these circumstances the Committee leaves the question of whether the maximum penalties under the infringement notice scheme 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.*

### **Delegation of legislative power—important matters in regulations Part 1, Schedule 2—General**

These amendments introduce a regulatory framework designed to strengthen the ability of the ASIC and MSIC schemes to mitigate national security threats by authorising the Secretary, through AusCheck, to suspend a person’s ASIC or MSIC identification card if the person is charged with a serious offence. A key feature of this scheme is that suspension of a card or an application for a card should be ‘automatic’ following a charge for a serious offence (statement of compatibility at 11). Suspension carries with it serious consequences in terms of an individual’s capacity to undertake various sorts of work (see statement of compatibility at 10).

As noted in the explanatory memorandum, many of the ‘details of this framework will be implemented through regulations made under the

AusCheck Act, including by creating offences for conduct such as failing to report a charge for a serious offence' (at 36, see also statement of compatibility at 12).

Unfortunately the explanatory memorandum does not clearly explain why it is necessary to contain important elements of the scheme in the regulations. For example, it is not clear why the serious aviation-security-relevant or maritime-security-relevant offences are to be determined in the regulations (see proposed subsection 4(1)). The statement of compatibility (at 11) appears to suggest that the limitation of the Secretary's power to suspend a person's card or application to only those offences that are prescribed in the regulations may in some way ameliorate the automatic suspension of an application or card. Although the statement of compatibility states that the 'list of offences prescribed in the regulations will be targeted and limited to offences involving conduct demonstrating that they pose a national security threat or may use their access to a secure area to engage in or facilitate serious and organised criminal activity' (11), no explanation is given as to why these details should not be provided for in primary legislation.

It is also of concern that it is difficult to assess the discussion in the statement of compatibility justifying how the 'suspension on charge measure will interact with the right to privacy' (at 11-13): the discussion of the arrangements envisaged to enable the sharing of personal information and the collection, use and storage of information appears to be insufficiently detailed as it does not specify exactly which arrangements will be provided for in existing or proposed regulations and how the regulation-making power is appropriately limited to ensure that there will be adequate protections.

**The committee therefore seeks the Minister's explanation as to why the important elements of the regulatory framework to facilitate the suspension of a person's ASIC or MSIC if they are charged with a serious offence are to be included in the regulations rather than in the primary legislation. This matter is of particular concern given the significant consequences that follow from a suspension of an ASIC or MSIC card. In addition, the committee seeks a fuller explanation as to the discussion of the arrangements envisaged to enable the sharing of personal information and the collection, use and storage of information as outlined above.**

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

## **Possible Trespass—fair hearing**

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

As noted in the above comment, it is envisaged that the regulatory scheme to be developed under this Part envisages the ‘automatic’ suspension of an ASIC or MSIC card or application following a charge for a serious offence (statement of compatibility at 11). It appears to be intended that the details of the scheme will not entitle a person to any sort of hearing prior to a suspension decision being made. Although an affected person will, of course, be given a fair hearing before being convicted of the offence for which they have been charged, it is noted that no hearing will occur prior to the imposition of the significant consequences that flow from the suspension of a card or application for a card—see statement of compatibility 10-11).

The reason given for ‘automatic’ suspension is that ‘the Government has decided it is not appropriate for a person charged with a serious offence to access secure areas where they may continue to pose a security or organised crime risk’ (statement of compatibility 11). It is also stated that the ‘suspension of charge measure is part of the Government’s response to operational law enforcement advice that organised criminals are successfully targeting and exploiting airports, seaports and the cargo supply chain to facilitated their criminal activities’ and that the measure is a response to the PJCLE June 2011 report on its *Inquiry into the Adequacy of Aviation*.

**While the committee understands the justification provided for the proposed approach, in light of the wide definition of restricted information the committee seeks the Minister’s advice as to the intended fault requirements for each of the elements of the offences (noting that the Minister’s response to committee’s concern above about important matters being included in subordinate legislation may be relevant to this matter.)**

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

## **Customs Tariff Amendment (Incorporation of Proposals) Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Home Affairs

### **Background**

This bill amends the *Customs Tariff Act 1995* to incorporate five technical alterations into the customs tariff that were contained in Customs Tariff Proposal (No. 1) 2013.

*The committee has no comment on this bill.*

## **Environment Protection and Biodiversity Conservation Amendment (Great Barrier Reef) Bill 2013**

Introduced into the Senate on 20 March 2013

By: Senator Waters

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to implement key World Heritage Committee recommendations in our national environment laws to ensure the Great Barrier Reef does not get added to the “world heritage in danger” list.

*The committee has no comment on this bill.*

## **Export Finance and Insurance Corporation Amendment (New Mandate and Other Measures) Bill 2013**

Introduced into the House of Representatives on 20 March 2013  
Portfolio: Trade and Competitiveness

### **Background**

This bill implements the Government's response to the Productivity Commission Inquiry *Report on Australia's Export Credit Arrangements*, released in May 2012.

The bill amends the *Export Finance and Insurance Corporation Act 1991* to:

- ensure Export Finance Insurance Corporation (EFIC) support in domestic supply chains can only be provided when it involves a contract that is integral to final exports of capital and non-capital goods and services; and
- broaden EFIC's guarantee powers to enable EFIC to guarantee loans of foreign-based subsidiaries of Australian-based small and medium sized enterprises (SMEs) where the purpose of the guarantee is to support 'Australian export trade', and where the SME certifies that the guarantee will not result in a net reduction in the number of its employees in Australia during the term of EFIC's guarantee.

*The committee has no comment on this bill.*

## **Fair Work Amendment Bill 2013**

Introduced into the House of Representatives on 21 March 2013

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *Fair Work Act 2009* (FW Act) to:

- introduce new family friendly arrangements;
- require employers to consult with employees about the impact of changes to regular rosters or hours of work, particularly in relation to family and caring responsibilities;
- amend the modern awards objective to require that the Fair Work Commission (FWC), take into account the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts;
- give the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes;
- provide for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder;
- facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders in remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangements to cost recovery;
- give the FWC capacity to deal with disputes in relation to accommodation and transport arrangements;
- expressly confer on the FWC the function of promoting cooperative and productive workplace relations and preventing disputes; and
- make a number of minor technical amendments.

The bill also amends the FW Act to give effect to the Government's response to the House of Representatives Standing Committee on Education and Employment's report *Workplace Bullying “We just want it to stop”* to:

- allow a worker who has been bullied at work in a constitutionally-covered business to apply to the FWC for an order to stop the bullying;
- adopt a definition of ‘bullied at work’ which is consistent with the definition of ‘workplace bullying’ recommended by the Committee in its report;
- require the FWC to start dealing with an application for an order to stop bullying within 14 days of the application being made; and
- enable the FWC to make any order it considers appropriate (other than an order for payment of a pecuniary amount) to stop the bullying.

*The committee has no comment on this bill.*

## **Financial Framework Legislation Amendment Bill (No. 2) 2013**

Introduced into the House of Representatives on 13 March 2013

Portfolio: Finance and Deregulation

### **Background**

This bill amends various Acts across three portfolios including:

- the *Financial Management and Accountability Act 1997* (FMA Act) to authorise the Commonwealth to form or participate in forming companies and to acquire shares in, or become a member of a company, so long as the proposed company is specified in the *Financial Management and Accountability Regulations 1997*;
- the *Administrative Decisions (Judicial Review) Act 1977* to include decisions made under the proposed amendment to the FMA Act in the relevant schedule of decisions not subject to review under that Act;
- the *Judges' Pensions Act 1968*, the *Remuneration Tribunal Act 1973* and the *Social Security Act 1991* to establish a 'recoverable payments' framework for dealing with administrative overpayments, and to address instances where the relevant agency makes payments from appropriations to recipients that are consistent with the requirements or preconditions imposed by legislation; and
- to enable deferred tax asset relief to be provided to the Commonwealth Superannuation Corporation in relation to the transfer of assets from the Military Superannuation and Benefits Fund to the ARIA Investments Trust that occurred in May 2012.

### **Exclusion of Judicial Review**

#### **Schedule 1, item 1, proposed paragraph (eh) of Schedule 1 of the Administrative Decisions (Judicial Review) Act 1997**

Item 2 of Schedule 1 of the bill proposes (new section 39B) to amend the *Financial Management and Accountability Act 1997* to expressly provide for statutory authority for the Commonwealth to form and participate in the formation of companies. As explained in the explanatory memorandum,

Commonwealth governments have long considered that such a power exists without express legislative authority as part of the executive power of the Commonwealth. The explanatory memorandum indicates that the proposed amendment to the FMA Act is enacted ‘in the interests of abundant caution following the High Court’s decision in *Williams v Commonwealth* [2012] HCA 23’ and is ‘designed to put beyond any argument the capacity of the Executive Government to form or participate in the formation of companies’ (p. 5).

Proposed paragraph (eh) of the *AD(JR) Act* will have the effect of excluding decisions made pursuant to new section 39B of the *FMA Act* from judicial review under the *AD(JR) Act*. The explanatory memorandum offers the following reasons for this exclusion from review pursuant to the *AD(JR) Act*:

Decisions under the proposed amendment to the FMA Act to form or participate in forming companies would be policy decisions regarding how the Commonwealth organises its bodies and governance arrangements. These decisions would not be administrative in nature and would not impact upon the interests of an individual. Accordingly, it is appropriate to exempt decisions under the proposed section 39B of the FMA Act from review under the AD(JR) Act.

Only decisions of an ‘administrative character’ are reviewable under the *AD(JR) Act*, and this requirement has been held by the courts to exclude the review of decisions of a ‘legislative’ or ‘judicial’ character. However, there is no clear basis in the case law for the conclusion that policy decisions or decisions relating to governance arrangements should be excluded from review for the reason that they are not decisions of an *administrative* nature. Further, whether or not decisions made under the proposed new section 39B of the *FMA Act* may in some circumstances impact upon the interests of a legal person is difficult to predict with certainty. Decisions made under proposed section 39B of the FMA Act must conform with a number of statutory conditions. As such the basis for excluding *AD(JR) Act* review to ensure that the power is exercised lawfully requires further explanation.

In this regard, two further matters should be noted. First, the mere fact that no attempt to exclude other sources of judicial review jurisdiction has been made is not in itself sufficient to justify the exclusion of *AD(JR) Act* review. This is because the *AD(JR) Act* has a number of remedial and procedural advantages over applications for the constitutional writs. Second, the strength of the case for excluding review under the *AD(JR) Act* in its entirety will be diminished to the extent that any unlikelihood that decisions will affect individual interests

may well mean that any judicial review action would fail because (1) the applicant would lack standing (that is, would not be a ‘person aggrieved’) or (2) the applicant would not have a right to a fair hearing (as the decision would not affect them in a direct or immediate way) or the decision-maker would not be bound to consider their individual circumstances in the making of the decision. **The committee therefore seeks the Minister's further advice as to the justification for the proposed exclusion of judicial review under the AD(JR) Act.**

*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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

## **Insufficient Parliamentary Scrutiny of Legislative Power**

### **Item 1, Schedule 1, proposed section 39B**

The explanatory memorandum indicates that the proposed amendment, the insertion of section 39B, to the FMA Act is enacted ‘in the interests of abundant caution following the High Court’s decision in *Williams v Commonwealth* [2012] HCA 23’ and is ‘designed to put beyond any argument the capacity of the Executive Government to form or participate in the formation of companies’ (p. 5).

Subsections 39B(1) and 39B(2) are said to ‘confirm that the Commonwealth has the power to form a company, participate in the formation of a company, acquire shares in a company or become a member of a company’ (p. 5). Proposed paragraphs 39B(1)(b) and 39B(2)(b) provide that the Commonwealth has the identified powers only in circumstances where the company in question has been specified in the regulations and the objects or proposed activities of that company have also been specified in the regulations. The statutory powers conferred by proposed section 39B ‘may be exercised on behalf of the Commonwealth by the Finance Minister’ (proposed subsection 39B(3)) and may only be delegated to Chief Executives (item 3).

It is apparent that the statutory powers granted by proposed section 39B to empower the Commonwealth to form a company, participate in the formation of a company, acquire shares in a company or become a member of a company are framed broadly (though the explanatory memorandum claims

that the powers must be exercised ‘within the limits of the legislative powers of the Parliament under the Constitution’) (p. 5). Although the power may be exercised only if the company in question and its objects or proposed activities are specified in the regulations, the precise nature of the requirement that these objects or proposed activities be specified is unclear.

The question of whether it is appropriate for Commonwealth purposes to be furthered through the formation of a company or through other institutional arrangements (eg through government departments, statutory corporations or agencies and so on) raises important questions. It is difficult, however, for the Parliament to assess the appropriateness of pursuing Commonwealth purposes through the formation of, or participation in, a company (as opposed to using alternative institutional arrangements) unless the purposes to be pursued by the company are specified to an appropriate level of detail.

This difficulty can be illustrated by reference to proposed Schedule 1B of the *FMA Regulations* (item 2 of Schedule 2 to the bill), which lists existing Commonwealth owned companies for the purpose of removing ‘any doubt over the Commonwealth’s capacity to engage in the formation, share acquisition or membership (where relevant) of these companies (p. 4). This list also specifies each company’s ‘objects or proposed activities’. Perusal of this list illustrates the fact that the specification of a company’s objects and activities may contain little detail about the actual purposes and activities to be pursued by the Commonwealth through that company. For example, the Australian Institute for Teaching and School leadership Limited will ‘provide national leadership for the Commonwealth, state and territory governments in promoting excellence in the profession of teaching and school leadership’. Without further information, it is difficult for the Parliament to assess the appropriateness of the purposes being pursued through a Commonwealth owned company. Thus, although the requirement for objects and activities to be specified in a disallowable instrument does facilitate parliamentary scrutiny of the appropriateness of the exercise of these legislative powers, a serious question arises as to the adequacy of such scrutiny. It is emphasised that the explanatory memorandum for the bill contains no information which enables close scrutiny of the appropriateness of the Commonwealth utilising companies to pursue the objectives or activities specified in proposed Schedule 1B of the *FMA Regulations*.

While it is acknowledged that the amendments reflect the Commonwealth's view that the proposed statutory powers are not strictly necessary, because

they fall within the existing limits of the executive powers of the Commonwealth (explanatory memorandum, p. 5), it is important to note that a clear theme of the High Court's judgment in the *Williams* case was the importance of adequate parliamentary control of executive government. It is therefore suggested that merely placing executive powers on a statutory basis may not, of itself, necessarily facilitate adequate control, unless the Parliament has before it sufficient information to enable it to assess the appropriateness of the Commonwealth pursuing particular objects or engaging in specified activities through the formation, or participation in the formation, of a company or by acquiring shares in a company or becoming a member of a company.

The importance of ensuring adequate parliamentary scrutiny is of particular concern in this case as it seems likely that a Commonwealth company that acted inconsistently with the objects and activities specified by the *FMA Regulations* would not be acting unlawfully, due to its status as a legal person separate from the Commonwealth (see Nick Seddon and Stephen Bottomley, 'Commonwealth Companies and the Constitution (1998) 26 *Federal Law Review* 271). The prospect that a Commonwealth corporation once formed might therefore potentially act outside its specified objects arguably undermines, at least in a practical sense, the justification given in the explanatory memorandum (p. 5) that the powers exercised pursuant to section 39B are to be exercised 'within the limits of the legislative powers of the Parliament under the Constitution'.

In light of these concerns regarding Parliament's ability to adequately assess the appropriateness of the Commonwealth pursuing objectives through the formation or participation in a company, it is appropriate to question whether the Executive should be empowered to specify, via regulation, the companies and their objects or proposed activities as the bill proposes. However, if the general scheme of specifying corporations and their objects and proposed activities via regulation were to proceed, it is prudent to ask whether it is intended (and by what legal mechanism) that those objects and activities constrain the activities of the listed company to which they pertain, and whether consideration should be given to enacting legislative requirements to ensure that any future regulation contains sufficient information to support effective parliamentary scrutiny of Executive decisions to pursue Commonwealth purposes through the formation or participation in companies. **The committee therefore requests additional information from the Minister about these matters and, in particular, about the**

**appropriateness of specifying via regulation the companies (and related objects and proposed activities) through which the Commonwealth may pursue its objectives.**

*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.*

## **Foreign Affairs Portfolio Miscellaneous Measures Bill 2013**

Introduced into the House of Representatives on 13 March 2013  
Portfolio: Foreign Affairs

### **Background**

This bill amends the *Intelligence Services Act 2001* and the *Work Health and Safety Act 2011* (WHS Act) to:

- create a mechanism for Australian Secret Intelligence Service (ASIS) employees to move to an Australian Public Service (APS) agency in the same way that APS employees can voluntarily transfer from one APS agency to another under section 26 of the *Public Service Act 1999*; and
- enable the Director-General of ASIS, with the approval of the Minister responsible for the WHS Act, to make a declaration that specified provisions of the WHS Act do not apply, or apply subject to modification in relation to persons carrying out work for the Director-General of ASIS.

### **Delegation of legislative power/broad discretion**

### **Insufficient Parliamentary scrutiny**

### **Schedule 1, item 6**

This item provides that declarations made under proposed subsection 12C(2A) are not legislative instruments. Item 3 of Schedule 1 would introduce subsection 12C(2A) into the *Work Health and Safety Act 2011*. This proposed subsection would enable the Director-General of ASIS to make a declaration that specified provisions of the WHS Act do not apply or have a modified application in relation to persons carrying out work for the Director-General of ASIS. The explanatory memorandum explains that, currently:

...section 12C provides that nothing in the WHS Act requires or permits a person to take any action, or refrain from taking any action, that would be, or could be reasonably expected to be prejudicial to Australia's nationals [sic] security.

However, under section 12C(2), the Director-General of ASIS:

...is unable to make a declaration that specified provisions of the WHS Act do not apply, or apply subject to modifications set out in the declaration. (p. 7).

The proposed declaration power is argued as providing welcome certainty around the application of section 12C to people who perform work for the Director-General of ASIS.

The position of ASIS may be compared with that of the Australian Security Intelligence Organisation (under section 12C) and the ADF (which has a similar mechanism under section 12D) as these organisations are able to make declarations that specified provisions of the WHS Act do not apply or apply with modifications. The statement of compatibility (p. 4) argues that ASIS should have a similar power given that the circumstances in which it operates are similar to those faced by ASIO and the ADF and that ‘these circumstances mean that the requirements of national security may not always be compatible with full compliance with all the obligations under the WHS Act’.

The explanatory memorandum (p. 8) states that a declaration under proposed 12C(2A) ‘would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act’ (*LIA*). A legislative instrument is defined by section 5 of the *LIA* to be an instrument in writing that is ‘of a legislative character’ and that ‘is or was made in the exercise of a power delegated by the Parliament’. Paragraph 5(2)(a) provides that an instrument is taken to be of a legislative character if, *inter alia*, it ‘determines the law or alters the content of the law, rather than applying the law in a particular case’.

Although the explanatory memorandum does not justify the conclusion that a declaration under proposed subsection 12C(2A) is not a legislative instrument, it may be argued that such a declaration would apply the law to a particular case rather than determine or alter the content of the law. On the other hand, the explanatory memorandum (p. 7) indicates that the Director-General has discretion as to how declarations made under this provision are expressed, and that they may apply to ‘specified workplaces or to particular activities that persons who carry out work for the Director General are engaged in or to particular categories of persons’. It would therefore seem possible that a declaration under proposed subsection 12C(2A) could be expressed in relatively general terms with the effect that certain provisions of the *Work Health and Safety Act 2011* would not apply or would apply in a modified way in relation to a category of persons as specified in the declaration.

While it is acknowledged that the line between changing the content of the law and applying the law to particular cases is not always capable of being clearly drawn, at least some declarations made under subsection 12C(2A) are therefore likely to, in effect, alter the content of the law to be applied in a general category of cases. It is of concern that declarations could be made which affect a class of persons' rights and interests without parliamentary scrutiny. **The Committee therefore seeks a fuller justification from the Minister regarding the proposed approach.**

*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.*

## **Health Insurance Amendment (Medicare Funding for Certain Types of Abortion) Bill 2013**

Introduced into the Senate on 19 March 2013

By: Senator Madigan

### **Background**

This bill amends the *Health Insurance Act 1973* to provide that Medicare benefits are not payable for medically induced terminations carried out on the basis of gender.

*The committee has no comment on this bill.*

## **Indigenous Education (Targeted Assistance) Amendment Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: School Education, Early Childhood and Youth

### **Background**

This bill amends the *Indigenous Education (Targeted Assistance) Act 2000* to provide additional funding for the period 1 January 2012 to 30 June 2014 for:

- the School Nutrition Program and the Additional Teachers initiative under the Stronger Futures in the Northern Territory National Partnership; and
- the Achieving Results Through Indigenous Education project to be administered through the Sporting Chance program.

*The committee has no comment on this bill.*

## **Insurance Contracts Amendment Bill 2013**

Introduced into the House of Representatives on 14 March 2013

Portfolio: Treasury

This bill is in similar terms to the bill introduced into the House of Representative on 17 March 2010. The committee commented on the bill in *Alert Digest No. 5 of 2010*. The minister's response was published in the committee's *Seventh Report of 2010*.

### **Background**

This bill amends the *Insurance Contracts Act 1984* with the purpose of streamlining requirements and addressing anomalies in the regulatory framework of insurance contracts. In particular, the key features of the bill are measures to:

- Remove impediments to the use of electronic communication for statutory notices and documents;
- make the duty of disclosure easier for consumers to understand and comply with, especially at renewal of household/domestic insurance contracts;
- make the remedies in respect of life insurance contracts more flexible;
- clarify the rights and obligations of persons named in contracts as having the benefit of cover, but who are not parties themselves; and
- clarify what types of contracts are exempt from its operation

### **Delayed Commencement**

#### **Schedule 4**

The amendments in this schedule (which broadly relate to disclosure and misrepresentation provisions) generally take effect 30 months after Royal Assent. The explanatory memorandum (at page 4) suggests that this delay 'is to allow insurers an opportunity to amend their business practices in response to the new rules regarding the operation of the duty of disclosure and notification of that duty'. **The committee notes the Senate resolution in relation to a delay in commencement and expects that a delay of greater**

**than six month is explained in the explanatory memorandum. The committee notes the information provided and would have preferred amore detailed explanation. However, in the circumstances the committee leaves consideration of this matter 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.*

### **Delayed Commencement**

#### **Schedule 5**

The amendments in this schedule regarding changes to the remedies for particular contracts of life insurance commence 12 months after the date of Royal assent. The explanatory memorandum (at 6) suggests that this delay ‘is to allow insurers an opportunity to factor into their affairs the changes to available remedies’. **The committee notes the Senate resolution in relation to a delay in commencement and expects that a delay of greater than six month is explained in the explanatory memorandum. The committee notes the information provided and would have preferred amore detailed explanation. However, in the circumstances the committee leaves consideration of this matter 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.*

### **Delayed Commencement**

#### **Schedule 6**

The amendments in this schedule relating to new rights and obligations of third party beneficiaries commence 12 months after the date of Royal assent. The explanatory memorandum (at page 7) suggests that this delay is to allow insurers an opportunity to factor these changes into their business operations. **The committee notes the Senate resolution in relation to a delay in commencement and expects that a delay of greater than six month is explained in the explanatory memorandum. The committee notes the information provided and would have preferred amore detailed**

**explanation. However, in the circumstances the committee leaves consideration of this matter 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.*

## **International Monetary Agreements Amendment Bill 2013**

Introduced into the House of Representatives on 14 March 2013

Portfolio: Treasury

### **Background**

This bill amends the *International Monetary Agreements Act 1947* to provide a standing appropriation and authority to borrow for payments to meet drawings made by the International Monetary Fund (IMF) under a bilateral loan agreement entered into by Australia and the IMF on 13 October 2012.

### **Standing Appropriation**

This bill contains a standing appropriation which enables Australia to lend to the IMF according to a Loan Agreement entered into by Australia and the IMF on 13 October 2012. The term of the loan is two years, extendable by the IMF for up to two additional one-year periods. As the amount which may be appropriated is capped the committee makes no further comment on this issue.

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

## **International Organisations (Privileges and Immunities) Amendment Bill 2013**

Introduced into the Senate on 13 March 2013

Portfolio: Foreign Affairs

### **Background**

This bill amends the *International Organisations (Privileges and Immunities) Act 1963* to provide a legislative basis for the enactment of Regulations conferring privileges and immunities on the International Committee for the Red Cross and the International Criminal Court.

*The committee has no comment on this bill.*

## **Marine Engineers Qualifications Bill 2013**

Introduced into the House of Representatives on 18 March 2013

By: Mr Wilkie

### **Background**

This bill requires that any marine regulations be amended by the issuing authority so that they comply with, and give effect to, the existing Australian standards for marine engineering and electro-technical competencies.

*The committee has no comment on this bill.*

## **Marriage Amendment (Celebrant Administration and Fees) Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Attorney-General

### **Background**

This bill amends the *Marriage Act 1961* to:

- provide for a celebrant registration charge to be imposed from 1 July 2013 on Commonwealth-registered marriage celebrants who are authorised under the Marriage Celebrants Program to perform marriages;
- provide for the deregistration of celebrants who do not pay the celebrant registration charge or obtain an exemption;
- enable the imposition of a registration application fee for prospective celebrants seeking registration;
- provide for exemptions and the imposition of processing fees for applications for exemptions;
- remove the requirement for marriage celebrants performance reviews every five years; and
- make minor amendments to the Marriage Celebrants Program.

### **Delegation of legislative power**

#### **Schedule 1, item 3, proposed subsection 39FA(3)**

This subsection provides for the making of regulations which may grant exemptions, on grounds specified in the regulations, from liability to the pay celebrant registration charge (paragraph (a)) and to provide for internal review of decisions to refuse to grant exemptions (paragraph (b)). The grounds for granting exemptions and the provision for internal review of exemption decisions may be considered to raise important questions and it is not clear why they cannot be dealt with in the legislation.

The same issue arises in relation to item 6 of Schedule 1, in relation to registration application fees.

**As the committee prefers that important matters be included in primary legislation unless a strong justification is provided it 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## **Marriage Amendment (Celebrant Registration Charge) Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Attorney-General

### **Background**

This bill imposes an annual celebrant registration charge with a statutory limit of \$600 for the 2013-14 financial year. The bill also provides for indexation of the statutory limit in later financial years.

*The committee has no comment on this bill.*

## **Military Justice (Interim Measures) Amendment Bill 2013**

Introduced into the House of Representatives on 21 March 2013

Portfolio: Defence

### **Background**

This bill amends the *Military Justice (Interim Measures) Act (No. 1) 2009* to extend the appointment, remuneration and entitlement arrangements for the Chief Judge Advocate and two Judge Advocates for an additional two years or until the minister declares a termination day, whichever is sooner.

*The committee has no comment on this bill.*

## **National Measurement Amendment Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Industry and Innovation

### **Background**

This bill amends the *National Measurement Act 1960* to provide for:

- a discretion for trade measurement inspectors to allow the continued use of measuring instruments for trade or the continued sale of packaged goods where there is a minor technical infringement of the Act but no material detriment to any affected person;
- a new monitoring power that allows trade measurement inspectors to enter public areas of business premises when open for business to purchase any article for sale and to collect information about trade measurement activities without having to identify himself or herself as an inspector;
- a new power allowing an inspector to give a reasonable direction to the controller of a business vehicle or a person in the vehicle which may include a direction to move or drive the vehicle, remain in or leave the vehicle or unload or reload the vehicle ensuring that inspections can be practically exercised and in accordance with the intent of the legislation;
- a new offence provision that applies to the controller of a business vehicle or a person in the vehicle who does not comply with a reasonable direction;
- a separation of the existing offence of repairing or adjusting an instrument without obliterating the verification mark from *causing* the repair or an adjustment to an instrument without obliterating the verification mark; and
- a number of minor and technical amendments to facilitate the working of the Act.

**Trespass on Personal Rights and liberties—reversal of onus  
Schedule 1, items 7 and 8, proposed subsection 18GE(10) and  
subsection 18GR(6)**

The bill will allow a trade measurement inspector to give a person a ‘notice to remedy’ for minor technical infringements of the Act under the amendments in items 7, 8, 10, 12, 15, 18, 24 and 26 in defined circumstances. As noted in the statement of compatibility, ‘the effect of these notices is that if a person complies with such a notice, they can rely on these notices as an exemption to certain offences under the Act’ (at 11). Proposed subsection 18GE(10), subsection 18GR(6), subsection 18HB(9), subsection 18HC(6), subsection HD(6), subsection HG(6), subsection 18JHA(3), and subsection 18JLA(3) state that compliance with such a notice or direction is an exemption to specified offences. A *Note* to each provision indicates that a defendant bears an evidential burden to establish that they have complied with the requirements set out in the notice or direction.

The statement of compatibility argues that this reversal of the burden of proof is appropriate (and should not be considered to violate the right to the presumption of innocence) for the reasons that:

The power of a trade measurement inspector to give a person a notice to remedy will ensure that a trade measurement inspector will not automatically find that a person has breached the Act. As this measure will be beneficial to those persons who use measuring instruments for trade, the fact that they will bear an evidential burden of proof to rely on the exemption is appropriate as those persons are best placed to produce the evidence of their compliance with the notice to remedy.

**In light of the explanation provide 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.*

## **Trespass on Personal Rights and liberties—uncertain application of offence provision**

### **Item 31, proposed subsection 18MIA(3)**

This proposed subsection provides that it is an offence to fail to comply with a direction given under proposed section 18MIA. Subsection 18MIA(1) provides that a trade measurement inspector is authorised to give ‘reasonable directions’ to the controller of a vehicle and any person in a vehicle they are otherwise authorised to inspect (under sections 18ME or 18MF). Subsection 18MIA(2) provides that without limiting subsection (1) an inspector may direct a person in control of or in a vehicle to do any or all of the following: drive or move the vehicle to or from a particular area, remain in, leave or return to the vehicle, or to unload or reload anything in or on the vehicle.

**The explanatory memorandum does not indicate why it is necessary to define authorised directions for the purposes of this offence by reference to the uncertain language of ‘reasonableness’. The committee therefore seeks an explanation of why a power broader than the more specific types of directions specified in subsection 18MIA(2) is necessary. Given that subsection 18MIA(4) provides for a strict liability offence in relation to the same conduct (ie breach of a ‘reasonable direction’), it would be possible for this power to be abused if it is not appropriately confined.**

*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**

#### **Subsection 18MIA(4)**

Note in relation to strict liability: The statement of compatibility contains a very detailed explanation as to the appropriateness of the use of strict liability in proposed subsection 18MIA(4). The following reasons are given in justification of the creation of a strict liability offence: ‘regulatory’ nature of the offence, the necessity of the offence for effective enforcement, the lower penalty for the strict liability offence (40 as opposed to 200 penalty units), and the fact that if a person chooses to pay the penalty when issued with an infringement notice for such an offence will pay a penalty as low as 5 penalty units. Subject to the above comment in relation to the uncertainty as to the

limits of authorised directions for the purposes of this offence, **in light of the explanation provide 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.*

## **Not-for-profit Sector Freedom to Advocate Bill 2013**

Introduced into the Senate on 13 March 2013

Portfolio: Finance and Deregulation

### **Background**

This bill seeks to make an agreement between a Commonwealth agency and a not-for-profit (NFP) organisation void if it includes any requirement that restricts or prevents the organisation from commenting on, advocating support for or opposing a change to any Commonwealth law, policy or practice. In short, the bill seeks to prohibit the use of 'gag clauses' in NFP funding agreements by the Commonwealth.

*The committee has no comment on this bill.*

## **Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures No. 2) Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Resources and Energy

### **Background**

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to:

- implement enforcement mechanisms including infringement notices, daily penalties for continuing offences and civil penalty provisions, injunctions and adverse publicity orders;
- enable National Offshore Petroleum Safety and Environmental Management Authority inspectors to issue environmental prohibition and improvement notices to require petroleum titleholders to remove significant threats to the environment and provide for publication of these notices;
- provide for an express polluter pays obligation and an associated third party cost recovery mechanism;
- clarify insurance requirements to ensure that maintenance of sufficient financial assurance is compulsory without a direction being given; and
- make technical amendments.

### **General Comment – enforcement mechanisms**

#### **Schedule 1**

The amendments in Schedule 1 of the bill introduce four new alternative enforcement mechanisms into the Act: infringement notices, injunctions, adverse publicity orders, and cumulative penalties for continuing offences.

The explanatory memorandum (15-31) explains the amendments in detail. It is apparent that the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* has been considered and that any departures have been thoroughly discussed. For example, it is acknowledged that the *Guide* sets a 60 penalty unity maximum for strict liability offences in primary

legislation but that the amendments which establish continuing offences for a number of existing strict liability offences (see Part 2 of Schedule 1) mean that ‘an offender may conceivably face an amalgamated penalty which totals more than 60 penalty units’.

The general justification provided for this approach is that it will encourage timely compliance with statutory requirements, noting that the context of these provisions includes the fact that the regulated activities occur in a ‘high hazard regime’ and that the ‘conduct and consequences associated with the offence are potentially extremely serious, particularly related to OHS or environmental matters, and therefore warrant application of a penalty high enough to provide sufficient disincentive to secure swift compliance.

**In light of the comprehensive justification provided for the schedule amendments, the committee does not raise any particular concerns and leaves the question to the consideration of the Senate as a whole.**

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

## **Merits Review**

### **Schedule 2, item 4**

This item makes a number of amendments to enable a NOPSEMA inspector to issue environmental prohibition notices and environmental improvement notices to a petroleum titleholder to require action to remove threats to the environment. The issue of these notices is not subject to merits review.

As noted in the explanatory memorandum, prohibition and improvement notices are commonly made reviewable by an administrative tribunal. Indeed the equivalent OHS notices in this regulatory scheme are reviewable by the AAT. Nevertheless, the explanatory memorandum offers a number of reasons for the absence of merits review appeals. Some of the reasons are of a practical nature. First, it is said that there is no established Commonwealth tribunal with the necessary environmental credentials, combining expertise in environmental regulation and offshore petroleum operations. Second, it would be difficult for such expertise to be established even if appropriately qualified persons were members of the AAT as they ‘would not have a flow of work that would enable them to build and maintain their expertise’. Third, an added difficulty is said to be that ‘of assembling such a group of persons within the

very short timeframe necessary to review decisions, given the very high cost of delaying offshore operations even for a short time’.

In addition to these practical objections to merits review, it is argued that it seems inappropriate to subject the decisions of an expert national regulator to review by a less-qualified and less experienced decision-maker, given that the reason for establishing NOPSEMA was ‘that no other body had the critical mass of expert, trained personal that was required to regulate environmental management of offshore operations’. In this context, the explanatory memorandum (at 35) concludes that merits review, were it made available, poses ‘a very high risk that it would result in gaming by the industry, with an inevitable loss of effectiveness of NOPSEMA as regulator’.

It is noted that judicial review is available, and that the amendments in Part 2 of Schedule 2 do (appropriately) limit the requirement that these notices be published when judicial review proceedings are, or may yet be, instituted. **Given this, the high risk nature of the industry and the unique regulatory challenges posed by offshore petroleum operations, the committee leaves to the Senate as a whole the question of whether not providing for merits review of prohibition and improvement notices is appropriate.**

*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.*

## **Public Interest Disclosure Bill 2013**

Introduced into the House of Representatives on 21 March 2013  
Portfolio: Public Service and Integrity

### **Background**

This bill establishes a framework to encourage and facilitate reporting of wrongdoing by public officials in the Commonwealth public sector.

The bill also ensures that Commonwealth agencies properly investigate and respond to public interest disclosures; and provides protections to public officials who make qualifying public interest disclosures.

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

#### **Subclause 23(1)**

Under paragraph 23(1)(a) a person seeking to claim immunity from prosecution under clause 10 of the bill (which provides that a person who makes a public interest disclosure is not subject to any civil, criminal or administrative liability on that account) bears the onus of pointing to evidence that suggests a reasonable possibility that the protection applies. Subclause 23(1)(b) provides that if the initial onus is discharged, then the party instituting the proceedings bears the onus of proving that the claim is not made out.

In the context of a criminal proceeding, the situation is therefore analogous to placing an evidential burden of proof to establish an exception to an offence based on clause 10 of the bill. **The explanatory memorandum does not give an explanation of why, in this context, it is appropriate for the defendant to bear such an onus and the committee therefore seeks the Minister's further advice as to the appropriateness of paragraph 23(1)(a).**

*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 29(1)**

Item 10 of the table in subclause 29(1) provides that the PID rules may prescribe further types of disclosable conduct. Given the importance of the definition of 'disclosable conduct' for the operation of the bill and the committee's long-standing view that important matters should be included in primary legislation unless a strong justification is provided, the committee seeks the Minister's advice as to the necessity for including further disclosable conduct in delegated 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—self-incrimination**  
**Clause 57**

It does not appear that this clause evinces a clear intention to abrogate the privilege against self-incrimination. **However, in light of the importance of this matter the committee seeks the Minister's clarification as to whether or not this is indeed the case.**

*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—exclusion of Legislative Instruments Act**  
**Subclause 59(2) and clauses 65 and 67**

The explanatory memorandum does not make it clear whether this subclause is a substantive exclusion from the *Legislative Instruments Act*. The procedures deal with important matters (such as the maintenance of confidentiality) and it is not clear why the provisions of the *LIA* should not apply. A similar situation also arises in relation to the reversal of onus in clauses 65 and 67. **The committee therefore seeks the Minister's advice on this issue. If the provisions are substantive exclusions from the *LIA*, the committee seeks the Minister's justification for the approach.**

*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.*

## **Referendum (Machinery Provisions) Amendment Bill 2013**

Introduced into the House of Representatives on 21 March 2013  
Portfolio: Special Minister of State

### **Background**

This bill amends the *Referendum (Machinery Provisions) Act 1984* to:

- require the Australian Electoral Commission to send a Yes/No referendum pamphlet to each residential address on the electoral roll rather than to each elector; and
- temporarily suspend the limit on Commonwealth spending on referendum proposals.

*The committee has no comment on this bill.*

# **Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013**

Introduced into the House of Representatives on 21 March 2013

Portfolio: Attorney-General

## **Background**

This bill amends the *Sex Discrimination Act 1984* to:

- insert definitions for ‘sexual orientation’, ‘gender identity’ and ‘intersex status’, replace the definition for ‘marital status’ with ‘marital or relationship status’, and make related changes to other definitions;
- provide that discrimination on these new grounds is unlawful in the same circumstances as for other grounds already covered by the SDA;
- amend existing exemptions as appropriate to include the new grounds, and introduce three new exemptions, for conduct in compliance with the *Marriage Act 1961*, for conduct in compliance with prescribed Commonwealth, State or Territory laws, and for requests for information and keeping of records in relation to sex and/or gender, and
- extend the functions of the Australian Human Rights Commission to include the new grounds.

The bill also contains minor amendments to address drafting anomalies in relation to family responsibilities discrimination and will make a minor consequential amendment to the *Migration Act 1958*.

## **Delegation of Legislative power**

### **Item 52**

This item includes paragraph 40(2B), which introduces an exemption that provides that prohibitions on discrimination on the basis of sexual orientation, gender identity and intersex status do not apply to anything done in direct compliance with a prescribed law of the Commonwealth or of a State or territory.

The explanatory memorandum justifies using a regulation-making power to prescribe laws for the purposes of this exemption by:

- noting the existence of a similar exemption in the *Disability Discrimination Act 1992*;
- stating that ‘there may be laws which appropriately make distinctions on these grounds’; and
- noting that the prescription of laws for the purposes of the exemption would be subject to parliamentary scrutiny, including by the PJCHR committee under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The explanatory memorandum also states that no decisions have been made regarding the prescription of laws for the purposes of this provision and that the ‘[i]nitial consideration of laws will be done prior to commencement in consultation with State and Territory governments’ (see the explanatory memorandum at page 21).

Although it is stated that there may be laws which appropriately make distinctions on the basis of sexual orientation, gender identity and intersex status, it is not clear what circumstances are likely to fall into this category and whether there is a need to provide for such exceptions by way of a regulation making power rather than through the legislative processes of the parliament. **However, in light of the explanation provided, and the existence of a similar exception in the *Disability Discrimination Act 1992*, 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.*

## **Social Security and Other Legislation Amendment (Caring for Single Parents) Bill 2013**

Introduced into the Senate on 13 March 2013

By: Senator Siewert

### **Background**

This bill amends the *Social Security Act 1991* and the *Fair Work Act 2009* to provide additional financial assistance to single parents on Newstart, to allow single parents on Newstart to earn more before losing their income support payment and to provide an enforceable right to request flexible work arrangements for people with caring responsibilities.

*The committee has no comment on this bill.*

## **Social Security Legislation Amendment (Disaster Recovery Allowance) Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Emergency Management

### **Background**

This bill amends the *Social Security Act 1991* (the SS Act), the *Social Security (Administration) Act 1999* and the *Income Tax Assessment Act 1936* to create a new payment, the Disaster Recovery Allowance, a fortnightly income support payment for individuals whose income has been affected by a major disaster.

*The committee has no comment on this bill.*

## **Statute Law Revision Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Attorney-General

### **Background**

This bill corrects technical errors in various Acts as a result of drafting and clerical mistakes.

The bill also contains amendments to:

- make amendments consequential on amendments to the *Acts Interpretation Act 1901* and the enactment of the *Legislative Instruments Act 2003*;
- repeal spent and obsolete provisions and Acts; and
- modernise language and make other technical amendments in certain legislation.

*The committee has no comment on this bill.*

## **Student Identifiers Bill 2013**

Introduced into the House of Representatives on 20 March 2013

Portfolio: Industry, Innovation, Science, Research and Tertiary Education

### **Background**

This bill establishes a framework for the introduction of a student identifier for individuals undertaking nationally recognised vocational education and training from 1 January 2014 including:

- providing for student identifiers to be assigned, collected, used and disclosed; providing for the creation of an authenticated transcript of an individual's record of nationally recognised training undertaken;
- establishing the Student Identifiers Agency to administer the scheme; and
- providing for the functions, powers, appointment and terms and conditions of the Chief Executive Officer of the agency.

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

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

#### **Parliamentary scrutiny**

#### **Various provisions**

As recognised in the statement of compatibility, the bill may impact on privacy interests of persons in a number of ways. In general, the Committee leaves the question of whether limitations on privacy are reasonable for achieving the bill's policy objectives to the Senate as a whole.

**However, the Committee is interested to better understand whether further protections of individual privacy have been considered or might be considered in relation to clauses 17 and 24 of the bill.** Both clauses enable the use of disclosure information (that will include personal information) if the use of disclosure is for the purposes of research and, among other things, that the disclosure 'meets the requirements specified by the Standing Council'.

The explanatory memorandum indicates (at pages 46 and 49) that these protocols will ensure the integrity of the scheme and provide a further layer of protection of individual privacy. The statement of compatibility states that

research related use and disclosures will ‘ultimately be for the benefit of students and the wider community’ (at 7). It is unclear why protocols designed to protect privacy in relation to research related use and disclosure could not be included in the primary legislation. Further, although it may be accepted that these protocols may have these beneficial outcomes, it is a matter of concern that they are not subject to any form of parliamentary accountability as they are not described as legislative instruments. **The committee is concerned that protocols relied upon to adequately protect privacy interests will not be subject to parliamentary scrutiny and requests a more detailed explanation from the Minister as to why this approach is necessary and considered appropriate. It is noted that if the protocols cannot be subjected to parliamentary scrutiny that consideration could be given to whether the bill could require the involvement of the Information Commissioner in the development of the protocols or review of the protocols. (Under clause 23 of the bill the Information Commissioner is given additional functions.)**

*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 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.*

## **Delegation of legislative power**

### **Clause 21**

Clause 21 of the bill provides that an entity is authorised to collect, use or disclose a student identifier of an individual if so authorised by the regulations. Clearly this clause enables the making of regulations that may infringe on an individual’s privacy. As such, the committee expects to see a strong justification for departing from the general principle that important matters should be dealt with in primary legislation.

The explanatory memorandum addresses the appropriateness of this clause at pages 47 and 48. It is explained that the regulations made under this clause will authorise RTOs to collect and use student identifiers for the purposes of meeting its reporting obligations under the Australian Quality Training Framework Essential Conditions and Standards for Initial Registration and the

Australian Quality Training Framework Essential Conditions and Standards for Continuing Registration. It is apparent that there is a need for the regulations to refer to these documents in order to ensure that the collection and use of student identifiers enables RTOs to comply with their up-to-date reporting obligations.

The regulations will, it is noted, provide for collection, use and disclosure to only a limited number of entities (eg former and current RTOs, schools whose students undertake a VET course, and other VET related bodies) in specific circumstances (at 47). The explanatory memorandum goes on to detail the initial matters it is envisaged will be covered by the regulations. The overall justification for providing for these matters is that permitted uses of student identifiers needs to be responsive to the national VET training system.

Although the need for a regulation making power may be accepted, it is not clear why many of the matters listed on p 48 of the explanatory memorandum to be dealt with by regulations cannot be dealt with in the primary legislation. However, as the regulations will be disallowable instruments and their making and amendment will require the agreement of the states and territories through the Standing Council, **the committee notes the above comment but leaves the appropriateness of the overall approach 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.*

## **Merits review**

### **Clause 25**

This clause provides that the CEO may, on request, give an individual who has been assigned a student identifier access to an authenticated VET transcript or extract from such a transcript. Although subclause 25(3) provides that the CEO must give reasons for any decision to refuse to give access, there does not appear to be any right to have such a decision reviewed. **The committee therefore seeks the Minister's advice as to whether consideration has been given to the appropriateness of providing for merits review of these discretionary decisions and whether it is appropriate to include more guidance in the legislation as to how this discretionary power is to be exercised.**

*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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

## **Delegation of legislative power**

### **Clause 53**

Subclause 53(1) provides that a RTO must not issue a VET qualification or VET statement of attainment to an individual unless the individual has been assigned a student identifier. Subclause 53(2), however, provides for an exception in relation to an issue of such a qualification or statement of attainment under subsection 3, which provides that the Minister may, by legislative instrument, specify an issue to which subsection (1) does not apply by reference to one or more of:

- (a) the RTO issuing the qualification or statement of attainment;
- (b) the qualification or a statement of attainment being issued; or
- (c) the individual to whom the qualification or a statement of attainment is being issued.

The explanatory memorandum indicates that the exemptions will be limited to maintain the integrity of the scheme and that it 'is necessary to provide for limited exemptions in order to be consistent with existing legislative provisions, such as those relating to issues of national security' (at 62). Unfortunately this is an insufficiently detailed explanation of the reasons why exemptions need to be available and why these are not being included in the primary legislation. **The committee therefore seeks a fuller explanation from the Minister.**

*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  
Clause 57**

There is no explanation provided for the power to make regulations that apply, adopt or incorporate a matter contained in an instrument or other writing as in force or existing from time to time. The Committee routinely expects such provisions to be accompanied by an informative explanation as they may be considered to enable legislative changes to be made in the absence of proper parliamentary oversight. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. **The committee therefore seeks the Minister's advice as to why the power is necessary; examples of what material is likely to be incorporated by reference and whether it is publicly available; and how people affected by the regulation will be made aware of any changes in the law arising from changes to the incorporated material.**

*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.*

## **Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013**

Introduced into the House of Representatives on 20 March 2013  
Portfolio: Treasury

### **Background**

This bill amends various taxation and superannuation laws.

Schedule 1 amends the *Income Tax Assessment Act 1997* to define ‘documentary’. It also clarifies that the exclusion of light entertainment programs from eligibility for the film tax offsets does extend to game shows.

Schedule 2 amends the *Income Tax Assessment Act 1997* to exempt from income tax ex-gratia payments made in relation to the disasters occurring across Australia during the 2011-12 and 2012-13 financial years.

Schedule 3 amends the *A New Tax System (Goods and Services Tax) Act 1999* to enable those entities that are paying their GST by instalments, and that subsequently move into a net refund position, to continue to use the GST instalments option if they wish.

Schedule 4 amends the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients (DGRs) by adding six entities as DGRs.

Schedule 5 to this Bill amends the *Superannuation Industry (Supervision) Act 1993* to expand the duties of trustees of particular superannuation funds to establish and implement procedures to consolidate accounts where a member of the fund has multiple accounts within a fund and consolidation is in the member’s best interest.

Schedule 6 amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to make changes to the superannuation co-contribution.

Schedule 7 amends the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* to consolidate eight separate tax offsets for dependants into one new tax offset from 1 July 2012.

Schedule 8 amends Division 230 of the *Income Tax Assessment Act 1997* and the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* to clarify and refine the operation of certain aspects of the Taxation of Financial Arrangements regime.

**Retrospective Commencement - legislation by press release**

**Schedule 1, item 3**

The amendments in this schedule define ‘documentary’ for the purposes of the *Income Tax Assessment Act 1997* to clarify that the term does not include ‘infotainment’ and ‘lifestyle programs and magazine programs’. The effect of this is to remove any eligibility for the film tax offsets associated with documentary films. The new meaning of documentary is consistent with the intended meaning in the ACMA Guidelines and the explanatory memorandum asserts that it is understood by the screen production industry.

The amendments will commence in relation to films where the principal photography commenced on or after 1 July 2012. It is noted, however, that these amendments have taken almost a year to come before the Parliament since they were announced in the 2012 budget. Where taxation amendments are not brought before the Parliament within 6 months of being announced the committee usually expects the delay to be explained and justified. The problem that committee is concerned to avoid is the practice of ‘legislation by press release’.

In this instance the explanatory memorandum states that although the amendment will therefore have a retrospective operation, that ‘operation restores the understanding of the provisions that was generally held in the context of government regulation of, and support for, documentaries before the recent Lush House decision’ (in the AAT). It is also noted that the industry was advised of the intended changes in the May 2012 budget and that ‘Screen Australia adopted the practice from July 2012 of advising applicants for the producer offset whether their film was a documentary under both the meaning adopted by the AAT and the meaning set out in the ACMA Guidelines’ (at 19). The conclusion is that the retrospectivity will not therefore produce any disadvantage of which producers would not have been aware when they commenced making their films in the knowledge of the intended amendments.

**In the circumstances, the committee leaves the appropriateness of the retrospective commencement date to the Senate as a whole.**

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

## **Strict Liability**

### **Schedule 5, item 4, proposed subsection 108A(5)**

This subsection provides that trustees who breach their obligation (under subsection 108A(1)) to establish rules setting out the procedure for the consolidation of a member's multiple superannuation accounts, commit an offence of strict liability. The penalty of 50 penalty units is less than the maximum penalty recommended in cases where strict liability is justified in the *Guide for Framing Commonwealth Offences* and there is an explanation of the approach offered in the explanatory memorandum (at 42). It is argued that the offence is necessary to 'ensure the integrity of the regulatory regime' as this depends on rules setting out the procedures for consolidation of member's superannuation accounts to be established. Further, it is argued that strict liability is necessary 'as the matter of whether the trustee has satisfied their duty under this measure is peculiarly within the knowledge of the trustees'. **In light of this explanation and the level of penalty for the offence, the committee leave the appropriateness of the provision 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.*

## **Retrospective commencement**

### **Schedules 6 and 7**

These schedules introduce amendments that may have detrimental effects on some taxpayers. The amendments apply to the 2012-13 tax year. Although both measures were announced in the 2012-13 Budget, there is no explanation offered for the retrospective commencement. **The committee therefore seeks the Assistant Treasurer's advice as to the justification for the proposed approach and the extent of any likely detriment to any taxpayers.**

*Pending the Assistant Treasurer'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.*

## **Retrospective commencement**

### **Schedule 8**

The amendments in this schedule are the outcome of ongoing monitoring of the implementation of the Taxation of Financial Arrangements regime. The explanatory memorandum notes that they have been developed following extensive consultation with industry. In general terms, the explanatory memorandum describes the nature of amendments as refinements and clarifications, which will ‘lower compliance costs and provide additional certainty to affected taxpayers’ (at 73).

The amendments will commence on the date the TOFA regime became mandatory, namely 1 July 2010. Given the considerable delay in bringing these amendments before the parliament surprisingly little is said in justification of the retrospective commencement date. Although the amendments were announced on 29 June 2010, this is now almost three years ago. The explanatory memorandum claims that the amendments are ‘generally beneficial to taxpayers’ (at 111). **However, the committee usually expects that the explanatory memorandum will directly address the issue of any possible detriment and therefore seeks further information from the Assistant Treasurer about the existence and extent of any possible detriment to some tax payers as a consequence of the retrospective commencement of these amendments.**

*Pending the Assistant Treasurer'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.*

## **Tax Laws Amendment (Disclosure of MRRT Information) Bill 2013**

Introduced into the House of Representatives on 20 March 2013

By: Mr Hockey

### **Background**

This bill amends the *Minerals Resource Rent Tax Act 2012* and *Taxation Administration Act 1953* to:

- require the minister to prepare and present to Parliament quarterly and annual reports on the amount of minerals resource rent tax instalments paid; and
- enable taxation officers to disclose that information for the purposes of preparing the quarterly and annual reports.

*The committee has no comment on this bill.*

## **Telecommunications Legislation Amendment (Consumer Protection) Bill 2013**

Introduced into the House of Representatives on 21 March 2013  
Portfolio: Broadband, Communications and the Digital Economy

### **Background**

This bill amends the *Do Not Call Register Act 2006*, the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Services Standards) Act 1999* to:

- clarify which party is responsible for making telemarketing calls and sending marketing faxes where third parties are carrying out the marketing activities;
- enable industry codes to be varied and extend the application of the reimbursement scheme for developing consumer-related industry codes to varying these codes;
- require code developers to publish draft code and draft variations and related public submissions; and
- require the Telecommunications Industry Ombudsman (TIO) scheme to comply with standards determined by the minister; and require independent periodic public reviews of the TIO scheme to be conducted.

*The committee has no comment on this bill.*

## **Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013**

Introduced into the House of Representatives on 20 March 2013  
Portfolio: Health and Ageing

### **Background**

This bill amends the *Therapeutic Goods Act 1989* (the Act) to:

- amend the definition of ‘therapeutic goods’ in subsection 3(1) of the Act to enable the Minister, by legislative instrument, to specify products that are taken not to be therapeutic goods for the purposes of the Act;
- enable the Secretary to remove products from the Australian Register of Therapeutic Goods which are not, or are no longer, therapeutic goods within the definition in the Act;
- clarify the source of the power for the Secretary to approve product information under section 25AA of the Act; and
- make minor amendments designed to ensure consistency in the way the different classes of therapeutic goods are treated under the Act.

### **Delegation of Legislative Power/Broad discretionary power Schedule 3, items 1 and 2**

These items introduce amendments the effect of which is to allow the Minister to exclude from the definition of ‘therapeutic goods’ those goods which have been determined by the Minister in a legislative instrument not to be therapeutic goods or not to be therapeutic goods when used, advertised or presented for supply in a specified way.

The consequence of excluding a particular good from the definition of ‘therapeutic goods’ is that it would no longer be regulated in accordance with the requirements of the Act. The explanatory memorandum notes that the definition of therapeutic goods is very broad and offers a detailed case for the importance of allowing ‘the Minister to respond flexibly, on a case by case basis, to ensure that the Therapeutic Goods Administration is not involved in the regulation of products for which there is no public health focus or for which there may be sound public policy reasons for their not being regulated’.

under the therapeutic goods legislation' (at 22). Although the need for flexibility may be accepted, it is not clear what sort of public policy reasons will be considered appropriate for excluding the requirements of the Act. **The committee therefore seeks the Minister's advice as to whether consideration has been given as to specifying the purposes for which this power may be exercised or to other ways to confine this power (which amounts to a broad discretion to exclude the operation of the Act in relation to particular 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 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.*

**Trespass on personal rights and liberties—strict liability offence**  
**Schedule 11, item 1 of**

This item would, through subsection 9G(2), introduce a new strict liability offence for providing false and misleading information in relation to a request under section 9D of the Act to vary an entry for therapeutic goods on the Register where the information relates to goods that if used would be likely to result in harm or injury to any person. The maximum penalty is 2000 penalty units, which is well above the maximum penalty recommended by the *Guide to Framing Commonwealth Offences* (60 penalty units for an individual and 300 units for a body corporate).

The explanatory memorandum (at 46 and 47) notes this issue but argues that the penalty is appropriate because:

- (1) there is no imprisonment element and the maximum is capped at 2000 penalty units;
- (2) the maximum penalty level 'reflects the seriousness of the conduct addressed by the offence' and is consistent with the penalty levels for existing offences in the Act relating to the provision of false or misleading information; and
- (3) the new strict liability offence forms part 'of the Act's tiered approach to criminal offences' and this approach 'serves an important role in deterring and addressing conduct that endangers public health'. Of these justifications the

key argument is relates to the importance of deterring conduct which has potentially serious consequences for public health.

As noted in the statement of compatibility, variations to goods listed on the Register can relate to a variety of matters, including quite serious safety issues, such as adding a warning or a precaution to the product information of a prescription medicine in connection with the use of the medicine' (at 5). What is lacking, however, is an explanation as to why strict liability will significantly enhance effective regulatory enforcement and why it is legitimate to penalise persons who lack fault. **The committee therefore seeks the Minister's further explanation of this matter.**

*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.*

## **Veterans' Affairs Legislation Amendment (Military Compensation Review and Other Measures) Bill 2013**

Introduced into the House of Representatives on 20 March 2013  
Portfolio: Veterans' Affairs

### **Background**

This bill amends the *Military Rehabilitation and Compensation Act 2004*.

Schedule 1 enhances rehabilitation services and transition management.

Schedule 2 makes the date of effect for periodic impairment compensation to be on the basis of each accepted condition rather than all accepted conditions and to incorporate a lifestyle factor in the calculation of interim permanent impairment compensation.

Schedule 3 expands the options for lump sum compensation for wholly dependent partners of deceased members.

Schedule 4 applies a one-time increase to the rate of periodic compensation payable for dependent children so the rate aligns with similar payments under the *Safety, Rehabilitation and Compensation Act 1988*.

Schedule 5 increases the amount of compensation for financial advice and to include legal advice within the new limit

Schedule 6 expands the eligibility criteria for Special Rate Disability Pension.

Schedule 7 makes changes to certain superannuation provisions so that they apply equally to both serving and former members and to amend the definition of 'Commonwealth superannuation scheme'.

Schedule 8 provides the Veterans' Review Board with an explicit power to remit a matter to the Military Rehabilitation and Compensation Commission for needs assessment and compensation.

Schedule 9 increases the membership of the Military Rehabilitation and Compensation Commission.

Schedule 10 requires all claims for conditions accepted under the *Veterans' Entitlements Act 1986* and aggravated by defence service after 1 July 2004 to be determined under the *Veterans' Entitlements Act 1986*.

Schedule 11 issues Repatriation Health Cards – For Specific Conditions (White Cards) to Part XI defence-related claimants under the *Safety, Rehabilitation and Compensation Act 1988*.

Schedule 12 defines members undergoing career transition, personnel holding honorary ranks and authorised representatives of philanthropic organisations as ‘members’ under the *Military Rehabilitation and Compensation Act 2004*.

Schedule 13 clarifies the appropriation of costs for certain aged care services between the *Veterans' Entitlements Act 1986*, the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* and the *Military Rehabilitation and Compensation Act 2004* (the Veterans’ Affairs Acts) and the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* (the Aged Care Acts).

Schedule 14 extends the entitlement for travelling expenses to the partner of certain eligible persons under certain circumstances.

Schedule 15 clarifies and streamlines the administrative arrangements for the payment of pensions, compensation and other pecuniary benefits under the *Veterans' Entitlements Act 1986* and the *Military Rehabilitation and Compensation Act 2004* into bank accounts.

Schedule 16 includes a minor and consequential amendment to the *Social Security Act 1991* that clarifies which payments made under the *Military Rehabilitation and Compensation Act 2004* are excluded income for the purposes of the *Social Security Act 1991*.

*The committee has no comment on this bill.*

## **Water Efficiency Labelling and Standards Amendment (Registration Fees) Bill 2013**

Introduced into the House of Representatives on 13 March 2013

Portfolio: Sustainability, Environment, Water, Population and Communities

### **Background**

This bill amends the *Water Efficiency Labelling and Standards Act 2005* to enable fees to be collected and administered by the Water Efficiency Labelling and Standards scheme Regulator.

### **Inappropriate Delegation of Legislative Power**

#### **Clause 7**

The committee prefers to see that the rate of a levy or tax be set by primary legislation rather than by regulation. In general, it is appropriate for the Parliament to set a rate of tax.

This bill enables the Minister to specify registration fees for registration applications by legislative instrument (subclause 7(1)), and these fees are imposed as taxes (subclause 7(2)). A legislative instrument made under subclause 7(1) may specify fees by either specifying an amount or by specifying a method for the calculation of the fee (subclause 8(2)).

The explanatory memorandum argues that setting the fees by legislative instrument provides ‘necessary flexibility’. The intention of the imposition of fees is to enable for the costs of administering the WELS scheme to be recovered and the explanatory memorandum indicates that setting fees by legislative instrument will allow ‘the quantum of the fee’ to ‘be changed from time to time to reflect the costs of the WELS Scheme, without an amendment Act being required’.

Although the bill does not set an upper limit for the fees that may be imposed there are two constraints in place. First, Subclause 8(2) provides that before making the instrument, the Minister must be satisfied that fees are set at a level that is designed to recover no more than the likely cost of administering the WELS scheme (including the corresponding State-Territory laws). Second, before making an instrument setting fees, the Minister must consult with each participating State or Territory (subclause 7(4)). It is also worth

noting that the explanatory memorandum states that although the bill allows for the recovery of up to 100 per cent of the costs of administering the scheme, the current intention is that only 80 per cent of the costs will be recovered.

**In light of the explanation for the approach contained in the explanatory memorandum and the existence of some constraints on the setting of the fees, the committee makes no further comment and 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## **Water Efficiency Labelling and Standards (Registration Fees) Bill 2013**

Introduced into the House of Representatives on 13 March 2013

Portfolio: Sustainability, Environment, Water, Population and Communities

### **Background**

This bill amends the *Water Efficiency Labelling and Standards Act 2005* to recover costs for the administration of the Water Efficiency Labelling and Standards scheme through taxes, in the form of fees for applying for registration.

*The committee has no comment on this bill.*

## **Commentary on amendments to bills**

### **Broadcasting Legislation Amendment (Digital Dividend) Bill 2013**

*[Digest 2/13 – no comment]*

On 18 March 2013 the House of Representatives agreed to two Opposition amendments and the bill was read a third time. The committee has no comment on the additional material.

### **Environment Protection and Biodiversity Conservation Amendment Bill 2013**

*[Digest 4/13 – no comment]*

On 21 March 2013 the House of Representatives agreed to six Government and 2 Independent (Mr Windsor) amendments and the Minister for Sustainability, Environment, Water Population and Communities (Mr Burke) tabled a supplementary explanatory memorandum. The committee has no comment on the additional material.

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

*[Digest 1/13 – response in 4/13 Report]*

On 20 March 2013 the Senate agreed to 16 Government and one Australian Greens amendments. On 21 March 2013 the House of Representatives agreed to the Senate amendments and the bill was passed. The committee has no comment on the additional material.

### **Royal Commissions Amendment Bill 2013**

*[Digest 2/13 – no comment]*

On 19 March 2013 the Senate agreed to seven Government amendments and the Parliamentary Secretary for Sustainability and Urban Water (Senator Farrell) tabled a supplementary explanatory memorandum. On 20 March 2013 the House of Representatives agreed to the Senate amendments and the bill was passed. The committee has no comment on the additional material.

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

*[Digest 2/13 – no comment]*

On 21 March 2013 the Parliamentary Secretary to the Treasurer (Mr Ripoll) tabled a correction to the explanatory memorandum and the bill was passed without amendment. The committee has no comment on the 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 42<sup>nd</sup> Parliament.

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

**Student Identifiers Bill 2013** — clause 49 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*)

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

**Indigenous Education (Targeted Assistance) Amendment Bill 2013** — Schedule 1, items 1 and 2: special appropriation clause – for finite amounts and finite periods of time (i.e. for particular financial years).