

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

**Alert Digest No.6 of 2013**

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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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- **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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- Fair Work Amendment Bill 2013
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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.

## **African Development Bank Bill 2013**

Introduced into the House of Representatives on 30 May 2013

Portfolio: Treasury

### **Background**

This bill enables Australia to become a member of the African Development Bank Group by authorising the Government to make the payments required to subscribe to membership shares in the African Development Bank and meet membership and ongoing subscriptions to the African Development Fund.

*The committee has no comment on this bill.*

## **Appropriation Bill (No.1) 2013-2014**

Introduced into the House of Representatives on 14 May 2013  
Portfolio: Finance and Deregulation

### **Background**

This bill appropriates \$78.2 billion to meet payments for the ordinary annual services of the government for the financial year ending 30 June 2014.

*The committee has no comment on this bill.*

## **Appropriation Bill (No.2) 2013-2014**

Introduced into the House of Representatives on 14 May 2013

Portfolio: Finance and Deregulation

### **Background**

The bill provides for appropriations totalling \$4.8 billion from the Consolidated Revenue Fund for services that are not the ordinary annual services of the government and it also proposes amendments to the *Commonwealth Inscribed Stock Act 1911*.

*The committee has no comment on this bill.*

## **Appropriation (Parliamentary Departments) Bill (No.1) 2013-2014**

Introduced into the House of Representatives on 14 May 2013

Portfolio: Finance and Deregulation

### **Background**

This bill appropriates \$185 million to meet the expenses of the parliamentary departments for the financial year ending 30 June 2014.

*The committee has no comment on this bill.*

## **Australian Capital Territory Water Management Legislation Amendment Bill 2013**

Introduced into the House of Representatives on 30 May 2013

Portfolio: Sustainability, Environment, Water, Population and Communities

### **Background**

This bill amends the *Australian Capital Territory (Planning and Land Management) Act 1988* so the abstraction of water on national land is no longer managed by the Commonwealth Government and can be managed by the ACT Government consistent with the Basin Plan.

*The committee has no comment on this bill.*

## **Australian Citizenship Amendment (Special Residence Requirements) Bill 2013**

Introduced into the House of Representatives on 30 May 2013

Portfolio: Immigration and Citizenship

### **Background**

This bill amends the *Australian Citizenship Act 2007* to provide the Minister for Immigration and Citizenship with a power to apply alternative residence requirements to certain applicants for citizenship by conferral.

### **Delegation of legislative power**

#### **Merits review**

#### **Various**

Insofar as this bill gives the Minister a personal, non-compellable discretionary power to substitute an alternative residence requirement for the purposes of sections 22A and 22B of the Migration Act, it engages the committee's concern with broad discretionary powers and the importance of adequate review rights for persons affected by such powers.

As is noted in the explanatory memorandum, the decisions by the Minister under new subsections 22A(1) and 22B(1BA) will be subject to parliamentary scrutiny and judicial review. In relation to judicial review, however, it should be noted that the fact that the Minister is not under a duty to consider whether to exercise his or her powers means that judicial review's remedies will likely be of very limited practical utility.

**However, given that the power is intrinsic to the policy of the bill the committee leaves the question of whether the power and the absence of merits review are appropriate to the consideration of the Senate as a whole.**

*The committee draws Senators' attention to the bill, as it 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 and to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## **Australian Education (Consequential and Transitional Provisions) Bill 2013**

Introduced into the House of Representatives on 5 June 2013

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *Federal Financial Relations Act 2009* and the *Schools Assistance Act 2008* to enable Commonwealth recurrent funding and capital funding for schools to be appropriated under the proposed *Australia Education Act 2013* from 1 January 2014. The bill will also enable regulations to be made to prescribe modifications of the *Australia Education Act 2013* for transitional matters.

### **Delegation of legislative power—Henry VIII clause Schedule 2, item 12**

This item provides that before 1 January 2015 regulations may be made to prescribe modifications to the *Australian Education Act 2013* that are necessary or convenient to deal with transitional matters. Subitem 12(3) provides that the requirement to consult the Ministerial Council under subsection 130(5) of the *Australian Education Act 2013* does not apply in relation to regulations made before 1 January 2014.

Insofar as this item enables regulations to modify the operation of primary legislation, the committee's usual expectation is that the necessity for the inclusion of such a power will be justified in the explanatory memorandum. Although there may be good reasons to allow for regulations to modify the operation of statutes, especially when the power is limited to transitional matters and available for a limited period of time, it is unfortunate that the explanatory memorandum does not address this matter. **The committee therefore seeks the Minister's advice as to the rationale for the proposed approach, including advice as to why consultation with the Ministerial Council is not required for any regulations made before 1 January 2014.**

*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 Jobs Bill 2013

Introduced into the House of Representatives on 15 May 2013

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

### Background

This bill requires an Australian Industry Participation (AIP) plan to be prepared for projects with a capital expenditure of \$500 million or more and establishes an Authority to administer the functions under the legislation.

### Delegation of legislative power

#### Subclauses 6(2) and (3); Subclauses (5) and (6)

These subclauses provide, respectively, that the:

- (1) legislative rules may declare that a specified thing, or a combination of 2 or more specified things, is an eligible facility for the purposes of this Act; and
- (2) Authority may, by legislative instrument, declare that a specified thing or a combination of things is not an eligible facility for the purposes of the Act.

The necessity for these provisions is not explained in the explanatory memorandum. **As the provisions affect the coverage of the bill and therefore deal with questions of significance, the committee seeks the Minister's advice as to the need to provide that delegated legislation can enable exceptions and extensions to the applicability of the 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.*

### Undue trespass on personal rights and liberties—privacy

#### Clause 50

This clause empowers the Authority to obtain information and documents from a person if it believes on reasonable grounds that the person has information or a document that is relevant to the operation of the Act. The statement of compatibility indicates that the object of provisions in Part 4 of

the bill (including this one) is only to obtain relevant commercial information. It is stated that the Authority will not request personal information and that ‘in the event that it is provided unintentionally by the project proponent or operator, the Authority will have a policy to deal with this’ (at 6).

While the intention appears to be to avoid the collection of personal information, on the basis of the bill and accompanying material it appears that the protection of personal information will depend on the practices and policies ultimately adopted by the authority. **The committee would prefer that a framework for privacy protection was included in the bill itself and therefore seeks the Minister's advice as to whether consideration has been given to how the legislation could ensure that these matters are appropriately dealt with.**

*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.*

## **Insufficiently defined administrative power**

### **Clause 57**

Clause 57 provides for administrative consequences following any non-compliance with the requirements of Parts 2, 3, or 4 of the Bill ‘without reasonable excuse’ (subclause 57(1)). Subclauses 57(2)-(5) empower the Authority to impose a number of adverse consequences including requiring the relevant person to publicise details of his or her non-compliance and any other matter the Authority considers appropriate.

It is concerning that the circumstances in which a person will be considered to have a ‘reasonable excuse’ are neither specified in the bill nor explained in the explanatory memorandum. Furthermore, the powers of the Authority to require that a person publicise particular information are framed in very broad terms. Although the Authority must afford a fair hearing prior to taking action under clause 57 and its decisions are reviewable by the AAT, the explanatory memorandum does not explain:

- the rationale for the proposed approach generally;
- why it is necessary to define the circumstances in which action may be taken using only the vague language of ‘reasonable excuse’; or

- why the power to require a person to publicise matters need to be so broadly framed so broadly.

**The committee therefore seeks the Minister's advice as to a detailed explanation for these powers including an indication as to whether similar powers, administered by administrative decision-makers, exist in other Commonwealth legislation.**

*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.*

### **Undue trespass on personal rights and liberties—privacy Clause 104**

Part 9 of the Bill deals with secrecy, and creates offences aimed at protecting sensitive information from unauthorised disclosure or use. As noted in the statement of compatibility, 'the majority of the provisions in Part 9 limit the disclosure of protected information to a specific purpose such as the performance of functions or the exercise of certain functions or powers' (at p. 6).

However, as is also noted at p. 6, clause 104 permits disclosure to the Minister, but is not subject to any limitation. The justification given for this approach is that 'the information being provided to the Minister under clause 104 will be purely of a commercial nature and not personal information'. **Although it may be that this is the intention underlying the clause, it is not clear why a limit to this effect is not included in the legislation. The committee therefore seeks the Minister's advice on this matter, including whether the bill can be amended to include a requirement that information provided to the Minister will not include personal information.**

*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.*

**Undue trespass on personal rights and liberties—reversal of onus  
Subclauses 102(1), 107(4), 107(6), 111(4) and 111(6)**

These subclauses are said, in the statement of compatibility, to contain reverse burden of proof provisions that will place an evidential burden on the defendant in relation to an offence of unlawfully disclosing protected information. However, the bill does not contain any express statements that a defendant will bear an onus of proof where that is the intention. (Bills usually include a note to the effect that:

The justification given for the placing an evidential burden of proof in relation to proving exceptions to the offence of unlawful disclosure of protected information relies on two basic claims:

- (1) the importance of compliance with the secrecy provisions given that highly sensitive commercial and confidential information may be held by the Authority; and
- (2) the ‘regulatory context of these provisions in the Bill is clear and in cases where there is a breach, it is clearly more practical for the accused to prove a fact rather than the prosecution to disprove it’ (statement of compatibility at p. 7).

While the committee understands the relevance of the first claim, the second claim does not reach the level of specificity the committee expects from a justification for reversing the onus of proof: the explanatory memorandum should directly reference every instance where it is intended that an onus be placed on defendants and explain the rationale for each provision. The committee therefore seek the Minister's.

**The committee therefore seeks the Minister's clarification as to whether it is intended that all of these provisions will place an onus onto the defendant and, if so, further advice as to why this is appropriate and as to why *Notes* explaining the reversal of onus are not included in the bill in line with the normal drafting practice.**

*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 Ownership Bill 2013

Introduced into the House of Representatives on 3 June 2013

By: Mr Katter

### Background

This bill prevents a foreign person or bodies from holding ownership interests of more than 49% in an Australian agribusiness or a parcel of Australian land of 4 hectares or greater.

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

#### Various

If this bill proceeds to further stages of debate, the committee intends to seek further information as to whether the penalties imposed are appropriate, the appropriateness of imposing criminal liability on officers of a corporation who authorises or permits the commission of an offence and the operation of subclause 7(4) (which seeks to introduce a defence which places an evidential burden on a defendant).

*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.*

## **Banking Amendment (Unclaimed Money) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Treasury

### **Background**

The bill amends the *Banking Act 1959* to exempt reactivated accounts from being reported and transferred to the Commonwealth as unclaimed moneys and to allow the Commonwealth to provide refunds to authorised deposit-taking institutions if moneys are collected unnecessarily.

The bill also provides a transition provision for unclaimed moneys collected under the transactional provision of the *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Act 2012*.

*The committee has no comment on this bill.*

## **Broadcasting Services Amendment (Advertising for Sports Betting) Bill 2013**

Introduced into the Senate on 15 May 2013

By: Senator Di Natale

Introduced into the House of Representatives on 3 June 2013

By: Mr Bandt

### **Background**

This bill amends the *Broadcasting Services Act 1992* to:

- prohibit the advertising of odds for sports betting at any time;
- restrict advertisements for sports betting on television and radio after 9.00 pm;
- prohibit the broadcasting of information about sports odds within 30 minutes of a sports broadcast or a sports-related broadcast; and
- prohibit the promotion of sports betting products and services outside commercial breaks.

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

#### **Various**

This bill clearly introduces limits on commercial and individual speech, and other personal rights, through limiting television and radio licence holders from broadcasting information and comment related to gambling services as part of sports broadcasts. The material accompanying the bill outlines the rationale for the proposed approach, based primarily on protecting children from exposure to gambling promotions. The committee also notes the comments on the bill made by the Parliamentary Joint Committee on Human Rights (in its *Seventh Report of 2013*) and **leaves the question of the 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.*

## **Charities Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Treasury

### **Background**

This bill introduces a statutory definition of charity that applies to all Commonwealth legislation.

*The committee has no comment on this bill.*



## **Charities (Consequential Amendments and Transitional Provisions) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Treasury

### **Background**

This bill provides for transitional arrangements for streamlining registration of the subtypes of entities with the Australian Charities and Not-for profits Commission.

The bill also makes consequential amendments arising from the enactment of the *Charities Bill 2013* when it takes effect.

*The committee has no comment on this bill.*

## Competition and Consumer Amendment (Australian Country of Origin Food Labelling) Bill 2013

Introduced into the Senate on 16 May 2013

By: Senator Milne

### Background

This bill amends the *Competition and Consumer Act 2010* and the *Imported Food Control Act 1992* to:

- create new provisions specifying new definitions and standards with regards to the country of origin labelling on packaged and non-packaged food; and
- make consequential amendments.

### Delegation of legislative power

#### Item 4, proposed subsection 137A(5)

This provision provides that the Minister must take all reasonable steps to ensure that a regulation providing for a definition of the meaning of ‘substantially transformed’ is tabled in each House of the Parliament under section 38 of the LIA within six months of Royal assent. **If the bill proceeds to further stages of debate, the committee seeks the Senator's advice as to whether the definition of this important term can be included in the primary legislation.**

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

### Undue trespass on personal rights and liberties—reversal of onus

#### Item 4, proposed subsection 137C(4)

This subsection provides for a defence to a pecuniary penalty provision if the ‘defendant proves that the defendant's possession or control of the food was not for the purpose of supplying or offering the food’. **If the bill proceeds to further stages of debate, the committee seeks the Senator's advice as to**

**why it is appropriate for the defendant to bear the onus of proof in relation to establishing this defence.**

*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.*

**Undue trespass on personal rights and liberties—reversal of onus and level of penalty**

**Items 17 to 19**

The explanatory memorandum indicates that these items introduce amendments so that the measures pertaining to country of origin food labelling requirements in this bill will be reflected in the *Imported Food Control Act 1992*. However, item 18 provides for the imposition of a significant penalty (10 years imprisonment) and item 19 places an evidential burden of proof in relation to the proposed defence to the relevant offence. As the explanatory memorandum does not address the appropriateness of these measures **if the bill proceeds to further stages of debate, the committee seeks the Senator's advice as to the rationale for the proposed approach.**

*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.*

## **Competition and Consumer Amendment Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Treasury

### **Background**

This bill amends the *Competition and Consumer Act 2010* to enable regulations to be made to provide exemptions from the single pricing requirements in the Australian Consumer Law.

*The committee has no comment on this bill.*

## **Constitution Alteration (Local Government) 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Attorney-General

### **Background**

This bill amends section 96 of the Australian Constitution to make specific provision in relation to the granting of financial assistance to local government bodies.

*The committee has no comment on this bill.*

## **Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Attorney-General

### **Background**

This bill amends various Acts relating to criminal law and law enforcement.

Schedule 1 amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and the *Law Enforcement Integrity Commissioner Act 2006* to ensure that the Integrity Commissioner is able to access all information held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) and allow the Australian Commission for Law Enforcement Integrity to second employees of police forces who are not sworn police officers.

Schedule 2 amends the *Crimes Act 1914* and the Criminal Code to ensure that victims and witnesses in Commonwealth criminal proceedings are afforded appropriate support and protection.

Schedule 3 amends the *Crimes Act 1914* and the *Migration Act 1958* to include a number of technical amendments relating to people smuggling prosecutions.

Schedule 4 amends the *Anti-Money Laundering and Counter-Terrorism Finance Act 2006* to enable expeditious review of decisions of AUSTRAC; enable AUSTRAC to engage secondees from the private sector; amend privacy protections and add the Clean Energy Regulator and the Integrity Commission of Tasmania as designated agencies.

Schedule 5 amends the *International Transfer of Prisoners Act 1997* and the *International War Crimes Tribunals Act 1995* to recognise the International Residual Mechanism for Criminal Tribunals.

Schedule 6 amends the *Australian Federal Police Act 1979* in relation to the provision of policing and regulatory services in the external Territories; and

also amends the *Telecommunications (Interception and Access) Act 1979* to reflect new public sector anti-corruption arrangements in Victoria.

### **Trespass on personal rights and freedoms Schedule 3, item 4, proposed section 236D**

This section provides that in specified proceedings relating to people smuggling offences under the *Migration Act* the prosecution bears the burden of proving, on the balance of probabilities, that the defendant was aged 18 or over when the offence was alleged to have been, or was, committed. The explanatory memorandum notes that this amendment makes it clear that the burden of proof for this element rests with the prosecution and not with the defendant. However, given the context it is not clear why the appropriate standard of proof is not the criminal standard of beyond reasonable doubt and the explanatory memorandum does not address this matter. **The committee therefore seeks the Minister's advice as to whether consideration has been given to the appropriateness of the criminal standard of proof in relation to age requirements in the context of people smuggling offences (subdivision A of Division 12 of Part 2 of the *Migration Act*).**

*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 Schedule 3, item 4, proposed section 236E**

This item provides for the use of evidentiary certificates in the prosecution of people smuggling offences. These certificates constitute prima facie evidence of the matters contained within them. The relevant matters are set out in subsection 236E(3) and relate to factual matters such as the number of passengers on a boarded vessel, the number of crew on the vessel, the location of the vessel when intercepted and a description of secured or seized items.

The Statement of Compatibility with human rights notes that, although such certificates create a rebuttable presumption as to the facts, these may be challenged by defendants during the court proceedings and that the defendant may require the person who signed a certificate to give evidence in person in respect to any matters in the certificate. The conclusion is that, as a result, 'the

defendant's right to be presumed innocent and to test witnesses is preserved' (at p. 15).

The justification of the use of evidentiary certificates is twofold. First, it is said that the amendments will mitigate operational difficulties and delays which 'may prolong the pre-charge detention of suspected people smugglers' because the relevant Border Patrol Personnel can remain at sea on patrol for up to six weeks at a time. For this reason the use of evidentiary certificates is said to promote the right to be tried without undue delay (statement of compatibility at 15). Second, the explanatory memorandum also focuses on the importance of minimising the time spent by personnel assigned to border protection by requiring them to appear in court proceedings for people smuggling offences. This reason is said to promote national security interests.

**In light of the rationale provided in the explanatory memorandum, the committee leaves the overall question of whether the use of evidentiary certificates 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.*

### **Delegation of power**

#### **Schedule 3, item 4, proposed section 236E**

Further to the above comment, however, given the significance of the use of evidentiary certificates the committee is of the view that in general the matters that may be the subject of evidentiary certificates should be determined by primary legislation. **As paragraph 236E(3)(j) provides that the Minister may prescribe further matters which may be the subject of evidentiary certificates (i.e. by way of delegated legislation), the committee seeks the Minister's advice as to why this provision is necessary and appropriate.**

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



**Trespass on personal rights and freedoms—reversal of onus  
Schedule 4, item 24**

This provision creates an exception to the offence of a reporting entity providing a designated service under the AML-CTF Act to a customer who is using a false customer name where use of that false name is justified, or excused, by or under a law. The statement of compatibility notes that the effect of the provision is to impose an evidential burden of proof in relation to establishing the exception on defendants, but does not otherwise justify the proposed approach by reference to the principles set out in the *Guide to Framing Commonwealth Offences*. **However, the committee accepts that circumstances relevant to the exception are likely to be peculiarly within the knowledge of the defendant 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.*

## **Customs Amendment (Anti-dumping Measures) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Home Affairs

### **Background**

This bill amends the *Customs Act 1901* to:

- remove, in certain circumstances, the need for the Minister to consider the lesser duty rule;
- clarify the application of retrospective duties provisions; and
- introduce a new type of anti-circumvention inquiry to address 'sales at a loss' cases.

*The committee has no comment on this bill.*

## **Customs Tariff (Anti-Dumping) Amendment Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Home Affairs

### **Background**

This bill amends the *Customs Tariff (Anti-Dumping) Act 1975* to:

- remove, in certain circumstances, the need for the Minister to consider the lesser duty rule;
- clarifies the application of retrospective duties provisions; and
- introduce a new type of anti-circumvention inquiry to address 'sales at a loss' cases.

*The committee has no comment on this bill.*

## Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013

Introduced into the House of Representatives on 30 May 2013

Portfolio: Defence

### Background

This bill establishes a framework that provides all non-Defence users within the Woomera Prohibited Area and industry more generally with a level of certainty over Defence activity in the area and allows users to make commercial decisions with some assurance as to when they will be requested to leave the area because of Defence activity. The bill gives effect to the recommendations in the Final Report of the Hawke Review of 3 May 2011.

### Trespass on personal rights and freedoms—strict liability Schedule 1 item 3, proposed subsection 72TG(2)

This provision imposes an offence of strict liability for failure to comply with conditions placed on a permission to be at a place in the Woomera Prohibited Area. The explanatory memorandum argues that ‘It is considered reasonable that breaching a condition of a permission should attract a strict liability offence to provide an adequate deterrent to breaching permit conditions which will attract a minor penalty of a maximum of 60 penalty units’. The committee also notes that a ‘permission...will clearly advise the conditions with which the permission holder will need to comply, including the potential consequences of non-compliance’ (at p. 7).

While the explanatory memorandum does provide information about the rationale, the committee is not persuaded that strict liability will significantly enhance the enforcement of the regime. Perhaps the appropriateness of strict liability may depend on the nature of the conditions; however the explanatory memorandum does not address these issues. **The committee therefore seeks a more detailed justification from the Minister as to the possible scope of any conditions and the appropriateness of the use of strict liability.**

*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.*

## **DisabilityCare Australia Fund Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Finance and Deregulation

### **Background**

This bill establishes the DisabilityCare Australia Fund, which consists of:

- the DisabilityCare Australia Fund Special Account, and
- the investments of the DisabilityCare Australia Fund.

The bill also establishes the DisabilityCare Australia Transitional Special Account which will fund the implementation of the *National Disability Insurance Scheme Act 2013* in its initial period of operation.

*The committee has no comment on this bill.*

## **DisabilityCare Australia Fund (Consequential Amendments) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Finance and Deregulation

### **Background**

This bill provides for the following consequential amendments arising from the enactment of the *DisabilityCare Australia Fund Act 2013*:

- enabling reimbursements to the States and Territories through the COAG Reform Fund;
- extending the Future Fund's duties to manage the DisabilityCare Australia Fund; and
- allowing for amounts to be transferred between each of the funds for the purposes of apportioning the expenses that have been paid from one fund and should be properly apportioned between two or more of the funds.

*The committee has no comment on this bill.*

## **Early Years Quality Fund Special Account Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: School Education, Early Childhood and Youth

### **Background**

This bill establishes a Special Account to administer the Early Years Quality Fund.

*The committee has no comment on this bill.*

## **Family Trust Distribution Tax (Primary Liability) Amendment (Disability Care Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Family Trust Distribution Tax (Primary Liability) Act 1998* to increase the rate of tax payable from 46.5 to 47 per cent to present entitlements conferred, or distributions made, on or after 1 July 2014.

*The committee has no comment on this bill.*



## **Fringe Benefits Tax Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Fringe Benefits Tax Act 1986* to increase the rate of tax in respect of the fringe benefits taxable amount of an employer for a year of tax from 46.5 to 47 per cent from 1 April 2014.

*The committee has no comment on this bill.*

## Homelessness Bill 2013

Introduced into the House of Representatives on 5 June 2013

Portfolio: Housing and Homelessness

### Background

This bill sets out a range of service delivery principles and strategies to reduce homelessness.

### Exclusion of judicial review

#### Clause 14

Clause 14 provides that the Act does not create legally enforceable rights and obligations (subclause 14(1)) and, also, that ‘no action, suit or proceeding is to be instituted in reliance on the terms of this Act or the operation of this Act’ (subclause 14(2)).

It can be noted, however, that the substantive provisions of the bill do not, in any event, appear to create legal rights or obligations or could otherwise be the basis of legal proceedings seeking to invoke judicial review. The explanatory memorandum explains that the purpose of the bill is to increase ‘recognition and awareness of people who are homeless or are at risk of homelessness’ (at 1) and the various clauses of the bill merely:

- acknowledge matters;
- express goals; and
- state intentions (about what will be done or achieved).

In these circumstances the committee makes no further comment about the provision.

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

## **Homelessness (Consequential Amendments) Bill 2013**

Introduced into the House of Representatives on 5 June 2013

Portfolio: Housing and Homelessness

### **Background**

This bill repeals the *Supported Accommodation Assistance Act 1994*.

The bill also makes a consequential amendment to the *Commonwealth Electoral Act 1918* to replace the definition of 'homeless person' that applies in the provisions about including itinerant electors in the Electoral Rolls.

*The committee has no comment on this bill.*

## Imported Food Warning Labels Bill 2013

Introduced into the House of Representatives on 27 May 2013

By: Mr Katter

### Background

This bill mandates all imported produce and food products to carry a warning label advising consumers that the produce is not grown or processed in Australia.

### Penalty

#### Clauses 6 to 8

If the bill proceeds to further stages of debate **the committee seeks the Private Member's advice as to the justification for the level of penalty (\$500 000) imposed for the offences in clauses 6-8, with particular reference to the principles outlined in the *Guide to Framing Commonwealth Offences* released by the Attorney-General in September 2011.**

*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.*

## **Income Tax (First Home Saver Accounts Misuse Tax) Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Income Tax (First Home Saver Accounts Misuse Tax) Act 2008* to increase the Medicare levy rate to 2 per cent to payments from the First Home Saver Account made on or after 1 July 2014.

*The committee has no comment on this bill.*

## **Income Tax Rates Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Income Tax Rates Act 1986* to increase the component of the rate of tax calculation, which incorporates the Medicare levy rate, from 1.5 to 2 per cent to assessments for the 2014-15 income year and later income years.

*The committee has no comment on this bill.*

## **Income Tax (TFN Withholding Tax (ESS)) Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Income Tax (TFN Withholding Tax (ESS)) Act 2009* to increase the rate of tax from 46.5 to 47 per cent to ESS interests on or after 1 July 2014.

*The committee has no comment on this bill.*

## **Infrastructure (Priority Funding) Amendment Bill 2013**

Introduced into the House of Representatives on 27 May 2013

By: Mr Bandt

### **Background**

This bill prioritises Commonwealth funding of rail projects identified by Infrastructure Australia over major road projects. The bill also includes exemptions for projects in relation to road safety, as well as existing projects.

*The committee has no comment on this bill.*



## Intellectual Property Laws Amendment Bill 2013

Introduced into the House of Representatives on 30 May 2013

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

### Background

This bill amends various Acts relating to intellectual property.

Schedule 1 amends the *Patents Act 1990* to clarify the scope of Crown use and its operation.

Schedule 2 and 3 amend the *Patents Act 1990* to allow Australian pharmaceutical manufacturers to supply certain countries with patented medicines.

Schedule 4 amends the *Plant Breeder's Rights Act 1994* to extend the jurisdiction of the Federal Circuit Court to include plant breeder's rights the option of taking action against alleged infringers.

Schedule 5 amends the *Design Act 2003* to implement a single trans-Tasman patent attorney regime and single patent application and examination process for Australia and New Zealand.

Part 1 of Schedule 6 will make administrative changes to the *Designs Act 2003*, the *Patents Act 1990* and the *Trade Marks Act 1995* to repeal unnecessary document retention provisions.

Part 2 of Schedule 6 amends the *Patents Act 1990* to make a number of technical amendments to address minor drafting oversights.

### Commencement

Schedule 5 will commence on a single day to be fixed by proclamation. However, if the provisions do not commence within a period of 24 months, the provisions are to be repealed. The explanatory memorandum gives a detailed explanation of the approach (at p. 44) and in light of the explanation provided the committee does not raise a scrutiny concern.

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

### **Trespass on personal rights and freedoms—retrospectivity Schedule 6, item 14, proposed new paragraph 119(3)(b)**

This amendment to paragraph 119(3)(b) of the *Patents Act* will ‘correct an inadvertently created inconsistency’ between that provision and a related provision created when the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* came into operation on 15 April 2013. The explanatory memorandum explains the need for the change as follows:

Ordinarily, if information about an invention is made publically available before a patent application is filed for the invention, the invention is not novel and so is unpatentable. However, section 24 of the Patents Act provides a ‘grace period’ so that, in certain circumstances, disclosure of an invention before filing the patent application for it does not make the invention unpatentable. To balance this against the interests of third parties who may have relied on the information being in the public domain, paragraph 119(3)(b) provides a countervailing exception to infringement. A third party does not infringe a patent if they derived the invention from information made publicly available by the applicant during the grace period.

Item 32 of Schedule 6 to the Raising the Bar Act amended paragraph 24(1)(a) of the Patents Act to omit the words ‘through the publication or use of the invention’. This was so that the grace period applies more widely to information made publically available. However, as an oversight, the same words appearing in paragraph 119(3)(b) were not also omitted. This item corrects the oversight, ensuring that the grace period and the countervailing infringement exemption continue to be aligned.

As stated in the explanatory memorandum, the amendment will ensure that the longstanding provisions of section 24 and 119 of the Patents Act continue to be aligned. The explanatory memorandum states that it ‘is both unlikely to have a substantive impact on users, and is consistent with existing policy’ (see p. 44). On the face of it the amendment appears reasonable and it appears that the provision is unlikely to have an adverse impact on individuals. **However, in determining the appropriateness of any change being made retrospectively the committee seeks to understand whether it is possible that a person’s rights may be adversely affected and the extent of any possible effect. As a result, the committee requests 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.*

## **Merits review**

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

This item relates to Crown exploitation of inventions. It seeks to restructure existing provisions and introduce new ones. Relevantly, the *Patents Act* provides for the review of certain decisions, but these determinations relating to Crown exploitation do not appear to be reviewable. **The committee therefore seeks the Minister's advice as to whether consideration has been given to the appropriateness of merits review (in the Administrative Appeals Tribunal) of decisions made by the relevant Minister which enable Crown exploitation of an invention in proposed sections 163 and 163A.**

*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.*

## **Rights liberties or obligations unduly dependent on non-reviewable decisions—accountability arrangements**

### **Schedule 5, item 25**

This item permits the Australian Patents Commissioner to delegate all or any of his or her powers and functions to a New Zealand patents official. Although decisions made by a New Zealand delegate would continue to be decisions made under Commonwealth legislation and, thus, judicial review under the ADJR Act and any merits review rights would continue to be available (this is confirmed by item 38, proposed section 227AB), the delegation of powers to New Zealand officials may mean that other accountability mechanisms are not available.

New Zealand delegates would not be 'officers of the Commonwealth' and, thus, their decisions would not be judicially reviewable under section 39B of the *Judiciary Act*. Further, as the jurisdiction of the Ombudsman and the

coverage of the FOI Act is, in general, defined by reference to Commonwealth government agencies, it appears that these administrative law accountability arrangements will not apply in relation to action taken in connection decisions to be made under Commonwealth legislation where the relevant powers are exercised by a New Zealand patents official. **The committee therefore seeks the Minister's advice as to whether this possible reduction in accountability for decision-making under the *Patents Act* is appropriate.**

*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.*

## **Interactive Gambling Amendment (Virtual Credits) Bill 2013**

Introduced into the Senate on 16 May 2013

By: Senator Xenophon

### **Background**

This bill amends the *Interactive Gambling Act 2001* to ensure that games where players can participate in gambling activities using virtual items purchased with real currency are appropriately regulated as ‘gambling activities’.

*The committee has no comment on this bill.*

## **International Interest in Mobile Equipment (Cape Town Convention) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Infrastructure and Transport

### **Background**

This bill facilitates Australia's accession to the Convention on International Interests in Mobile Equipment and Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Management. The Convention and Protocol provide an international registry system to protect secured creditors who finance the acquisition of aircraft.

The bill increases the protection of creditor interests in aircraft assets and concurrently reduces their risk – thereby resulting in increased access to cheaper aircraft asset financing for the Australian aviation industry.

*The committee has no comment on this bill.*

## **International Interest in Mobile Equipment (Cape Town Convention)(Consequential Amendments) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Infrastructure and Transport

### **Background**

This bill amends the *Air Services Act 1995*, the *Civil Aviation Act 1988* and the *Personal Property Securities Act 2009* (PPS Act) to:

- provide for the priority ranking of statutory liens included in the Register of Statutory Liens maintained as required by the Air Services Act;
- allows functions to be conferred on Civil Aviation Safety Authority in relation to the operation of the Cape Town *Convention on International Interests in Mobile Equipment* made under the Civil Aviation Act; and
- include a provision in the PPS Act to note that the Cape Town Convention will prevail over the PPS Act.

### **Commencement**

Schedule 5 will commence on either a single day to be fixed by proclamation or 6 months and 1 day after the commencement of *Convention on International Interests in Mobile Equipment*. While the explanatory memorandum does not specifically detail the reason for the delay (discussion of clause 2 is at 22) it is clear that commencement of the bill is linked to commencement of the convention and this does not give rise to a scrutiny concern.

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

## Live Animal Export Restriction and Prohibition Bill 2013

Introduced into the House of Representatives on 27 May 2013

By: Mr Wilkie

This bill is in identical terms to the bill introduced into the House of Representatives on 20 June 2011 by Mr Wilkie. The committee repeats the comments it made about the bill in *Alert Digest No. 7 of 2011*.

### Background

This bill amends the *Australian Meat and Livestock Industry Act 1997* and the *Export Control Act 1982* to ban the export of live animals for slaughter by 1 July 2017.

### Incorporating material by reference

#### Schedule 1, item 4

Item 4 of the Schedule to this bill seeks to insert a new section 9N into the *Export Control Act 1982*. Proposed subsection 9N(4) provides that live-stock for slaughter may not be exported and a permission or other consent may not be granted under the regulations ‘unless the Secretary is satisfied that the live-stock will be treated satisfactorily in the country of destination’. Proposed subsection 9N(5) provides that ‘live-stock for slaughter will be treated satisfactorily in the country of destination if they will be, among other things, kept in holding premises that comply with the ‘Holding Standards’ and (b) treated in accordance with the ‘OIE Guidelines’. Proposed subsection 9N(8) defines ‘Holding Standards’ to mean a number of standards drawn from version 2.3 of the Australian Standards for the Export of Livestock, published by the Department of Agriculture, Fisheries and Forestry. ‘OIE Guidelines’ is defined to mean the ‘relevant sections of the current version of the Terrestrial Animal Health Code published by the OIE (the World Organisation for Animal Health). The appropriateness of this delegation of legislative power is not addressed in the explanatory memorandum. In order to better assess the proposed provision, and if the bill proceeds to further stages of debate, **the committee requests the Member’s advice as to the reasons for the proposed approach.**



*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.*

## **Marriage Act Amendment (Recognition of Foreign Marriages for Same-Sex Couples) Bill 2013**

Introduced into the Senate on 16 May 2013

By: Senator Hanson-Young

### **Background**

This bill amends the *Marriage Act 1961* to ensure that marriages that are validly entered into in foreign countries can be recognised under the laws of Australia.

*The committee has no comment on this bill.*

## **Medicare Levy Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Medicare Levy Act 1986* to increase the Medicare levy rate from 1.5 to 2 per cent of taxable income for the 2014-15 income year and later income years.

*The committee has no comment on this bill.*

## **Migration Amendment (Offshore Resources Activity) Bill 2013**

Introduced into the House of Representatives on 30 May 2013

Portfolio: Immigration and Citizenship

### **Background**

This bill amends the *Migration Act 1958* to implement a key recommendation of the Migration Maritime Taskforce that persons who participate in, or support an offshore resources activity are taken to be in the migration zone and thereby require them to hold a visa.

### **Commencement**

Schedule 1 will commence on a single day to be fixed by proclamation. However, if the provisions do not commence within a period of 12 months, the provisions are to be repealed. The explanatory memorandum gives a detailed explanation of the approach (at p. 6) and it does not give rise to a scrutiny concern.

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

## **Migration Amendment (Temporary Sponsored Visas) Bill 2013**

Introduced into the House of Representatives on 6 June 2013

Portfolio: Immigration and Citizenship

### **Background**

The Bill amends the *Migration Act 1958* to:

- reinforce the purpose of Division 3A of Part 2 of the Migration Act relating to sponsorship;
- require prescribed classes of sponsors to undertake labour market testing in relation to a nominated occupation in a manner consistent with Australia's international trade obligations;
- provide the evidence for labour market testing which is to accompany an application for a nomination;
- provide exemptions from labour market testing in circumstances where there has been a major disaster, or the skill level of the nominated occupation is equivalent to Skill level 1 or Skill Level 2 as provided for in the Australian and New Zealand Standard Classification of Occupations (ANZSCO);
- (in relation to exemptions from labour market testing) provide for the Minister, by way of legislative instrument, to specify the occupations and for such legislative instruments to be subject to disallowance by either House of the Parliament;
- enshrine the kinds of sponsorship obligations which the Minister must take reasonable steps to ensure are prescribed in the *Migration Regulations 1994* (the Migration Regulations);
- enhance the enforcement framework in relation to sponsorship to include enforceable undertakings between the Minister and an approved sponsor or former approved sponsor and the enforcement of those undertakings;
- empower Fair Work Inspectors to be Inspectors under the Migration Act;

- clarify that entry to premises under the *Fair Work Act 2009* will enable a Fair Work Inspector to exercise powers under the Migration Act; and
- provide that an additional purpose for exercising inspector powers under the Migration Act is to determine whether a person who is or was an approved sponsor has contravened a civil penalty provision in or committed an offence against relevant provisions of the Migration Act relating to work (employer sanctions provisions).

The Bill also amends the Migration Regulations to prescribe:

- standard business sponsors as the class of sponsor which is required to undertake labour market testing in relation to a nominated occupation; and
- extend the period in which a Subclass 457 visa holder subject to visa condition 8107 can seek new sponsored employment from 28 consecutive days to 90 consecutive days.

**Trespass on personal rights and liberties—privacy**  
**Schedule 5, item 4, proposed new subsection 140RA(6)**

This subsection authorises the Minister to publish on the Department's website an undertaking given by a sponsor. As made clear in the explanatory memorandum, the publication of such an undertaking will indicate that the approved sponsor or former approved sponsor has failed to satisfy an applicable sponsorship obligation. Indeed, the purpose of the subsection is to draw public attention to the breach and to deter further breaches of obligations arising under the legislation in the future.

In justifying the authority to publish undertakings, the explanatory memorandum adds that doing so 'provides transparency to the Australian community' on the 'administration and enforcement actions taken under it', along with its role in deterring breaches of obligations (at p. 25).

Although it is acknowledged that the exercise of this power may adversely impact on personal privacy, the explanatory memorandum also states that 'the published undertaking will not include the personal information of any person or any other information that may assist in the identification of a person who has provided the undertaking' (at p. 25). However, this apparent 'safeguard' appears to be asserted as a matter of intended practice rather than legal

obligation. **As such the committee seeks the Minister's advice as to whether consideration a provision can be included in the bill that will limit the publication of personal information.**

*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.*

## **National Disability Insurance Scheme Legislation Amendment Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill amends the *National Disability Insurance Scheme Act 2013* to clarify the intended operation of provisions relating to compensation claims. The bill also addresses minor anomalies, technical errors and makes consequential amendments to other Commonwealth legislation.

### **Undue trespass on personal rights and liberties—retrospectivity Item 28**

This item provides that NDIS rules made under the NDIS Act and any actions taken pursuant to those rules prior to the commencement of the amendments made in this bill are to be treated as valid ‘as they would have been if the amendments made by this Schedule had been in effect when the rules were made’. The explanatory memorandum states that the provision ensures the validity of NDIS Rules made before the commencement of this bill and states that this ‘is necessary because many of the NDIS Rules need to be made before 1 July 2013 so that the scheme commences from that date’. Although the result is that the amendments are intended to commence with retrospective effect, the explanatory memorandum indicates that no person’s ‘rights will be adversely affected by the retrospectivity’. As the progressive implementation of the scheme will commence from July 2013 and the bill has already passed the committee makes no further comment on this issue.

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



## **National Health Reform Amendment (Definitions) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

Portfolio: Health and Ageing

### **Background**

This bill amends the definitions of 'local hospital network', 'primary health care organisation', 'private hospital' and 'public hospital' in the *National Health Reform Act 2011* to allow flexibility in identifying the bodies and organisations on which the National Health Performance Authority must prepare performance reports.

*The committee has no comment on this bill.*

## **Parliamentary Service Amendment (Freedom of Information) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Leader of the House

### **Background**

This bill amends the *Parliamentary Service Act 1999* (the Act) to restore the exclusion from the *Freedom of Information Act 1982* for parliamentary departments and office holders under the Act.

### **Trespass on personal rights and freedoms—freedom of information Schedule 1, item 2**

The effect of item 1 of the bill, proposed section 68A, is to exclude the parliamentary departments and persons who hold or perform the duties of an office established under the *Parliamentary Service Act* from the application of the FOI Act. This change is justified in the explanatory memorandum by pointing to the fact that when originally enacted the FOI Act did not apply to parliamentary departments and that the *Parliamentary Service Act 1999* ‘may have inadvertently and unintentionally exposed the parliamentary departments to coverage by the FOI Act’. (It is noted that the Parliamentary Budget Office is specifically exempted from the FOI Act.)

The statement of compatibility contains a discussion of the appropriateness of excluding the operation of the FOI Act for parliamentary departments and office holders under the *Parliamentary Service Act*. It is argued that the parliamentary departments are required to provide professional advice and support for the Parliament independently of the Executive Government and that, ‘by its nature, much of this advice is provided on a confidential basis to senators and members to inform their parliamentary work and deliberations’. A core objection to the application of the FOI Act is outlined in the following passage:

In the absence of an exemption from the FOI Act to ensure confidentiality, senators and members may be reluctant to request such advice, leading to a deleterious effect on the work of the Parliament. Additionally, arguably such advice should not be subject to the FOI Act because FOI disclosure could lead to such advice becoming part of the political process and thereby potentially jeopardising the ability of parliamentary officers to carry out their legislative

responsibility of providing ‘non-partisan and impartial’ advice and services to members of parliament’.

While noting this position, the committee is concerned that although there may be reasons that some advice and information should be confidential, this bill seeks to exclude *all* information held by the parliamentary departments. It may be observed that similar arguments (concerning the chilling effect FOI rights may have in the provision of frank and fearless advice and the risk of the politicisation of the public service) have been frequently raised in the past in contexts concerning the application of FOI laws to the executive government. In these contexts the current FOI Act balances the right to information (subject to certain exemptions) against the public's right to know.

Also of relevance to this bill, the committee notes that the Leader of the House, in his second reading speech, emphasised that the current bill is a temporary measure. However, the bill is not cast in terms that reflect this. The committee is aware of the current review of the operation of the FOI Act being undertaken by Dr Allan Hawke AC, which includes examining the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act.

**While the committee acknowledges the arguments outlined in support of the bill, it remains concerned by the proposal to exempt *all* information held by parliamentary departments. However, the committee notes that the bill has already been passed by both Houses of Parliament and makes no further comment.**

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

### **Trespass on personal rights and freedoms—retrospectivity Schedule 1, item 2**

This bill seeks to have retrospective application so that the FOI Act operates as if the parliamentary departments had not been prescribed authorities from the relevant date in 1999. Retrospectivity is justified on the basis that the bill:

- (1) 'restores what was widely thought to be the position' prior to the enactment of the *Parliamentary Service Act*'; and
- (2) preserves the parliament's right to make an informed decision about whether and how the FOI Act may apply to parliamentary departments, given that this may have a 'potential impact on parliamentary privilege'. (see SOC 5 and explanatory memorandum at 8)

In relation to (1), the restoration of what was widely thought to have been the legal position is not, in itself, usually accepted by the committee as a sufficient justification for retrospective legislation. The committee is of the view that retrospectivity typically imposes costs on the integrity, and perceived integrity, of the legal system. The committee also seeks to understand whether retrospectivity will, or is likely to, have an adverse impact on any person. However, the committee notes (2) and observes that while the FOI Act (paragraph 46(1)(c)) already provides for an exemption in relation to documents which may 'infringe the privileges of the Parliament of the Commonwealth', two of the core justifications for the substantive amendment (the application of FOI legislation to parliamentary departments may lead to deleterious effects on the work of the Parliament and to the politicisation of advice given by officers within the parliamentary departments) are potentially broader in scope.

**While the committee is concerned by the significant retrospective application of this bill, as the bill has already been passed by both Houses of Parliament the committee makes no further comment.**

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

## **Privacy Amendment (Privacy Alerts) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Attorney-General

### **Background**

This bill amends the *Privacy Act 1988* to introduce mandatory data breach notification provisions for agencies and organisations that are regulated by the Privacy Act (entities).

*The committee has no comment on this bill.*

## **Private Health Insurance Legislation Amendment (Base Premium) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

Portfolio: Health and Ageing

### **Background**

This bill amends the *Private Health Insurance Act 2007* to index the Australian Government's private health insurance rebate for each private health insurance policy from 1 April 2014 to a proportion of the premium charged for that policy as at 1 April 2013.

### **Delegation of legislative power**

#### **Item 4, proposed subsection 22-50(5)**

Item 4 establishes formulas and other relevant information to calculate the *base premium* for a private health insurance policy, which amount will then be used to determine other figures relating to health insurance rebates. One component of the calculation, the *weighted average ratio* described in subsection 22-50(5), will be determined in accordance with the Private Health Insurance (Incentive) Rules. The explanatory memorandum (at p. 8) notes this arrangement, but does not explain why it is appropriate to leave this matter to be dealt with by legislative instrument (the Rules) rather than including it in primary legislation. **The committee prefers that important matters are included in primary legislation whenever possible and therefore seeks the Minister's advice as to whether the use of the Rules for this purpose is appropriate.**

*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.*

## **Public Governance, Performance and Accountability Bill 2013**

Introduced into the House of Representatives on 16 May 2013

Portfolio: Finance and Deregulation

### **Background**

This bill establishes a system of governance and accountability across Commonwealth entities by:

- establishing a uniform set of duties for accountable authorities; establishing a uniform set of duties for all officials who use or manage public resources;
- establishing a comprehensive and uniform reporting framework including requiring the development of corporate plans;
- placing a duty on entities to establish appropriate systems of risk oversight and management (earned autonomy);
- enabling Commonwealth entities to partner with the states, territories and not-for-profit sector; and
- clarifying the Finance Minister's role in relation to the financial framework.

### **Delayed Commencement**

#### **Clause 2**

The substantive provisions in the bill will commence on 1 July 2014 or an earlier day fixed by proclamation. The explanatory memorandum sets out a detailed and adequate justification (at p. 11) for this extended period for Proclamation and in light of the explanation the provision does not give rise to a scrutiny concern.

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

## **Delegation of Legislative Power General**

The bill is designed to establish a coherent framework for the governance, performance and accountability of the Commonwealth. It is acknowledged in the explanatory memorandum that this is framework legislation and that much of the detail will be dealt with in the rules. The explanatory memorandum claims that the bill ‘does not unnecessarily push requirements from the primary legislation into the rules’ and notes that most issues ‘for which rules can be made are already contained in the subsidiary legislation of the FMA and CAC Acts’ (see pp. 64 and 65). It should, however, be noted that there are instances where matters which have hitherto been dealt with in the FMA Act or CAC Act will be dealt with in the rules under this bill.

The use of rules, including rules that may be tailored to specific circumstances of particular entities, is part of an overall approach designed to ‘operationalise the earned autonomy model, which is a key underpinning enhancement to the Commonwealth’s financial framework in order to reduce the compliance burden and improve performance’. This approach is said to ‘enable the nature and extent of regulatory intervention to be based on an entity’s risk profile and performance, and allows for a more nuanced approach than applying blanket requirements across all Commonwealth entities’ (at 65). This model draws on a recent report of the Productivity Commission, *Identifying and Evaluating Regulatory Reforms* (see explanatory memorandum at 8).

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

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

## **Delegation of legislative power Clause 87**

This clause enables the executive government to establish new corporate Commonwealth entities through rules made for this purpose. This is a significant new power as new bodies corporate are usually established by an



Act of Parliament. This clause provides power to create statutory bodies corporate, which are not companies, by rules made under this bill.

The explanatory memorandum includes a detailed justification of this new power. The following points are raised:

- The power cannot be used to abolish an entity that has been established by legislation or to wind up a company;
- Bodies established under this power will be subject to the *PGPA Act*;
- The power enables a more efficient option for forming and abolishing bodies corporate. An act of Parliament is time consuming and this limits the government's capacity to be responsive to its operating environment. Although the Government has the option to establish companies under the Corporations Act, this option is often inappropriate and the proposed power provides more scope for parliamentary accountability and oversight.
- Other legislative accountability frameworks, such as the *FOI Act*, can be applied to bodies corporate formed under this clause in accordance with paragraph 87(j).
- The power under this clause is not unprecedented—a similar power exists under the *Primary Industries and Energy Research and Development Act 1989* to create statutory authorities for research and development purposes.

In light of the explanation provided, the committee leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

However, while the creation of bodies corporate under the proposed power does have accountability advantages when compared to the formation of companies under the Corporations Act the committee has a concern in relation to accountability mechanisms. Proposed paragraph 87(j) provides only for the regulations to deal with the application of other Commonwealth laws to the body corporate and this does not seem to ensure that appropriate accountability mechanisms will definitely apply. The explanatory memorandum states that 'when the Finance Minister proposes to set up a body corporate under clause 87, he or she will undertake consultation with appropriate Ministers to ensure such frameworks apply' (at 58).

**The committee would prefer that this requirement be included in the primary legislation and therefore seeks the Minister's advice as to whether consideration has been given to making such consultations a statutory requirement or to including other legislative mechanisms to ensure that appropriate accountability frameworks apply.**

*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—Henry VIII clause Clause 104**

This clause provides that the Finance Minister may make rules to modify the application of the bill in relation to certain Commonwealth entities and companies, namely, intelligence, security or law enforcement agencies. The explanatory memorandum indicates that the application of the bill to some such entities may be contrary to the Commonwealth's security interests. It is further noted that this provision is equivalent to an existing section of the FMA Act. A similar power exists in relation to modifications being made to the application of the bill to the Commonwealth Superannuation Corporation 'so as not to interfere with its specific obligations as the corporate trustee of the Australian Government's main civilian and military superannuation schemes'. **In the circumstances the committee leaves question of whether the proposed approach is appropriate to the Senate as a whole.**

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

### **Standing appropriation Subclause 105(3)**

This clause provides that the CRF is appropriated for the purposes of the expenditure of other CRF money by a person other than the Commonwealth or a Commonwealth entity if the expenditure is in accordance with requirements prescribed the rules (pursuant to subclause 105(1)) and the Finance Minister is satisfied that the expenditure is not authorised by another

appropriation. The explanatory memorandum notes that occasionally ‘it is the case that persons other than the Commonwealth... may hold and spend money that is part of the CRF’, for example if a person outside the Commonwealth was acting as an agent of the Commonwealth in, for example, collecting money payable to the Commonwealth and making payments from that money’. The explanatory memorandum argues that subclause 105(3) designed to ‘provide constitutional certainty for certain situations that may arise in relation to money’ that is not relevant money as defined in the Bill but ‘may nevertheless be money forming part of the CRF’. The clause will ensure that appropriations in these circumstances are ‘appropriations made by law’ for the purposes of section 83 of the *Constitution*.

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

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

## **Public Interest Disclosure (Consequential Amendment) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Public Service and Integrity

### **Background**

This bill amends a number of Acts in support of the scheme in the Public Interest Disclosure Bill 2013(PID Bill) to:

- amend the *Ombudsman Act 1976* to permit the Ombudsman to investigate a public interest disclosure made under the PID Bill where some or all of the disclosable conduct relates to an agency that is not an intelligence agency or the Inspector-General of Intelligence and Security (the IGIS);
- amend the Ombudsman Act to require the Ombudsman to consult the Australian Public Service Commissioner where a complaint, including a public interest disclosure, relates to an allegation of misconduct by an APS Agency Head. Also, require the Ombudsman to bring evidence of misconduct to the notice of the Australian Public Service Commissioner if that evidence suggests that an APS Agency Head may have breached the APS Code of Conduct;
- amend the *Inspector-General of Intelligence and Security Act 1986* to permit the IGIS to inquire into a public interest disclosure that has been, or is required to be, allocated under the PID Bill where some or all of the disclosable conduct relates to an intelligence agency;
- repeal existing provisions in the *Public Service Act 1999* (as amended by the *Public Service Amendment Act 2013*) and the *Parliamentary Service Act 1999* (as amended by the *Parliamentary Service Amendment Act 2013*) relating to whistleblower reports;
- (consequential upon the repeal of the whistleblower provisions in the Public Service Act as amended by the Public Service Amendment Act) amend the Public Service Act to preserve a function for the Australian Public Service Commissioner and the Merit Protection Commissioner to inquire into public interest disclosures; and

- (consequential upon the repeal of the whistleblower provisions in the Parliamentary Service Act (as amended by the Parliamentary Service Amendment Act amend the Parliamentary Service Act to preserve a function for the Parliamentary Service Commissioner and the Parliamentary Service Merit Protection Commissioner to inquire into public interest disclosures.

*The committee has no comment on this bill.*

## **Social Security Amendment (Supporting More Australians into Work) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Education, Employment and Workplace Relations

### **Background**

This bill amends the *Social Security Act 1991* to:

- increase the income free area that applies for recipients of Newstart Allowance, Widow Allowance, Partner Allowance, Parenting Payment (Partnered) and Sickness Allowance;
- extend eligibility for the Pensioner Education Supplement (PES) to single principal carer parents receiving Newstart Allowance payments;
- provide a 12 week extension of eligibility for the Pensioner Concession Card to single parents who are no longer qualified for Parenting Payment (Single) because their youngest child has turned 8 years of age and who do not qualify for another income support payment due to earnings from employment.

*The committee has no comment on this bill.*

## **Social Security Legislation Amendment (Public Housing Tenants' Support) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill amends the *Social Security (Administration) Act 1999* and the *A New Tax System (Family Assistance)(Administration) Act 1999* to implement the Housing Payment Deduction Scheme for public housing tenants who are in serious rental arrears that could lead to eviction and housing abandonment as a result of rental arrears.

*The committee has no comment on this bill.*

## **Statute Stocktake (Appropriations) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

Portfolio: Finance and Deregulation

### **Background**

This bill seeks to repeal 84 annual Appropriation Acts from 1999-2000 until 2009-2010 (inclusive).

*The committee has no comment on this bill.*



## **Sugar Research and Development Services Bill 2013**

Introduced into the House of Representatives on 5 June 2013

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill provides the mechanism to implement key elements of reforms to sugar research and development (R&D) arrangements including:

- providing the Minister with the power to enter into a funding contract with an eligible company to enable it to receive and administer levies collected by the Commonwealth for R&D; and
- allowing the eligible company to receive the Commonwealth's matching funding for eligible R&D expenditure.

### **Delegation of legislative power - accountability concerns**

#### **Various provisions**

This bill creates a complex funding mechanism with the purpose of delivering increased research and development efficiencies for the benefit of the sugar industry and the nation. The scheme involves a levy on industry participants to be collected by the Commonwealth. Monies raised from this levy will be used to fund an industry owned company (Sugar Research Australia Limited (SRA)). The bill also will allow SRA to receive the Commonwealth's matching funding for eligible R&D expenditure. More particularly, the bill provides for the Minister for Agriculture, Fisheries and Forestry to enter into a funding contract with an eligible company (intended to be SRA) which will enable that company to receive monies for R&D.

This mechanism for directing government money to sugar R&D means that the normal accountability arrangements which attend the expenditure of money by commonwealth bodies will not apply to decisions and actions taken by the industry-owned company responsible for the R&D functions. The explanatory memorandum addresses this issue in the following way:

The funding contract between the Commonwealth and the industry services body [i.e. the industry owned company] will set out certain obligations and accountability requirements for the company, including provisions relating to the use of levy monies and Commonwealth matching funding. The detail of the industry services body's accountability arrangements to the Commonwealth will be outlined in the funding contract.

The reliance on an industry-owned company to deliver outcomes for the benefit of the industry as a whole and the nation also raises issues as to the appropriateness of governance within that company. The bill does not contain provisions which deal with the question of ensuring that the company board is appropriately qualified and independent or how to ensure that any conflicts of interests are appropriately dealt with (given the expenditure of public money).

It may well be that the above issues will be adequately addressed through the funding agreement and in the development of the governance arrangements for the industry-owned company. Further, any Ministerial declarations of the ‘industry services body’, and also the funding contract, are subject to parliamentary scrutiny—each must be tabled in each House of the Parliament. In this respect, it is noted that the Minister in his second reading speech concluded as follows:

With the Statutory Funding Agreement and the revised constitution [of the SRA], the government is confident that the governance arrangements for the new organisation will satisfy transparency and accountability requirements and support an efficient and effective organisation. This, in turn, should contribute to increased productivity and profitability for the sugar industry.

Nevertheless, it should be emphasised that this bill largely leaves the appropriate resolution of accountability and governance requirements to be established through non-legislative means. **While the committee accepts that the detail of these provisions will be subject to industry consultation, the committee requests the Minister's advice as to whether the bill can include a general requirement that the funding contract deal with accountability and governance issues.**

*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.*

## **Sugar Research and Development Services (Consequential Amendments and Transitional Provisions) Bill 2013**

Introduced into the House of Representatives on 5 June 2013

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill makes consequential amendments to various acts in respect of the imposition and collection of the levy including:

- providing for an increase of the levy; and
- the wind-up of the Sugar Research and Development Corporation and matters arising from the transition to a new industry services body.

*The committee has no comment on this bill.*

## **Superannuation (Excess Concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Superannuation (Excess Concessional Contributions Tax) Act 2007* to increase the rate at which excess concessional contributions tax is payable from 31.5 to 32 per cent of an individual's excess concessional contributions from the 2014-15 financial year and later financial years.

*The committee has no comment on this bill.*

## **Superannuation (Excess Non-concessional Contributions Tax) Amendment (Disability Care Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* to increase the rate at which excess non-concessional contributions tax is payable from 46.5 to 47 per cent of an individual's excess non-concessional contributions from the 2014-15 financial year and later financial years.

*The committee has no comment on this bill.*

## **Superannuation (Excess Untaxed Roll-over Amounts Tax) Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Superannuation (Excess Untaxed Roll-over Amounts Tax) Act 2007* to increase the amount of the tax from 46.5 to 47 per cent to excess untaxed roll-over amounts paid on or after 1 July 2014.

*The committee has no comment on this bill.*

## **Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013**

Introduced into the House of Representatives on 29 May 2013

Portfolio: Treasury

### **Background**

This bill amends various taxation laws.

Schedule 1 amends the *Income Tax Assessment Act 1997* to provide income tax relief to superannuation funds where there is a mandatory transfer of default members' account balances to a MySuper product in another superannuation fund.

Schedule 2 amends the *Defence Force Retirement and Death Benefits Act 1973* to enable the Commonwealth Superannuation Corporation to pay amounts and to adjust the benefits under the Defence Force Retirement and Death Benefits scheme to reflect those payments.

*The committee has no comment on this bill.*

## **Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013**

Introduced into the House of Representatives on 15 May 2013

Portfolio: Treasury

### **Background**

This bill will impose a 15 per cent tax on concessional superannuation contributions made from 1 July 2012 of individuals with income above \$300,000.

*The committee has no comment on this bill.*



## **Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

Portfolio: Treasury

### **Background**

This bill amends various taxation laws.

Schedule 1 amends the *Income Tax Assessment Act 1997* and the *Income Tax (Transitional Provisions) Act 1997* to increase the concessional contributions cap temporarily to \$35,000 for the 2013-14 financial year for individuals aged 60 years and over, and to \$35,000 for the 2014-15 financial year and later financial years for individuals aged 50 years and over. The temporary cap will cease when the general cap indexes to \$35,000.

Schedule 2 amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to make technical changes to ensure the low income superannuation contribution operates effectively.

Schedule 3 amends the income tax and superannuation law and the *Taxation Administration Act 1953* to reduce the tax concession for concessional contributions of very high income earners by 15 per cent.

Schedule 4 makes consequential amendments to legislation concerning some of the Commonwealth defined benefit superannuation plans where members of those plans are affected by the reduction in the tax concession for concessional contributions.

### **Trespass on personal rights and liberties—retrospectivity Schedule 3**

This Schedule makes a number of amendments associated with a reduction in the tax concession for concessional contributions of very high income earners by 15 per cent. The changes take effect to concessional contributions for the 2012-13 income year and later income years. Although the explanatory memorandum indicates that this proposal was announced in the Minister for Financial Services and

Superannuation's media release No 24 of 8 May 2012, it is noted that it has taken over 12 months for the bill to enact the proposal to be brought before the Parliament. Neither the reasons for the delay nor the justification for retrospective application given the delay are dealt with in the explanatory memorandum.

It is also noted that some of the provisions within Schedule 3 enable the making of regulations to take effect retrospectively, although the explanatory memorandum does provide a justification for the necessity of this approach (e.g. at 54).

The committee has in the past been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, and this has usually been limited to publication of a draft bill within six calendar months after the date of that announcement. 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'.

It is regrettable that it has taken well over six months from the announcement of this legislative change for the bill to be brought before the Parliament **and the committee seeks the Minister's explanation for the delay.**

*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.*

## **Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 1) Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Taxation (Trustee Beneficiary Non-disclosure Tax) Act (No. 1) 2007* to increase the rate of the tax from 46.5 to 47 per cent and applies to the 2014-15 income year and later income years.

*The committee has no comment on this bill.*

## **Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 2) Amendment (DisabilityCare Australia) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

*(passed by both Houses on 16 May 2013)*

Portfolio: Treasury

### **Background**

This bill is part of a package of 11 bills and amends the *Taxation (Trustee Beneficiary Non-disclosure Tax) Act (No. 2) 2007* to increase the rate of the tax from 46.5 to 47 per cent and applies to the 2014-15 income year and later income years.

*The committee has no comment on this bill.*

## **Tax Laws Amendment (2013 Measures No. 1) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

Portfolio: Treasury

### **Background**

This bill amends various taxation laws.

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

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

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

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

### **Trespass on personal rights and liberties—retrospectivity Schedule 1, item 20**

This item provides that some of the integrity changes that affect the CGT provisions will apply with retrospective effect. The explanatory memorandum states that this will provide certainty for transactions that have occurred since the time the proposal was announced.

The committee has in the past been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, and this has usually been limited to publication of a

draft bill within six calendar months after the date of that announcement. Where taxation amendments are not brought before the Parliament within 6 months of being announced the committee usually expects the delay to be comprehensively explained and justified, particularly when it could involve a detrimental effect for any person. The problem that committee is concerned to avoid is the practice of 'legislation by press release'.

It is regrettable that it has taken well over six months from the announcement of this legislative change for the bill to be brought before the Parliament. **In the circumstances the committee therefore seeks the Minister's advice as to the justification for the delay and further advice as to the rationale for seeking to apply these provisions retrospectively.**

*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.*

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

Introduced into the House of Representatives on 29 May 2013

Portfolio: Treasury

### **Background**

This bill amends various taxation laws.

Schedule 1 requires large entities to pay PAYG instalments monthly rather than quarterly or annually. Entities will be transitioned into the monthly PAYG instalment system over a four year period.

Schedule 2 amends the *Income Tax Assessment Act 1997* to provide a tax incentive for entities that carry on a nationally significant infrastructure project that has been designated by the Infrastructure Coordinator.

Schedules 3 and 4 amends the *Tax Agent Services Act 2009* to bring entities that give tax advice in the course of giving advice that is usually provided by financial services licensees within the regulatory regime administered by the Tax Practitioners Board.

Schedule 5 amends the *Taxation Administration Act 1953* to:

- require the Commissioner of Taxation to publish limited information about the tax affairs of large corporate taxpayers;
- allow for the publication of certain aggregate tax information irrespective of whether the publication, in conjunction with publicly available information, may be reasonably capable of being attributed to a particular taxpayer (other than a natural person); and
- allow for enhanced information sharing between Government agencies in relation to decisions under the *Foreign Acquisitions and Takeovers Act 1975* and Australia's Foreign Investment Policy.

Schedule 6 amends the *Petroleum Resource Rent Tax Assessment Act 1987* to address the unintended impacts arising from the decision of the Full Federal Court in *Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2012] FCAFC 5.

Schedule 7 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to remove the capital gains tax (CGT) discount on discount capital gains accrued after 8 May 2012 for foreign resident and temporary resident individuals, and also makes consequential amendments.

Schedule 8 amends the *Income Tax Assessment Act 1997* to exempt from income tax, payments made under the Defence Abuse Reparation Scheme.

Schedule 9 ensures that certain services and other things supplied to a participant as a part of a National Disability Insurance Scheme (NDIS) plan under the *National Disability Insurance Scheme Act 2013* (NDIS Act) are GST-free.

Schedule 10 amends the *Income Tax Assessment Act 1997* to update the list of specifically listed deductible gift recipients.

Schedule 11 makes a number of miscellaneous amendments to the taxation and superannuation laws.

## **Delegation of Legislative Power**

### **Parliamentary Scrutiny by of legislative powers**

#### **Schedule 2, item 4, proposed subsections 415-100(1) and (2)**

Item 4 of schedule 2, proposed subsection 415-100(1) empowers the Minister to make infrastructure project designation rules. The explanatory memorandum (at p. 59) states that these rules, which are legislative instruments for the purposes of the *Legislative Instruments Act*, provide for subsidiary detail affecting the scope and operation of the designated infrastructure projects regime introduced by this schedule. This is an accurate statement although it should be noted that they can also prescribe conditions which must be satisfied for a project to receive provisional or final designation (see proposed paragraphs 415-65(1)(d)(i) and 415-70(1)(d)(i)).

This delegation of legislative power may be considered appropriate in light of the nature of the scheme, which is intended to be a short term encouragement for infrastructure investments, and the fact that the rules are disallowable instruments. **The committee therefore leaves the question of whether the delegation of legislative power in proposed subsection 415-100(1) is appropriate to the consideration of the Senate as a whole.**

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



## **Incorporating material by reference**

### **Subsection 415-100(2)**

It is noted that proposed subsection 415-100(2) provides that the rules may incorporate other documents made by Infrastructure Australia as in force or existing from time to time. The provision thus expressly exempts the infrastructure project designation rules from the requirement in subsection 14(2) of the *Legislative Instruments Act*.

The committee routinely draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

The explanatory memorandum justifies this exemption from 14(2) of the *Legislative Instruments Act* on the basis that it will enable, for example, the rules ‘to incorporate Infrastructure Australia’s published list of nationally significant projects which is available on the internet’ (at 60). As the capacity to incorporate documents in the delegated legislation is limited to documents created by a single entity (which is statutory body, established under the *Infrastructure Australia Act 2008*) and those documents will be readily available on the internet the committee leave **the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

## **Delegation of Legislative Power**

### **Schedule 2, item 4, proposed subsections 415-60(5) and 415-75(2)**

The scheme is intended as a short term encouragement for infrastructure investments and projects must be designated before 1 July 2017. It is also the case that there is a cap placed on the total estimated expenditure projects that are able to access the concessions of \$25 billion and that this ‘indirectly’ limits the cost of the scheme to Commonwealth revenue (explanatory memorandum at 60). Nevertheless, proposed subsection 415-60(5) allows the rules to prescribe a later date by which projects must be designated and proposed subsection 415-75(2) allows for the cap on the total estimated

expenditure of projects to be increased. These measures may have substantial revenue implications. **The committee prefers that important matters be included in primary legislation whenever possible and therefore seeks the Minister's advice as to whether or not it would be more appropriate for these measures to be taken by enacting primary legislation rather than leaving them to subordinate 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.*

### **Delegation of Legislative Power**

#### **Schedule 3, item 43, subsection 90-15(2) and paragraph 90-15(3)(b)**

Although the bill contains provisions defining the meaning of 'tax (financial) advice services' (proposed section 90-15), proposed subsection 90-15(2) and paragraph 90-15(3)(b) of the TPB can also prescribe, by legislative instrument, services that are to be 'tax (financial) advice services' and that are not 'tax financial advice services'. The explanatory memorandum argues that this is necessary to provide 'ongoing flexibility as to what constitutes a tax (financial) advice service and ensure that the regulatory framework continues to reflect industry practice' (at 90). It would have been desirable for the explanatory memorandum to elaborate further the reasons for the expectation that industry practice may change and why regulatory adjustments would then be required. **However, the committee notes the information that was included in the explanatory memorandum and that the legislative instruments will be disallowable and leaves 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.*

### **Trespass on personal rights and freedoms—reversal of onus Schedule 5, items 2 and 6**

These items introduce exceptions to offences relating to 'periodic aggregate tax information'. The committee expects that any provisions that will reverse the usual onus of proof through the use of a defence will provide a justification for the proposed approach in the explanatory memorandum which addresses the principles outlined in the *Guide to Framing Commonwealth Offences*. **As the explanatory memorandum does not address this matter, the committee seeks the Minister's advice about the appropriateness of these items placing an evidential burden of proof onto a defendant.**

*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 freedoms—retrospective application Schedule 7**

The measure in this schedule applies to capital gains tax events that occur after 8 May 2012, that being the date when the measure was announced. The committee has in the past been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, and this has usually been limited to publication of a draft bill within six calendar months after the date of that announcement. 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'.

It is regrettable that it has taken well over six months from the announcement of this legislative change for the bill to be brought before the Parliament. **In the circumstances the committee therefore seeks the Minister's advice as to the justification for the delay, the rationale for seeking to apply these provisions retrospectively, and whether the provisions could have an adverse impact on any person.**

*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 freedoms—retrospective application**

### **Schedule 11, Part 1**

The amendments made in this Part of schedule 11 commence on 3 December 2012, being the date that the *Australian Charities and not-for profits Commission Act 2012* commenced.

The explanatory memorandum indicates that the purpose of the amendments made in this Part is to ensure that entities that are covered by the ACNC are not exempt from income tax unless the entity is registered under the *Australian Charities and not-for profits Commission Act 2012*. The amendments therefore mirror 'the previous law which required entities that fell within the scope of the Commissioner's endorsement requirements to be endorsed in order to be eligible for an exemption from income tax' (at 216). Thus, it is concluded that 'the retrospective operation of these amendments is not intended to alter any decisions that have already been made by the Commissioner of the ACNC or the Commissioner of Taxation' and the amendments, in effect, merely ratify the operation of the current regime (at 216). Given the explanation provided in relation to Part 3 of Schedule 11 (at 219), it is also concluded that the amendments will not have any adverse retrospective effect on any affected tax payer.

In light of this explanation the does not raise any concern against the scrutiny principles outlined in Standing Order 24(1)(a).

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

## **Tax Laws Amendment (Medicare Levy) Bill 2013**

Introduced into the House of Representatives on 15 May 2013

Portfolio: Treasury

### **Background**

This bill amends the *Medicare Levy Act 1986* to increase the Medicare levy low-income threshold for families and the dependent child-student component of the threshold from 2012-13 income year and later income years.

*The committee has no comment on this bill.*

## **Voice for Animals (Independent Office of Animal Welfare) Bill 2013**

Introduced into the House of Representatives on 27 May 2013

By: Mr Bandt

### **Background**

This bill establishes the Office of Animal Welfare as an independent statutory authority with responsibility for:

- reporting of animal welfare issues; and
- reviewing laws and policy that impact on the Commonwealth.

*The committee has no comment on this bill.*

## Commentary on amendments to bills

### **Aboriginal Land Rights and Other Legislation Amendment Bill 2013**

*[Digest 5/13 – no comment]*

On 29 May 2013 the House of Representatives agreed to three Government amendments and the Minister for Families, Community Services and Indigenous Affairs (Ms Macklin) tabled a supplementary explanatory memorandum. The committee has no comment on the additional material.

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

*[Digest 5/13 – awaiting response]*

On 28 May 2013 the Minister for Community Services (Ms Collins) tabled a correction to the explanatory memorandum in the House of Representatives. The committee has no comment on the additional material.

### **Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013**

*[Digest 1/13 – response in 3/13 Report]*

On 15 May 2013 the House of Representatives agreed to 42 Government amendments and the Parliamentary Secretary for Agriculture, Fisheries and Forestry (Mr Sidebottom) tabled two supplementary explanatory memoranda. The committee has no comment on the additional material.

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

*[Digest 5/13 – no comment]*

On 30 May 2013 the House of Representatives agreed to 24 Government amendments and the Minister for Employment, and Workplace Relations (Mr Shorten) tabled a supplementary explanatory memorandum.

### **Delegation of legislative power**

#### **Amendment (8) section 23A**

This amendment introduces a broad power of delegation. The CEO may delegate all or any of the CEO's functions or powers to a person who is a member of the staff of the Agency. The rationale for this approach is that the Agency is not intended to have a large number of staff 'and within that staff possibly no officers within the Senior Executive Service'. **While the committee notes this explanation, the committee seeks the Minister's**

**advice as to whether the power could be amended to include a requirement that the CEO be satisfied that the delegate has appropriate qualifications and experience to exercise the power in light of the nature of the power being delegated.**

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

### **Australia Council Bill 2013**

*[Digest 5/13 – no comment]*

On 16 May 2013 the House of Representatives agreed to five Government amendments and the Parliamentary Secretary for the Arts (Mr Danby) tabled a supplementary explanatory memorandum, and the bill was read a third time. The committee has no comment on the additional material.

### **Australian Education Bill 2012**

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

On 4 June 2013 the Minister for School Education, Early Childhood and Youth (Mr Garrett) tabled a supplementary explanatory memorandum. On 5 June 2013 the House of Representatives agreed to 18 Government amendments and the bill was read a third time.

### **Broad discretionary power**

#### **Division 2, subclause 14(3)**

In a number of instances the bill confers broad discretionary powers on the Minister to determine particular matters if special circumstances exist. As the explanatory memorandum does not indicate what sort of circumstances may justify the exercise of the power **the committee seeks the Minister's advice as whether more guidance as to the appropriate exercise of the power may be included in the bill and the explanatory memorandum so as to ensure that the power is sufficiently defined and exercised appropriately.**

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



**Delegation of legislative power**

**Division 2, subclause 22(1)**

This subclause provides that payment of financial assistance under this Act to a State or Territory is subject to the condition that the State or Territory implement national policy initiatives for school education in accordance with the regulations. Subclause 22(2) provides that before making regulations for the purposes of this section, the Minister must have regard to any decisions of the Ministerial Council relating to national policy initiatives and any relevant arrangement of a State or Territory (in its capacity as an approved authority for government schools). Although the effect of these provisions is that much of the policy detail will be implemented through the regulations, there is a *Note* that explains that the national policy initiatives will be those agreed policies that the States and Territories have responsibility for implementing. The explanatory memorandum indicates that the policy framework will be agreed through the Standing Council for School Education and Early Childhood and reflect the reforms outlined in the National Education Reform Agreement. **In these circumstances the committee leaves the question of whether providing for the conditions attached to financial assistance be implemented through regulations is appropriate be left 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.*

**Delegation of legislative power**

**Clause 130**

It is noted that this bill is clearly framework legislation. Much of the detail as to the operation of the funding model and the associated regulatory requirements remains to be filled out in the regulations. For this reason it is regrettable that the explanatory memorandum does not address the appropriateness of this overall approach as doing so would assist the Senate in its consideration of the bill.

Clause 130 confers on the Governor-General a general regulation-making power. Subclause 130(2) specifically provides that the regulations may prescribe for (a) penalties, not exceeding 50 penalty units, for offences in the

regulations relating to the requirement to provide information relating to a school's census or making records of, using or disclosing protected information, and (b) if a provision of the Act or regulations permits or requires a decision to be made, the regulations may prescribe matters that the decision-maker may or must have regard to in making the decision. Although the maximum penalty for a for an offence provided for in the regulations is within the maximum recommended in the *Guide to Framing Commonwealth Offences*, the explanatory memorandum does not address the general question of why it is appropriate for these matters to be dealt with in the regulations. The committee prefers that important matters are included in primary legislation whenever possible and expects that any proposal to delegate important matters will be comprehensively justified in the explanatory memorandum.

**Therefore, in relation to the overall reliance on regulations the committee seeks the Minister's further explanation of how the regulations and primary legislation are intended to inter-relate to one another and why more detail cannot be provided in the bill. In addition, in relation to the matters in subclause 130(2), the committee seeks the Minister's explanation as to why the use of regulations for these matters is appropriate.**

Subclause 130(4) provides that despite subsection of 14(2) of the *Legislative Instruments Act*, the regulations may provide in relation to a matter by applying, adopting or incorporating with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The explanatory memorandum (at 48), states that the purpose of this provision is to enable reference in regulations to 'documents published from time to time by bodies including the Australian Curriculum Assessment and Reporting Authority, Australian Institute for Teaching and School Leadership and the Australian Bureau of Statistics, including documents prepared for and endorsed by the Standing Council on School Education and Early Childhood'.

The committee routinely draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

In light of the explanation provided, the committee leaves the general question of whether the approach proposed in subclause 130(4) is appropriate to the Senate as a whole, **however the committee seeks the Minister's advice as to whether the bill can be amended to include a requirement that documents incorporated by reference be readily accessible and that the Departmental website clearly indicate when changes have been made to such documents that have the effect of changing the law.**

*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.*

### **Merits Review**

#### **Subclauses 122(2) and 122(3)**

Subclause 122(2) provides that an application may not be made to the AAT in respect of a decision to determine a total entitlement for an approved authority for a year if the amount of financial assistance to which the determination relates is transitional recurrent funding for participating schools. The result is that such decisions are only subject to internal review. No explanation this result is provided in the explanatory memorandum.

Subclauses 122(3) provides that applications to the AAT may only be made by or on behalf of the relevant person for the reviewable decision. The default standing provision in the AAT Act (subsection 27(1)) provides that any person whose interests are affected may apply for review. Subclause 122(4) states that subsection (2) has effect despite subsection 27(1) of the AAT Act. Although it is clear that standing to apply for review is intended to be so restricted, no explanation is given in the explanatory memorandum for this restriction.

**In light of the absence of explanatory material providing a justification for these provisions, the committee seeks the Minister's advice as to the rationale for the proposed approach in subclauses 122(2) and 122(3).**

*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.*

*Note:* Subclause 122(4) appears to refer to subsection (2) in error. It appears that the correct reference should be to subsection (3).

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

### **Delegation of legislative power**

#### **Clause 125**

Subclause 125(1) provides that the Minister may make a record of, use, or disclose protected information (including personal information) in accordance with the regulations and impose conditions on any record, use or disclosure of protected information. Subclause 125(2) provides that the Minister may publish, in any manner he or she thinks fit, protected information (except personal information). Subsection (3) provides that the regulations may prescribe the following matters: (a) the person or body to whom protected information may be disclosed, the purposes for which protected information may be recorded, used, or disclosed and the conditions on any record, use or disclosure of protected information. Subclause 130(2) provides that the general regulation-making power includes the power to prescribe penalties for making records of, using or disclosing protected information.

The explanatory memorandum does not address the question of whether clause 125 provides adequate protection of individual privacy. Although the regulations *may* provide for adequate protection, clause 124 authorises disclosure regardless of whether any adequate protections are included in the regulations. **The committee is concerned about the delegation of important matters and the potential impact on privacy and requests a detailed explanation from the Minister as to how individual interests in personal privacy will be adequately protected under the proposed approach to the disclosure of information obtained under or for the purposes of this Act.**

*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.*

**Standing appropriation  
Clause 126**

In its *Fourteenth Report of 2005*, the committee stated (at 272) that:

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

The committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary and also looks to other circumstances such as a cap on the funding or a limitation on the period during which it applies. **In this instance the explanatory memorandum does not explain why a standing appropriation is necessary, so the committee seeks the Minister's explanation 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 Amendment (Simple Corporate Bonds and Other Measures) Bill 2013**

*[Digest 5/13 – awaiting response]*

On 28 May 2013 the Minister for Financial Services and Superannuation (Mr Shorten) tabled a replacement explanatory memorandum and the bill was read a third time. The committee has no comment on the additional material.

**Fair Work Amendment Bill 2013**

*[Digest 4/13 – no comment]*

On 6 June 2013 the House of Representative agreed to 19 Government amendments and the Minister for Employment and Workplace Relations (Mr Shorten) tabled a supplementary memorandum and a further supplementary memorandum, and the bill was read a third time.

**Trespass on personal rights and freedoms—fair hearing**  
**Item 6, section 376; item 19, section 780**

The explanatory memorandum states that this replacement section for the existing section 376 ‘will provide a strong deterrent for lawyers and paid agents from encouraging parties to bring or continue speculative general protections disputes they know have no reasonable prospect of success’. The provision, it is explained, will also ‘deter lawyers or paid agents from unreasonably encouraging a party to defend a general protections dispute with no reasonable prospect of success’. This deterrent is ‘stronger’ than that in the current provision ‘as it will make lawyers and paid agents subject to the possibility of adverse costs orders even if they are not granted, or do not seek, permission to represent the party in the dispute before the FWC’ (at 17). The SOC argues that this, and other measures in the amendments, will not prevent genuine claims from being pursued but will provide a deterrent against unreasonable conduct during proceedings’ (at 7). A similar issue also arises in relation to item 19, new section 780.

It should be noted that the possibility of costs orders being made against lawyers and paid agents—even if limited to unreasonable actions—has the potential to affect the capacity of persons to access advice or the nature of the advice given. The extent of any such an impact is, however, is uncertain.

Nevertheless, in the committee's view the Senate’s consideration of the appropriateness of the provision would be assisted by the presentation of evidence concerning the extent of the problem to which this provision is addressed. Without such evidence it is difficult to assess the necessity for strengthening the deterrent purpose of this provision. **The committee therefore seeks the Minister's advice on 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.*

**Family Assistance and Other Legislation Amendment Bill 2013**

*[Digest 2/13 – no comment]*

On 29 May 2013 the House of Representatives agreed to eight Government amendments and the Minister for Families, Community Services and Indigenous Affairs (Ms Macklin) tabled a supplementary explanatory memorandum, and the bill was read a third time. The committee has no comment on the additional material.

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

*[Digest 14/12 – response in 2/13 Report]*

On 16 May 2013 the Senate agreed to three Government amendments and the Parliament Secretary for Pacific Island Affairs (Senator Thistlethwaite) tabled a supplementary explanatory memorandum. On the same day the House of Representative agreed to the Senate amendments and the bill was passed. The committee has no comment on the additional material.

**Parliamentary Service Amendment (Parliamentary Budget Officer) Bill 2013**

*[Digest 4/13 – no comment]*

On 28 May 2013 the House of Representatives agreed to 13 Government amendments and the Parliamentary Secretary to the Treasurer (Mr Ripoll) tabled a supplementary explanatory memorandum, and the bill was read a third time. The committee has no comment on the additional material.

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

*[Digest 1/13 – no response required]*

On 15 May 2013 the House of Representatives agreed to 36 Government amendments and the Minister for Financial Services and Superannuation (Mr Shorten) tabled two supplementary explanatory memoranda and a correction to the supplementary explanatory memorandum. The committee has no comment on the additional material.

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

*[Digest 2/13 – no comment]*

On 29 May 2013 the House of Representative agreed to four Government amendments and the Assistant Treasurer (Mr Bradbury) tabled two supplementary explanatory memoranda and the bill was read a third time. The committee has no comment on the additional material.

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

*[Digest 6/13]*

On 6 June 2013 the House of Representatives agreed to six Government amendments and the Assistant Treasurer (Mr Bradbury) tabled two supplementary memoranda, and the bill was read a third time. 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***

**Early Years Quality Fund Special Account Bill 2013** — clause 5 (**SPECIAL ACCOUNT**: CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*)

**Public Governance, Performance and Accountability Bill 2013** — subclauses 58(7), 78(4), and 105(3), and clauses 77 and 80

**Sugar Research and Development Services Bill 2013** — subclause 7(1)

**Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013** — Schedule 4, Part 1, item 1, subsection 4BA(5); Schedule 4, Part 2, item 5, Part VC, Division 2, subsection 22SC(3)

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

Nil