

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



**Alert Digest**

**No. 2 of 2010**

**24 February 2010**



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# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator D Cameron

Senator J Collins

Senator R Siewert

Senator the Hon J Troeth

## 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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## **Antarctic Treaty (Environment Protection) Amendment Bill 2010**

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Environment, Heritage and the Arts

### **Background**

This bill amends the *Antarctic Treaty (Environment Protection) Act 1980* ('the Act') to implement Australia's international obligations arising from revisions made to Annex II to the *Protocol on Environmental Protection to the Antarctic Treaty* [1998] ATS 6 ('the Madrid Protocol').

The Madrid Protocol is a multilateral agreement under the *Antarctic Treaty* [1961] ATS 12. It commits parties to the comprehensive protection of the Antarctic environment and its dependent and associated ecosystems, and designates Antarctica as a natural reserve, devoted to peace and science. Annex II outlines provisions for the conservation of Antarctic fauna and flora.

The primary purpose of the amendments to Annex II is to extend the protection afforded to Antarctic native fauna and flora by creating a number of provisions to better regulate the taking of native fauna and flora, and through reducing the risk to native fauna and flora from the introduction of non-indigenous organisms.

### **Commencement**

#### **Item 2**

This item provides for commencement of the Act to be linked to the day on which Measure 16 comes into force in Australia. Measure 16 was adopted by the XXXIInd Antarctic Treaty Consultative Meeting at Baltimore on 17 April 2009 and contains the *Amendment of Annex II to the Protocol on Environmental Protection to the Antarctic Treaty*.

The explanatory memorandum does not provide further details about the commencement process and the possible timeframe is unclear. Information on the Secretariat of the Antarctic Treaty website indicates that commencement of Measure 16 is currently expected on 17 April 2010. If commencement of Measure 16 is delayed, it could lead to delayed commencement of this Act.

The Committee understands the link between commencement and Measure 16, but would prefer that the explanatory memorandum contained more information about the commencement process.

*The Committee makes no further comment on the item.*

### **Reversal of onus**

#### **Schedule 1, proposed subsections 19AC(2) and (3), 19AD(4) and 19AE(3) and (5)**

As a general principle in criminal law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt. This is reflected in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. However, the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum. This is especially the case where the standard of proof is 'legal' (on the balance of probabilities) rather than 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out). In both circumstances, if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

In this bill proposed subsections 19AC, 19AD and 19AE create new offences about dealing with organisms and food appropriately in the Antarctic which all attract penalties of up to 2 years imprisonment or 120 penalty units or both. In each case there are circumstances outlined in which it is stated that the provision creating the offence 'does not apply'. For example, subsection 19AC(1) will make it an offence to introduce an organism into the Antarctic that is not indigenous to the area. However, this does not apply if the organism

is brought in for use as food (19AC(2)(a)), the person has taken all reasonable precautions to prevent the introduction (19AC(2)(b)) or in an emergency (19AC(3)).

These 'do not apply' provisions are not specifically framed as defences and are not described as such in the explanatory memorandum. However, it appears to the Committee that these provisions will operate, in effect, like defences and place the burden of proof for these matters on the defendant. As it seems likely that the details of these matters are peculiarly within the knowledge of the defendant, the Committee agrees that the burden of adducing evidence of that defence or matter might be placed on the accused. However, the Committee considers that it is desirable that the level of burden of proof the defendant is expected to meet is articulated in each provision (ie an 'evidential' burden or 'legal' burden in each case) and that the explanatory memorandum describes the reason for the reversal of onus in each case.

Therefore, the Committee **seeks the Minister's advice** on the rationale for the current approach in these proposed subsections; whether the recommendations in the *Guide* were considered in the drafting of these provisions; whether the onus of establishing these matters rests with the defendant; whether the applicable legal burden intended to apply to the defendant can be articulated in the bill for each proposed subsection; and whether more information about these matters can be included in the explanatory memorandum.

*Pending the Minister's advice, 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 Climate Change Regulatory Authority Bill 2010**

Introduced into the House of Representatives on 2 February 2010

Portfolio: Climate Change and Water

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill establishes the Australian Climate Change Regulatory Authority (Authority) as a statutory authority. The Authority will be responsible for administering the Carbon Pollution Reduction Scheme, the Renewable Energy Target, and the National Greenhouse and Energy Reporting System.

This bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009 and negatived in the Senate on 13 August 2009 and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009. The Committee commented on the original bill in *Alert Digest No. 6 of 2009*, seeking advice from the Minister in relation to a number of issues. The Minister's response to these issues is contained in the Committee's *Seventh Report of 2009*. Please refer to *Alert Digest No. 6 of 2009* and the *Seventh Report of 2009* for further information.

*The Committee has no further comment on this bill.*

## Australian Research Council Amendment Bill 2010

Introduced into the House of Representatives on 4 February 2010  
Portfolio: Innovation, Industry, Science and Research

### Background

This bill makes funding adjustments in the *Australian Research Council Act 2001* (the Act) that will allow the Australian Research Council to implement its funding Budget Initiatives, an Australian Government Initiative resulting from the 2020 Summit and apply indexation against existing schemes.

This funding supports three funding initiatives which include: the *Research in Bionic Vision Science and Technology*, *Super Science Fellowships* scheme and continued funding for *National ICT Australia*.

Specifically the bill alters three existing financial year funding figures and extends the forward estimate period to 2013, resulting in additional spending of \$886.6 million over the four financial years.

*The Committee has no comment on this bill.*

## **Carbon Pollution Reduction Scheme Amendment (Household Assistance) Bill 2010**

Introduced into the House of Representatives on 2 February 2010

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill is linked to the package of legislation giving effect to the national emissions trading scheme. The bill amends the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Income Tax Assessment Act 1997*, the *A New Tax System (Family Assistance) Act 1999*, the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Veterans' Entitlements Act 1986*, the *Military Rehabilitation and Compensation Act 2004*, the *Income Tax Assessment Act 1936* and the *Medicare Levy Act 1986* to assist low and middle-income households with expected increases in the cost of living arising from the introduction of the Carbon Pollution Reduction Scheme.

The bill provides for increases to pensions, benefit and allowance payments and family tax benefit; and also provides for additional tax offsets and for transitional payments to independent adults in low-income households who do not receive sufficient assistance from other measures set out in the bill and in the Pension Reform Act.

This bill is substantively similar to a bill introduced into the House of Representatives on 28 May 2009, negated in the Senate on 13 August 2009, and reintroduced into the House of Representatives on 22 October 2009 and negated in the Senate on 2 December 2009. This 2010 bill does contain new dollar amounts and percentages for calculating entitlements, in addition to new provisions relating to the *Social Security Act 1991* (Schedule 2). However, these new provisions do not give rise to any new concerns beyond that upon which the Committee commented in *Alert Digest No. 6 of 2009*. Please refer to *Alert Digest No. 6 of 2009* for further information.

*The Committee has no further comment on this bill.*

## Carbon Pollution Reduction Scheme Bill 2010

Introduced into the House of Representatives on 2 February 2010

Portfolio: Climate Change and Water

### Background

As the main bill in the package of 11 bills relating to the Carbon Pollution Reduction Scheme, this bill gives effect to Australia's obligations to reduce greenhouse gas emissions under the United Nations Framework Convention on Climate Change and the Kyoto Protocol. The bill contains the detailed framework of the national emissions trading scheme. The simplified outline in the bill explains that:

- This bill sets up a scheme to reduce pollution caused by emissions of carbon dioxide and other greenhouse gases.
- The scheme begins on 1 July 2011, and operates on a financial year basis.
- The scheme is administered by the Australian Climate Change Regulatory Authority.
- A person who is responsible for greenhouse gas emitted from the operation of a facility must surrender one eligible emissions unit for each tonne of carbon dioxide equivalence of the gas.
- A person who imports, manufactures or supplies synthetic greenhouse gas must surrender one eligible emissions unit for each tonne of carbon dioxide equivalence of the gas.
- A person who imports, produces or supplies eligible upstream fuel must surrender one eligible emissions unit for each tonne of carbon dioxide equivalence of the potential greenhouse gas emissions embodied in the fuel.
- Each of the following units are eligible emissions units:
  - (a) Australian emissions units issued under this Act;
  - (b) certain Kyoto units;

- (c) certain non-Kyoto international emissions units.
- Most Australian emissions units will be issued as the result of an auction.
- A national scheme cap limits the total number of auctioned Australian emissions units.

With three significant exceptions, this bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009 and negated in the Senate on 13 August 2009 and reintroduced into the House of Representatives on 22 October 2009 and negated in the Senate on 2 December 2009.

The Committee commented on the original bill in *Alert Digest No. 6 of 2009*, seeking advice from the Minister in relation to a number of issues. The Minister's response to these issues is contained in the Committee's *Seventh Report of 2009*. Please refer to *Alert Digest No. 6 of 2009* and the *Seventh Report of 2009* for further information.

The major differences between the May and October bills considered by the Senate last year and the current bill are the introduction of significant material in relation to coal mining (Part 8A), a domestic offsets program (Part 11A) and the domestic offsets integrity committee (Part 25A). This new material gives rise to some concerns, but they are similar to those to which the Committee has drawn attention in the past.

*The Committee has no further comment on this bill.*

## **Carbon Pollution Reduction Scheme (Charges— Customs) Bill 2010**

Introduced into the House of Representatives on 2 February 2010  
Portfolio: Climate Change and Water

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill allows for the imposition of charges for the issue of Australian emissions units as the result of an auction, or for a fixed charge, if the charges are taxation and duties of customs within the meaning of section 55 of the Constitution.

This bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009, negatived in the Senate on 13 August 2009, and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009. The Committee commented on the original bill in *Alert Digest No. 6 of 2009*. Please refer to *Alert Digest No. 6 of 2009* for further information.

*The Committee has no further comment on this bill.*

## **Carbon Pollution Reduction Scheme (Charges— Excise) Bill 2010**

Introduced into the House of Representatives on 2 February 2010  
Portfolio: Climate Change and Water

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill allows for the imposition of charges for the issue of Australian emissions units as the result of an auction, or for a fixed charge, if the charges are taxation and duties of excise within the meaning of section 55 of the Constitution.

This bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009, negatived in the Senate on 13 August 2009, and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009. The Committee commented on the original bill in *Alert Digest No. 6 of 2009*. Please refer to *Alert Digest No. 6 of 2009* for further information.

*The Committee has no further comment on this bill.*

## **Carbon Pollution Reduction Scheme (Charges— General) Bill 2010**

Introduced into the House of Representatives on 2 February 2010  
Portfolio: Climate Change and Water

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill allows for the imposition of charges for the issue of Australian emissions units as the result of an auction, or for a fixed charge, if the charges are taxation within the meaning of section 55 of the Constitution but are neither duties of customs nor duties of excise.

This bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009, negatived in the Senate on 13 August 2009, and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009. The Committee commented on the original bill in *Alert Digest No. 6 of 2009*. Please refer to *Alert Digest No. 6 of 2009* for further information.

*The Committee has no comment on this bill.*

## **Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2010**

Introduced into the House of Representatives on 2 February 2010

Portfolio: Climate Change and Water

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill contains consequential amendments to the *National Greenhouse and Energy Reporting Act 2007*, and to taxation legislation, to provide the basis for emissions reporting required under the scheme.

The bill also contains transitional provisions that are necessary as the result of amendments which will transfer the functions of the Greenhouse and Energy Data Officer under the *National Greenhouse and Energy Reporting Act 2007* and the Renewable Energy Regulator under the *Renewable Energy (Electricity) Act 2000* to the Australian Climate Change Regulatory Authority.

With two significant exceptions, this bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009 and negatived in the Senate on 13 August 2009 and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009.

The Committee commented on the original bill in *Alert Digest No. 6 of 2009*, seeking advice from the Minister in relation to an issue. The Minister's response to this issue is contained in the Committee's *Seventh Report of 2009*. Please refer to *Alert Digest No. 6 of 2009* and the *Seventh Report of 2009* for further information.

The major differences between the May and October bills considered by the Senate last year and the current bill are the inclusion of transitional material relating to employees transferring to the Australian Climate Change

Regulatory Authority (Schedule 1, items 94A and 94B) and new provisions amending *the Income Tax (Transitional Provisions) Act 1997* (Schedule 2, item 50A) . This new material does not gives rise to any concerns.

*The Committee has no further comment on this bill.*

## **Carbon Pollution Reduction Scheme (CPRS Fuel Credits) Bill 2010**

Introduced into the House of Representatives on 2 February 2010

Portfolio: Treasury

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill seeks to implement a Carbon Pollution Reduction Scheme fuel credit program to provide transitional assistance to eligible industries such as agriculture, fishing, forestry and heavy on-road transport industries, and gaseous fuel suppliers (who will not benefit from the 'cent-for-cent' fuel tax reduction made under the Excise Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2009).

Noting the inclusion of forestry activities in the 2010 version, this bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009, negatived in the Senate on 13 August 2009, and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009. The Committee commented on the original bill in *Alert Digest No. 6 of 2009* and the new material does not give rise to any new concerns. Please refer to *Alert Digest No. 6 of 2009* for further information.

*The Committee has no further comment on this bill.*

## **Carbon Pollution Reduction Scheme (CPRS Fuel Credits) (Consequential Amendments) Bill 2010**

Introduced into the House of Representatives on 2 February 2010  
Portfolio: Treasury

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill amends the *Fuel Tax Act 2006*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* as a consequence of the introduction of the Carbon Pollution Reduction Scheme (CPRS Fuel Credits) Bill 2009 and other administrative arrangements announced by the Federal Government.

This bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009, negatived in the Senate on 13 August 2009, and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009. The Committee commented on the original bill in *Alert Digest No. 6 of 2009*. Please refer to *Alert Digest No. 6 of 2009* for further information.

*The Committee has no further comment on this bill.*

## ComSuper Bill 2010

Introduced into the House of Representatives on 4 February 2010

Portfolio: Finance and Deregulation

### Background

This bill is a part of a package of three bills which give effect to Government decisions in 2008 and 2009 to establish governance arrangements for the Commonwealth superannuation schemes that are effective and consistent with the broader superannuation industry.

The bill will establish ComSuper as a statutory agency for the purposes of the *Public Service Act 1999*, consisting of a Chief Executive Officer (CEO) and staff. The CEO, an independent statutory officeholder, will be the head of ComSuper. ComSuper will also be a prescribed agency for the purposes of the *Financial Management and Accountability Act 1997*, and that Act will apply to the operations of the agency.

### ‘Henry VIII’ clause

#### Possible insufficient Parliamentary scrutiny

#### Part 3, Division 1, item 8(6)

This item provides that regulations may provide that subsections (1) and (3) outlining the CEO's functions (in relation to the Public Sector Superannuation Accumulation Plan only) operate subject to modifications prescribed in the regulations or cease to have effect at a specified time. These are ‘Henry VIII’ clauses.

A ‘Henry VIII’ clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to ‘Henry VIII’ clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

The Committee notes that the explanatory memorandum states that 'it is intended that this provision has sufficient flexibility to allow the administration of PSSAP to be outsourced to the available competitive market.' The usual scrutiny and disallowance mechanisms will apply to any regulations made under the provision.

Nonetheless, the Committee is concerned that a future decision to outsource the administration of a government superannuation scheme established by an Act of Parliament should be implemented by a future Act of Parliament. The Committee therefore **seeks the Minister's advice** on whether a decision to outsource the administration of the PSSAP will be made in primary legislation; and whether it is appropriate for this power in item 8(6) to be delegated to subordinate legislation.

*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.*

## **Corporations Amendment (Financial Market Supervision) Bill 2010**

Introduced into the House of Representatives on 10 February 2010

Portfolio: Treasury

### **Background**

Introduced with the Corporations (Fees) Amendment Bill 2010, the bill amends the *Corporations Act 2001* (the Act) to provide for the Australian Securities and Investment Commission (ASIC) to supervise trading on financial markets with a domestic Australian market licence. The bill contains three key measures:

- removes the obligation on Australian market licensees to supervise their markets, replacing it with an obligation to monitor and enforce compliance with the markets' operating rules;
- provides ASIC with the function of supervising domestic Australian market licensees; and
- provides ASIC with additional powers including the power to make rules with respect to trading on such markets and additional powers to enforce such rules.

### **Delayed commencement**

#### **Clause 2**

Subclause 2(1) contains the table of commencement information and provides that Schedule 1 commences on a day 'to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months' after Royal Assent then they are repealed. This could lead to a situation in which commencement of the bill is delayed by longer than six months.

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3. The explanatory memorandum provides (at 1.13) that:

The 12 month time period for commencement is necessary, as there is a considerable amount of transitional work to be done in order for ASIC to be capable of performing the supervisory functions, including acquiring the necessary systems. This has the potential to take a significant amount of time and possibly longer than six months but less than a year.

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

**Wide discretion  
Insufficient parliamentary scrutiny  
Schedule 1, proposed section 798G**

The bill provides that ASIC may, by legislative instrument, make rules that deal with a wide range of circumstances relating to the activities or conduct of licensed markets and associated people and financial products. A market integrity rule may include a penalty of up to \$1 million and ASIC must obtain the written consent of the Minister to the making of the rule, usually before the rule is made except in emergency circumstances.

The explanatory memorandum states (at p. 11) that:

The regime is designed to be flexible and to allow ASIC to make rules to cover new and emerging issues as the market adapts and innovates, while also recognising that every market is different and needs operating rules tailored to the specifics of that market.

A breach of a market integrity rule will be a breach of a civil penalty provision of the Act, and subject to a pecuniary penalty of up to \$1 million. ASIC will set a penalty amount for the breach of a market integrity rule where it is appropriate to do so. This reflects the broad range of matters which the market integrity rules are expected to cover. Some rules will relate to minor and technical or procedural matters and it will be appropriate that a lower penalty level, or no penalty, attach to those rules.

The Committee's preference is usually that matters of such significance (in this instance potentially attracting a penalty of up to \$1 million) would be identified in more detail in the primary legislation and be subject to full parliamentary scrutiny.

The Committee acknowledges the exceptional circumstances, the reasons outlined in the explanatory memorandum and the requirement for ministerial

consent before a market integrity rule can be made. The Committee also recognises the fact that a rule will be a legislative instrument subject to the scrutiny and disallowance regime provided by the *Legislative Instruments Act 2003* and the fact that the bill appears to be seeking to formalise in legislation what is a clear policy decision. As a result, the Committee **leaves to the Senate as a whole** the question of whether it is appropriate for ASIC to have the ability to make market integrity rules.

However, the Committee remains concerned from a scrutiny perspective that the bill does not contain general minimum requirements or a framework for the content of any market integrity rules, such as that each rule must: specify the purpose of the rule; specify to whom the rule applies (individuals and/or bodies corporate, is collective responsibility permitted); detail the conduct the subject of the rule, with each element in separate paragraphs to aid clarity; explain if fault is required or excluded in clear terms; ensure that the penalty, if any, is adequate and appropriate; and detail whether any time limits apply. Therefore, the Committee **seeks the Treasurer's advice** on whether consideration can be given to providing ASIC with more legislative guidance about the content of any market integrity rules.

*Pending advice from the Treasurer, the Committee draws Senators' attention to the provision, as it 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.*

### **'Henry VIII' clause**

#### **Schedule 1, item 14, section 798L and item 34, section 1513**

Item 798L provides that regulations may exempt a person or class of persons and financial markets from the operation of proposed Part 7.2A of the bill (*Supervision of financial markets*), or varied its applications as specified in the regulations. This is a 'Henry VIII' clause.

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to

amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

While the Committee does not condone the use of 'Henry VIII' clauses, it notes that explanatory memorandum explicitly states (at p.14) that:

The Bill provides for regulations to be able to make exemptions from and modify the legislation. Provisions which allow similar exemption and modification are spread throughout the Act. Including such a provision in this new Part is in line with the construction of the Act and similar provisions applying in respect of existing Parts. This regulation making power is needed to allow the framework to develop to meet innovations in the market. The financial market is by nature fluid and it may be necessary to apply the rules differently to different entities. If it becomes clear that this is necessary, the rules may need to be modified swiftly to ensure the integrity of the market is maintained. The regulation making power will allow the framework to adapt quickly to developments in the market.

Item 1513 will allow regulations to provide for transitional arrangements and the provision specifically states that these 'may modify provisions of this Act.' The explanatory memorandum states (at p.14) that the ability to implement transitional arrangements 'will be important if practical issues arise over the coming months with the transfer of responsibility for supervision from market operators to ASIC.'

The usual scrutiny and disallowance mechanisms will apply to any regulations made under these provisions.

The Committee considers that proposed sections 798L and 1513 may inappropriately delegate legislative powers but, given the detailed reasons stated in the explanatory memorandum, **leaves for the Senate as a whole** the question of whether it does so unduly.

### **Review of decisions**

#### **Schedule 1, item 24**

This item excludes decisions relating to market integrity rules (such as ASIC's decision to make a market integrity rule) from review of the Administrative Appeals Tribunal (AAT). The explanatory memorandum (at p.15) states that:

It is appropriate that such decisions are not subject to review by the AAT, as the decisions excluded are more akin to policy and rule-making decisions and should not be subject to merit review.

Since the bill appears to be seeking to implement what is a clear policy decision, the Committee **leaves to the Senate as a whole** any further consideration of this issue.

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

**Retrospective application**  
**Omission in explanatory memorandum**  
**Schedule 1, item 34, proposed subsection 1512(1)**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

Proposed section 1512(1) provides that items 2, 5 to 11, 14, 17 and 18 of Schedule 1 'apply in relation to Australian market licences granted before, on or after commencement'. Although the reason for this approach can be inferred from the nature of the legislation the Committee notes that – despite the reference to *Schedule 1, item 34, section 1512* at p. 14 of the explanatory memorandum – there does not appear to be a detailed statement about the justification for proposed section 1512(1). The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by a detailed explanation of the intent and operation of proposed amendments. The Committee **draws to the attention of the Treasurer** the lack of detailed explanation of this item.

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

The Committee notes the possibility that this bill will be referred to a legislation or select Committee for inquiry and report. In that event, and given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee so they may be taken into account during that inquiry.

## Corporations (Fees) Amendment Bill 2010

Introduced into the House of Representatives on 10 February 2010

Portfolio: Treasury

### Background

Introduced with the Corporations Amendment (Financial Market Supervision) Bill 2010, the bill is a supporting bill which contains amendments regarding chargeable matters in support of the measures in the Corporations Amendment (Financial Market Supervision) Bill 2010. This is required to be in a separate bill for constitutional reasons as a bill imposing taxation.

The bill amends the *Corporations (Fees) Act 2001* to allow a fee to be charged to market operators in respect of market supervision functions which the main Bill vests in the corporate regulator Australian Securities and Investment Commission (ASIC).

### Wide delegation

#### Schedule 1, Items 3 and 4

In accordance with the 1997 Wallis Inquiry recommending that the costs of financial regulation should be borne by those who benefit from it, the *Corporations (Fees) Act 2001* provides that regulations may prescribe fees for defined *chargeable matters*. In relation to these fees, any such regulation can specify either an amount as the fee or a method for calculating the amount of the fee and the fee 'need not bear any relationship' to the cost of the *chargeable matter*.

Similarly, item 4 of this bill seeks to provide that the regulations to the Act may also prescribe fees in relation to ASIC's proposed new role to supervise trading on domestic Australian markets.

However, the existing ability to prescribe fees by regulation authorised by the *Corporations (Fees) Act 2001* is limited by the section 6 caps on the amount or sum of the fees chargeable.

The Committee notes that the effect of item 3 means that there is no limit proposed for the fee or the sum of the fees that will be chargeable under the new section 6A power. The explanatory memorandum (at p.15) acknowledges that the bill places no cap on the amount ASIC can charge and states that this is because the cost to supervise the market will change dramatically in response to the number of market participants and the volume of trades performed. The explanatory memorandum also says (at p. 15) that:

The formula for calculation of the levy on market operators will be set out in the Regulations and will be consulted upon with industry before being introduced.

The clauses are clearly designed to allow the imposition of fees by regulation of any amount in relation to ASIC's proposed new financial market supervision function. As a result, as is its practice, the Committee **leaves to the Senate as a whole** the question of whether it is appropriate for the bill to have this effect.

*In the circumstances, the Committee makes no further comment about this approach.*

## **Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010**

Introduced into the House of Representatives on 4 February 2010  
Portfolio: Home Affairs

### **Background**

This bill amends the *Australian Crime Commission Act 2002*, the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

The bill seeks comprehensive coverage of sexual offences against children by ensuring that all behaviour relating to sexual offences against or involving children criminalised within Australia is also criminalised when committed by Australians overseas, including reflecting best practice approaches domestically and internationally. The bill:

- strengthens the existing child sex tourism offence regime
- introduces new offences for dealing in child pornography and child abuse material overseas
- introduces new offences for using a postal service for child sex-related activity
- enhances the coverage of offences for using a carriage service for sexual activity with a child or for child pornography or child abuse material
- makes minor consequential amendments to ensure existing law enforcement powers are available to combat Commonwealth child sex-related offences, and
- introduces a new scheme to provide for the forfeiture of child pornography and child abuse material and items containing such material.

### **Absolute liability**

#### **Schedule 1, item 4 (subsections 272.8(4), 272.9(4), 272.12(4), 272.13(4), 272.14(2), 272.15(2), 471.27(1) and (2)), 475.1B(2) and item 45**

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to the attention of Senators any provisions in bills which create strict and absolute liability offences. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

Schedule 1 of the bill contains many new serious offence provisions. Several of these provisions impose absolute liability for some aspects of the offences. Examples relate to what is described as a 'physical element' (that a child is under 16 or has a mental impairment) and a 'jurisdictional component' (that the conduct occurred overseas or a carriage service was used to engage in conduct).

For example, proposed new section 272.8 of the bill seeks to make it an offence for an Australian to engage in sexual intercourse with a child, or to cause a child to engage in sexual intercourse with another person, outside Australia. Subsection 272.8(4) specifies that the fault standard for the physical elements of both offences in paragraphs 272.8(1)(b) and (c) and 272.8(2)(c) and (d), that the child is under 16 and that the sexual intercourse is engaged in outside Australia, will be absolute liability.

In relation to absolute liability for the element that the child was under 16 the explanatory memorandum states that it is 'appropriate and required...given the intended deterrent effect of these offences and the availability of the specific 'belief about age' defence available. Similarly, the physical element of the age of a person (that a person is under 16, between 16 and 18, or over 18 depending on the provision) attracts absolute liability as set out in subsections 272.9(4), 272.12(4), 272.13(4), 272.14(2), 272.15(2), 471.27(1) and (2) and item 45.

In relation to the element that the activity was engaged in outside Australia the explanatory memorandum explains that 'absolute liability is appropriate and required...because this element is a jurisdictional element of the offence that does not relate to the substance of the offence'. This is said to be consistent with Commonwealth criminal law practice as described in the *Guide*. Similar elements attract absolute liability as set out in subsections 272.13(4), 272.14(2), 272.15(2), 273.5(2) and 273.6(2).

Subsection 272.10(4) and Item 53 apply absolute liability to the element that a child has a mental impairment. The explanatory memorandum explains that this is appropriate because the defendant's belief about whether the child had a mental impairment is peculiarly within the knowledge of the defendant. In addition, a defence will be available under proposed subsection 272.10(6) based on a belief that the child did not have a mental impairment.

In relation to benefiting or encouraging an offence, subsection 272.18(3) applies absolute liability to the element that the conduct is reasonably capable of resulting in a benefit and 272.19(3) applies absolute liability to the element that the conduct is reasonably capable of encouraging such an offence. The explanatory memorandum explains in both cases that this is because the elements are objective facts 'established by reference to an objective standard that does not relate to culpability'.

Items 22 and 26 and proposed subsection 475.1B(2) provide that absolute liability applies to the element of offences that the person engaged in particular conduct using a carriage service. The explanation provided for this approach is that these are jurisdictional elements that do not relate to the substance of the offence. Whether a person intended to use a carriage service is not relevant to their culpability.

The Committee considers these are appropriate uses of absolute liability provisions that are consistent with the provisions of the *Guide*, and was pleased to see the detailed explanations provided in the explanatory memorandum.

*The Committee makes no further comment on these provisions.*

### **Strict liability**

#### **Schedule 1, item 4, subsection 272.10(5), 272.12(5), 272.13(5) and Item 53**

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to the attention of Senators any provisions in bills which create strict and absolute liability offences. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

Schedule 1 of the bill contains many new serious offence provisions. Several of these provisions impose strict liability for the physical element of some offences relating to whether the person was in a position of trust or authority in relation to the child or young person.

The explanatory memorandum notes that this approach is 'appropriate given it would be very unlikely that an offender was not aware that he or she was, for example, the child's teacher, doctor or sports coach'. The Committee acknowledges this explanation and notes that the application of strict liability leaves available the general defence of mistake of fact.

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

### **Retrospective application**

#### **Schedule 1, item 64**

Item 64 sets out the application of controlled operations provisions to child sex offences. The item states that:

The amendments made by items 62 and 63 apply in relation to a controlled operation authorised on or after the commencement of this item, whether the offence was committed before, on or after that commencement.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

In this case the explanatory memorandum states at p.108 that 'the item clarifies that a controlled operation will not be able to be authorised in relation to conduct that did not constitute an offence before the commencement of this item.'

The Committee notes that although item 64 does not explicitly state that a controlled operation cannot be authorised in relation to conduct that did not constitute an offence before the commencement of this item, it has this effect because the relevant new offences in Schedule 1 of this bill do not commence until the day after the new Act receives Royal Assent.

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

### **Retrospective application Schedule 1, subitems 78(2) and (3)**

These items seek to ensure that powers under the *Telecommunications (Interception and Access) Act 1979* are available to combat all Commonwealth child sex offences.

Although subitems 78(2) and (3) are framed so as to have retrospective operation in respect of the offences to which they refer, the explanatory memorandum outlines that in substance the conduct covered by these offences 'would have constituted an offence before the commencement of these amendments'. The Committee therefore does not have any concern about the retrospective application of these items.

*The Committee makes no further comment on these provisions.*

### **Reversal of onus of proof**

**Schedule 1, subsections 272.9(5), 272.10(6), 272.13(6), 272.16, 272.17, 273.9, 471.18, 471.21, 471.27(3), 471.29, 474.25A(4)**

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt, but the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum. This is especially the case where the standard of proof is 'legal' (on the balance of probabilities) rather than 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out). In both circumstances, if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

In this bill there are numerous instances of the use of defences which mean that the burden of proving that element is the responsibility of the defendant. Some of the defences require a 'legal' burden, and some an 'evidential burden'. In addition, proposed provisions 471.27(3) and 475.1B create presumptions which are effectively a legal burden defence.

The Committee is pleased to note that in each instance the explanatory memorandum confirms that placing the burden onto the defendant is appropriate because the relevant information is peculiarly within the knowledge of the defendant and not readily available to the prosecution.

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

The Committee notes that this bill has been referred to a legislation or select Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee so they may be taken into account during that inquiry.

## **Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010**

Introduced into the Senate on 3 February 2010

By Senator Xenophon

### **Background**

This bill is to amend the *Criminal Code Act 1995* to make it a criminal offence for a person over 18 years of age to intentionally misrepresent their age in communications with a person they reasonably believe to be under 18 years of age.

Under this bill if an adult intentionally lies to a minor about their age via an online communication they will have broken the law.

There are three offences under this bill, related to a person over 18 years of age misrepresenting their age to a person they believe to be under 18 years of age, with three maximum penalties – misrepresentation of one's age; misrepresentation of one's age to in order to make it easier to meet minor physically; and misrepresentation of one's age with the intention of committing an offence. The maximum penalties are three, five and eight years imprisonment, respectively.

### **Absolute liability**

#### **Schedule 1, subsection 474.41(1)**

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to the attention of Senators any provisions in bills which create strict and absolute liability offences. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

In this bill subsection 474.41 applies absolute liability to the physical element of the offence that the recipient is under 18 years of age. The Committee notes the explanation given in the explanatory memorandum for the application of absolute liability to ensure that it is consistent with existing offences in sections 474.26 and 474.27 of the Criminal Code.

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

### **Reversal of onus of proof Schedule 1, 474.41(2), 474.42**

The 2007 updated *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* notes at page 27 that:

In general, the prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. A matter should be included in a defence [or presumption] only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

The Committee supports the primary principle that a person is innocent until proven guilty, but also agrees that in the circumstances described in the *Guide* (and outlined above) the burden of adducing evidence of that defence or matter might be placed on the accused. However, the use of defences or presumptions, which impose this burden of proof on the accused, should be kept to a minimum. The Committee also notes that if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

In this bill there are some instances in proposed section 472.42 of the use of defences which mean that the burden of proving that element is the responsibility of the defendant. These defences impose an 'evidential' burden (which requires the defendant to point to evidence which suggests a reasonable possibility that the defence is made out). In addition, proposed subsection 474.41(2) creates a presumption, which is effectively a legal burden defence.

The Committee notes the explanatory memorandum advice that these provisions are modelled on existing Criminal Code provisions.

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

## **Customs Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2010**

Introduced into the House of Representatives on 2 February 2010

Portfolio: Home Affairs

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill amends the *Customs Tariff Act 1995* to ensure that reductions made to the excise rates on fuels (on a 'cent by cent' basis to offset the initial price impact on fuel of introducing the Carbon Pollution Reduction Scheme) will also apply to the relevant imported products. Where a relevant excise rate – as defined in the Excise Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2009 – is reduced, the bill will substitute the same rate to the excise-equivalent customs duty rates.

This bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009, negatived in the Senate on 13 August 2009, and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009. The Committee commented on the original bill in *Alert Digest No. 6 of 2009*. Please refer to *Alert Digest No. 6 of 2009* for further information.

*The Committee has no further comment on this bill.*

## **Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010**

Introduced into the House of Representatives on 11 February 2010  
Portfolio: Special Minister of State

### **Background**

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

The Joint Standing Committee on Electoral Matters (JSCEM) conducted an inquiry into the conduct of the 2007 federal election and the resulting report is entitled *Report on the conduct of the 2007 federal election and matters related thereto* (JSCEM Report). The bill contains amendments arising from the JSCEM Report and one additional measure relating to the number of candidates that can be endorsed by a political party in each Division which emerged as an issue at the 2009 Bradfield by-election and requires legislative amendment prior to the conduct of any subsequent federal elections.

Provisions in the bill will:

- restore the close of Rolls period to seven days after the issue of the writ for an election;
- repeal the requirement for provisional voters to provide evidence of identity before their votes are admitted to scrutiny;
- modernise enrolment processes to enable electors to update their enrolment details electronically;
- allow the Australian Electoral Commission (AEC) to manage its workload more efficiently by enabling enrolment transactions to be processed outside the Division for which the person is enrolling;
- enable pre-poll votes cast in an elector's 'home' Division to be cast and counted as ordinary votes, wherever practicable; and

- restrict the number of candidates that can be endorsed by a political party in each Division.

### **Wide delegation of power Schedule 4, items 3 and 188**

Item 3 provides that the Electoral Commissioner may delegate any enrolment powers and functions to 'any officer' and 'any other member of the staff of the Electoral Commission.' 'Enrolment powers and functions' are limited to functions under specified provisions of the *Commonwealth Electoral Act 1918* and the delegate must comply with any directions of the Electoral Commissioner.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case the explanatory memorandum (at p 17) provides a detailed statement of reasons for the approach, including that the approach is based on JSCEM recommendation 42, that the Electoral Commissioner will delegate to 'any suitable person or class of people in the AEC' and that the 'broad power to delegate enrolment-related powers and functions is required so that all staff and geographical locations can be utilised to derive maximum efficiency in enrolment processing.'

The Committee notes that the delegation is limited to a considerable degree by particularising the functions and the ability of the Electoral Commissioner to provide directions to a delegate. The explanatory memorandum states that the Commissioner's delegation is limited to 'enrolment-related functions such as entering a person's details on the electoral Roll or annotating an enrolment record to identify a special category elector, such as an eligible overseas elector.'

Item 188 is in similar terms to item 3, and the explanatory memorandum states that it 'amends the delegation power for the same reasons as discussed at item 3 for the purposes of the Referendum Act.'

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

## **Environment Protection and Biodiversity Conservation Amendment (Prohibition of Support for Whaling) Bill 2010**

Introduced into the Senate on 4 February 2010

By Senators Siewert and Abetz

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to create a new offence relating to support for whaling.

### **Trespass unduly on rights and liberties Schedule 1, item 1, proposed new section 229E**

The proposed section seeks to make it an offence if a person 'provides any service, support or resources to an organisation engaged in whaling'.

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4 deals with *Framing an offence*, and in particular Part 4.3 outlines matters which should be considered relating to the specificity of an offence and to separating the physical elements of an offence into paragraphs.

Item 1 seeks to make it an offence if a person 'provides any service, support or resources to an organisation engaged in whaling.' The explanatory memorandum states that the intention of the proposed section 'is to make unlawful the provision of any assistance to a whaling venture...'.

The Committee prefers that proposed offences are specific so that the parameters of the prohibited conduct are as clear as possible, but notes that the provision reflects the policy intent to capture any assistance given to whaling.

Since the bill appears to be seeking to implement what is a clear policy decision, the committee **leaves to the Senate as a whole** any further consideration of this issue.

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

## **Excise Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2010**

Introduced into the House of Representatives on 2 February 2009

Portfolio: Treasury

### **Background**

Part of a package of 11 bills in relation to the establishment of a national emissions trading scheme, this bill amends the *Excise Tariff Act 1921* to cut fuel taxes on a 'cent for cent' basis to offset the initial price impact on fuel of introducing the scheme. The first fuel tax reduction of 2.455 cents per litre will occur on 1 July 2011 with the commencement of the scheme.

This bill is substantively similar to a bill introduced into the House of Representatives on 14 May 2009, negatived in the Senate on 13 August 2009, and reintroduced into the House of Representatives on 22 October 2009 and negatived in the Senate on 2 December 2009. The Committee commented on the original bill in *Alert Digest No. 6 of 2009*. Please refer to *Alert Digest No. 6 of 2009* for further information.

*The Committee has no further comment on this bill.*

# Governance of Australian Government Superannuation Schemes Bill 2010

Introduced into the House of Representatives on 4 February 2009

Portfolio: Finance and Deregulation

## Background

This bill is part of a package of three bills giving effect to Government decisions in 2008 and 2009 to establish governance arrangements for the Commonwealth superannuation schemes that are effective and more consistent with the broader superannuation industry.

The bill gives effect to the Government's announcement in October 2008 to merge the Australian Reward Investment Alliance (ARIA), the Military Superannuation and Benefits Board (MSB Board) and the Defence Force Retirement and Death Benefits Authority (DFRDB Authority) to form a single trustee body from 1 July 2010.

## Explanatory memorandum

### Part 2, Division 1, Sub-clause 5(1)

Clause 5 of the bill seeks to exclude the Commonwealth Superannuation Corporation from the operation of section 15 of the *Commonwealth Authorities and Companies Act 1997*. The explanatory memorandum notes (at p. 9) that this section places an obligation on a Commonwealth authority to notify the responsible Minister of significant events. The explanatory memorandum states that the section 'will not apply in relation to the management and investment of scheme funds by CSC', but it does not articulate the reason for this approach.

The Committee **seeks the Minister's advice** on the reason for this approach and whether consideration can be given to including this information in the explanatory memorandum.

## Wide delegation of power

### Division 3, clause 35

This clause provides that CSC may delegate any or all of its powers under an Act administered by CSC or relevant regulations to a very broad range of persons, including a member of staff of CSC or ComSuper and APS employee in the department or a member of the Australian Defence Force. The clause also provides that sub-delegations are possible. The only limit on the power is that CSC may only delegate its power to reconsider its decisions, or decisions of its delegates, to specified committees.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices, persons with relevant qualifications or expertise, or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the explanatory memorandum (at p. 20) outlines the effect of the clause, but does not state why this wide delegation of power is necessary. Therefore, the Committee **seeks the Minister's advice** on the reasons for the wide delegation of power and whether consideration can be given to confining the powers delegated or limiting the delegation to members of the Senior Executive Service.

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

## Healthcare Identifiers Bill 2010

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Health and Ageing

### Background

The bill implements a national system for consistently identifying consumers and healthcare providers and to set out clear purposes for which healthcare identifiers can be used. The scheme originated from a February 2006 Council of Australian Governments (COAG) decision, which was reaffirmed in 2008 when COAG agreed to universally allocate a unique identifying number to each individual healthcare recipient in Australia.

On 7 December 2009, COAG signed a *National Partnership Agreement for E-Health*. This Agreement provides a framework for cooperative jurisdictional arrangements and responsibilities for e-health and sets out the objectives and scope for the Healthcare Identifiers Service, as well as relevant governance, legislative, administrative and financial arrangements.

The bill establishes arrangements for operating and maintaining the Healthcare Identifiers Service, including the conferral of functions on the Chief Executive Officer of Medicare Australia. These functions include:

- assigning, collecting and maintaining identifiers for individuals, individual healthcare providers and organisations by using information already held by Medicare Australia for its existing functions;
- collecting information from individuals and other data sources;
- developing and maintaining mechanisms for users to access their own records and correct or update details;
- using and disclosing healthcare identifiers and associated personal information, for the purposes of operating the Healthcare Identifiers Service; and
- disclosing healthcare identifiers for other purposes set out in the Bill.

The bill sets out the permitted purposes for which healthcare identifiers may be used or disclosed and the offences relating to the misuse of healthcare identifiers and penalties for breaches of the legislation. This provides a clear framework to support the proper use and disclosure of healthcare identifiers and ensures that any inappropriate handling of healthcare identifiers can be addressed.

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

### **Various**

Proposed subsection 9(1) provides that the service operator is authorised to assign a number to a healthcare provider or recipient and subsection 9(4) provides that service operator is 'not required to consider' whether the provider or recipient agrees. Another primary aspect of the bill involves outlining the circumstances in which the specified parties are 'authorised to disclose' healthcare identifier information between parties (various proposed sections including 16, 17, 18, 20 and 24).

The explanatory memorandum (at p.4) states that:

The inclusion of healthcare identifiers in a health records system or a patient's file will not change how and when healthcare providers share information about individuals...

This is framework legislation that restricts itself to establishing a system to assign one healthcare number and to share it in particular circumstances. It is clearly designed, however, to provide the foundation for further legislative and policy development in relation to individual health records. These are areas that have previously given rise to broad community concerns in relation to personal rights including in relation to privacy and the use of data matching; areas that have also been of concern to the Committee. Some of the issues raised are reminiscent of the 2006 'Access Card' project and the 1987 Australia Card legislation debate.

The Committee notes, however, that the bill is seeking to formalise in legislation what is a clear policy decision. As a result, as is its practice, the Committee **leaves to the Senate as a whole** the question of whether it unduly trespasses on personal rights and liberties.

The Committee notes the possibility that this bill will be referred to a legislation or select Committee for inquiry and report. In that event, and given

that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee so they may be taken into account during that inquiry.

**Administrative review**  
**Explanatory memorandum**  
**Proposed clauses 9**

Clause 9(5) provides that regulations may prescribe requirements for assigning healthcare identifiers 'including providing for review of decisions made under this section.' The explanatory memorandum at page 12 says that, because the decision to assign an identifier is procedural and does not affect the ability to deliver healthcare, the decisions about assigning healthcare identifiers 'will not be subject to administrative review.'

It appears to the Committee on the face of it that assigning a healthcare identifier number is primarily a mechanical process. However, the reference in proposed clause 9(5) to 'providing for review of decisions' implies that the process is not simply mechanical but involves a decision being made.

If it is a purely mechanical process the fact that the assignment of a number is not reviewable is not of concern to the Committee. However, the Committee's attention is captured by any indication that a decision-making power is not subject to appropriate review. The Committee therefore questions whether this proposed provision has the potential to have an impact on a person's rights and entitlements.

The Committee also notes that, while proposed clause 9(5) refers to the ability for regulations to provide for the review of decisions, the explanatory memorandum states that they 'will not be subject to administrative review.'

The Committee **seeks the Minister's advice** about whether there are circumstances in which a healthcare identifier would not be assigned; whether this would be to the detriment of any person; if so, whether the ability to review the decision should be included in the primary legislation; and whether the explanatory memorandum and proposed clause 9(5) are inconsistent.

## Reversal of onus of proof Item 15(2), 15(3) and 26(2)

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt, but the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum, take into account the December 2007 *Guide to Framing Commonwealth Offences, Civil Penalties, and Enforcement Powers*, and the explanatory memorandum should describe the reason for the reversal of onus in each instance. Whether the standard of proof is 'legal' (on the balance of probabilities) or 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out) if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

The bill outlines offences for circumstances in which a healthcare identifier is disclosed, but allows defences if the disclosure was appropriate. Items 15(2), 15(3) and 26(2) describe the elements of the defences and the Criminal Code (subsection 13.3(3)) has effect to apply an 'evidential' burden of proof on the defendant. The explanatory memorandum (at pp 15 and 20) repeats the terms of these provisions, but does not provide a justification for placing this initial burden of proof on the defendant. The Committee recognises that there are grounds for taking the approach in the bill as the relevant information is peculiarly within the knowledge of the defendant. However, the Committee prefers that ordinarily policy will take into account the December 2007 *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* and the explanatory memorandum will explain reversals to the onus of proof. The Committee **seeks the Minister's advice** about whether consideration can be given to addressing these matters in the explanatory memorandum.

## Wide delegation of power

### Part 7, subclause 39(2)

Subclause 39(2) provides that 'the regulations may provide for the imposition of a penalty (of not more than 50 penalty units) for contravention of a regulation.' At page 25 the explanatory memorandum repeats the terms of the subclause, but provides no other information about the proposed approach.

The December 2007 *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth, states at page 14 that:

The elements of an offence should be stated in the offence provision, not left to be provided for under another instrument, unless appropriate limitations apply.

The Committee notes the clause 33 requirement for the Minister to consult the Ministerial Council before a regulation is made. Although the regulations are subject to the usual disallowance procedures and any contravention regulations must be limited to a maximum of 50 penalty units, the Committee is concerned that there is no justification provided for delegating to regulations the ability to impose penalties. The Committee **seeks the Minister's advice** on the rationale for delegating this power.

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

The Committee notes the possibility that this bill will be referred to a legislation or select Committee for inquiry and report. In that event, and given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee so they may be taken into account during that inquiry.

## **Healthcare Identifiers (Consequential Amendments) Bill 2010**

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Health and Ageing

### **Background**

Introduced with the Healthcare Identifiers Bill 2010, the bill makes minor amendments to the *Health Insurance Act 1973* to authorise the Chief Executive Officer of Medicare Australia to delegate functions to officers to support the day-to-day running of the Healthcare Identifiers Service.

In addition, minor amendments to the *Privacy Act 1988* will provide for the Privacy Commissioner's role as the independent regulator of the Healthcare Identifiers Service.

*The Committee has no comment on this bill.*

## **Health Insurance Amendment (Pathology Requests) Bill 2010**

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Health and Ageing

### **Background**

This bill amends the *Health Insurance Act 1973* (the Act) to improve patient choice in respect of pathology services.

The bill amends the Act to remove the legislative requirement that, with the exception of a pathologist-determinable service, in order for a Medicare benefit to be payable for a pathology service rendered by or on behalf of an approved pathology practitioner, a request for the service must be made to that approved pathology practitioner or to the approved pathology authority who is the proprietor of the laboratory in which the service is rendered. There will still be a legislative requirement for a request to be made, but there will no longer be a requirement that the request be made to a particular approved pathology practitioner or authority.

*The Committee has no comment on this bill.*

## **Higher Education Support Amendment (FEE-HELP Loan Fee) Bill 2010**

Introduced into the House of Representatives on 10 February 2010

Portfolio: Education

### **Background**

This bill amends section 137-10(2)(a) of the *Higher Education Support Act 2003* to increase the amount of the FEE-HELP debt to 125 per cent of the loan.

The amendment will give effect to the recommendation of the Review of Australian Higher Education to increase the loan fee for FEE-HELP for fee paying undergraduate students to 25 per cent.

*The Committee has no comment on this bill.*

## **Higher Education Support Amendment (University College London) Bill 2010**

Introduced into the House of Representatives on 4 February 2009  
Portfolio: Education

### **Background**

This bill is to provide for an amendment to section 16-22 of the *Higher Education Support Act 2003* to list University College London as a Table C provider.

This amendment will allow University College London to offer FEE-HELP to eligible domestic students.

### **Retrospective application Schedule 1, item 2**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

Item 2 provides that the Act will be taken to have commenced from 1 January 2010. However, the explanatory memorandum states (at p.4) that the purpose of the retrospective commencement is 'to avoid disadvantaging students who may wish to see FEE-HELP assistance for a unit of study they undertake with the University College London during semester 1 of the 2010 academic year.'

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

## **Indigenous Education (Targeted Assistance) Amendment Bill 2010**

Introduced into the House of Representatives on 4 February 2009

Portfolio: Education

### **Background**

This Bill amends the *Indigenous Education (Targeted Assistance) Act 2000* (the IETA Act) to include additional appropriations announced in the 2009-10 Budget for the Sporting Chance program. The funding for the Budget measure Closing the Gap – Sporting Chance Program was included as an annual administered expense (Appropriation Act number 1). The bill will enable all the funding for the Sporting Chance Program to be administered under the IETA Act from 1 January 2010.

### **Retrospective application**

#### **Schedule 1, item 2**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

Item 2 provides that the Act will be taken to have commenced from 1 January 2010. The explanatory memorandum states (at p.3) that retrospective commencement is 'considered necessary to bring the additional funding to expand the Sporting Chance announced in the 2009-10 Budget, in line with other appropriations for that program.'

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

## **National Consumer Credit Protection Amendment Bill 2010**

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Treasury

### **Background**

This bill amends the *National Consumer Credit Protection Act 2009* to recognise certain exclusions to the scope of the amendment of power in the Proposed State Credit (Commonwealth Powers) Act and to enable an effective reference of State power to be made either with or without any exclusions to that power.

Amendments in the bill also allow States to refer regulatory powers in relation to consumer credit by 'adopting' the Commonwealth's legislation which will ensure constitutional soundness of the referral of consumer credit powers.

*The Committee has no comment on this bill.*

## **Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010**

Introduced into the House of Representatives on 10 February 2010

Portfolio: Resources and Energy

### **Background**

This bill makes minor policy and technical amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

In particular, the bill aims to:

- retain fees raised under the *Offshore Petroleum and Greenhouse Gas (Registration Fees) Act 2006* (the Registration Fees Act) to provide establishment funding for the National Offshore Petroleum Regulator (NOPR);
- augment the functions of the National Offshore Petroleum Safety Authority (NOPSA) to include regulatory oversight of non-OHS structural integrity for facilities, wells and well related equipment;
- clarify how titleholder provisions relating to making applications and requests and giving nominations and notices, and titleholder provisions establishing obligations will apply in relation to multiple titleholders;
- make certain offence provisions applying to titleholders, where the offence consists of a physical element (the doing of or failure to do an act), offences of strict liability;
- clarify that a titleholder's occupational, health and safety (OHS) responsibilities relate only to wells and not to facilities more generally; and
- update listed OHS laws in Section 638 and provide transitional arrangements.

**‘Henry VIII’ clause**

**Schedule 1, Part 3, item 12, proposed subsections 775D(2) and 775E(2)**

The explanatory memorandum states (at p.7) that proposed subsections 775D(1) and 775E(1) seek 'to clarify the requirements on titleholders where a title is owned by two or more title holders.' In each case proposed subsections 775D(2) and 775E(2) provide that regulations may exempt a specified obligation from the scope of the arrangements outlined.

A ‘Henry VIII’ clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to ‘Henry VIII’ clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

The explanatory memorandum states that the 'Henry VIII' clauses as to 'future-proof' provisions 775D and 775E. The Committee prefers that a more substantive explanation is provided when these clauses are used, but as these appear to be instances with very limited impact, makes no further comment.

**Strict liability**

**Schedule 1, Part 4, items 15, 17, 19, 21, 23, 25, 27, 29, 31, 32, 34 to 37, 39, 41, 42, 44 to 46 and 48 to 50**

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to the attention of Senators any provisions in bills which create strict and absolute liability offences. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

Part 4 of the bill seeks to amend numerous existing offences applying to titleholders in which the offence consists of only a physical element to make

them offences of strict liability. The explanatory memorandum notes that 'it is not proposed to amend offence provisions applying to titleholders that contain fault elements'. The specified offences relate to the obligations on titleholders relating to conduct such as reporting, notifications, complying with directions by the regulator and to meet expected work practices.

The explanatory memorandum provides refers to the *Guide*, and provides detailed commentary about the reasons for taking the approach in the bill. In particular, the notes the observation at p. 9 of the explanatory memorandum that given the remoteness of offshore petroleum and greenhouse gas operations:

...it is not physically possible for regulatory staff to directly and comprehensively monitor, with any frequency, the titleholders' activities. Thus regulatory staff are dependent on reporting by titleholders to confirm that they have complied with directions and requirements.

...

Given the regulators' dependence on titleholders for provision of accurate operational and monitoring data and information, any offence provision which requires proof of any level of fault on the part of titleholders is likely to be difficult or even impossible to enforce.

The Committee is cognisant that the bill is not seeking to increase any penalties on titleholders, and in some instances the bill removes imprisonment as a penalty and replaces this sanction with penalty units. The Committee is also aware that the application of strict liability also leaves available the general defence of mistake of fact.

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

### **Retrospective application**

#### **Schedule 1, Part 6, subsections 8A(4) to (6), 8B(4) to (6), 13A & 13B**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee considers that the reasons for the retrospectivity should be set out in the relevant explanatory memorandum.

In this case clauses 8A and 8B of the bill seek to establish that the responsibilities associated with a petroleum or greenhouse gas title are derived from the preceding title(s). The explanatory memorandum outlines (at p.12) that this concept is then applied to new clauses 13A and 13B so that 'a titleholder's duty of care in relation to wells will extend not only to wells in respect of which activities are carried out during the term of the current title but also to wells in respect of which activities have been carried out under the authority of any previous title in the series of titles regardless of the identity of the titleholder.' These sections recast existing offences 13A and 13B in Schedule 3 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to correct some uncertainty about their application and to ensure that all conduct that was intended to be dealt with is covered.

These clauses are clearly designed to have retrospective effect, but the Committee is concerned to ensure that the retrospective application does not have a detrimental effect, especially as existing clauses 13A and 13B do 'not cover all aspects...' and are being expanded. Therefore, the Committee **seeks the Minister's advice** on the rationale for imposing retrospective liability in relation to a titleholder's duty of care and whether the retrospective application is appropriate in all the circumstances.

*Pending the Minister's advice, 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.*

**Absolute liability****Schedule 1, Part 6, subsection 13A(4) and 13B(4)**

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to the attention of Senators any provisions in bills which create strict and absolute liability offences. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

In this case, the explanatory memorandum states that it is intended that new clauses 13A and 13B will extend a titleholder's duty of care in relation to wells 'not only to wells in respect of which activities are carried out during the term of the current title but also to wells in respect of which activities have been carried out under the authority of any previous title in the series of titles regardless of the identity of the titleholder.' These sections recast existing offences 13A and 13B in Schedule 3 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to correct some uncertainty about their application, to narrow a titleholder's responsibility from facilities generally to wells and well-related equipment, and to ensure that all conduct that was intended to be dealt with is covered.

Proposed subsections 13A(4) and 13B(4) seek to impose absolute liability for the physical element of whether or not a duty of care was owed by the defendant. The explanatory memorandum states (at p. 13) that:

A requirement to prove a particular state of mind in relation to a non-conduct element of the offence will therefore make a breach of the duty of care difficult or impossible to prove. The application of absolute liability to this element is therefore essential to the integrity of the occupational health and safety regime.

The Committee notes that absolute liability applies to the existing versions of sections 13A and 13B in identical terms to those proposed in this bill.

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

**Possible retrospective application  
Explanatory memorandum  
Schedule 1, Part 8, items 79, 80 and 81**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee considers that the reasons for the retrospectivity should be set out in the relevant explanatory memorandum.

It appears that new regulations came into force on 1 January 2010. The bill has some retrospective application in referring to those regulations from their date of effect. The new regulations update and consolidate four earlier sets of regulations (which are then repealed). Transitional provisions in the bill continue the applicability of the earlier regulations in relation to contraventions that occurred prior to the commencement of the new regulations.

*In the circumstances, the Committee has no further comment.*

## **Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Amendment Bill 2010**

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Resources and Energy

### **Background**

This bill provides transitional arrangements from 1 January 2010 until 31 December 2012 in relation to section 8 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2003* which imposes a safety case levy in relation to designated coastal waters.

### **Retrospective application Schedule 1, items 2, 5 and 6**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

In this case the specific purpose of the bill is to provide transitional arrangements from 1 January 2010 until 31 December 2012. The *Offshore Petroleum and Greenhouse Gas Storage Act 2003* was amended in 2009 to extend the safety case levy to cover pipelines and to remove references to the safety management plan levy. As the explanatory memorandum outlines:

While the Amendment Act provided transitional arrangements it did so on the basis that State and Territory regulations which correspond to the Commonwealth regulations would be similarly amended. This has not yet occurred which means that some safety levy payments due to the National Offshore Petroleum Safety Authority may not be collectable until such time as the Act is amended. Thus a transitional period is required...

The Committee acknowledges this explanation and is not aware of a detrimental effect on any person.

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

## Protection of the Sea Legislation Amendment Bill 2010

Introduced into the House of Representatives on 3 February 2009

Portfolio: Infrastructure, Transport, Regional Development and Local Government

### Background

This bill amends the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008*.

Schedule 1 amends Part IIID of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement a revised Annex VI (Air Pollution) of the *International Convention for the Prevention of Pollution from Ships* (MARPOL). The main effect of the revised Annex VI is to provide for a stepped reduction in the sulphur level in fuel oil used in ships to reduce the emission of sulphur oxides.

Schedule 2 adds a responder immunity provision to the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* to protect persons who act reasonably and in good faith.

### Possible error in the explanatory memorandum

#### Clause 2

Clause 2 explains the commencement arrangements for the bill. It explains that 'Schedule 1 will commence on the later of the day after the proposed Act receives Royal Assent and 1 July 2010. The date of 1 July 2009 is when the revised Annex VI of MARPOL enters into force internationally.'

The Committee understands that the proposed commencement date for Annex VI is 1 July **2010**, which is consistent with the actual commencement arrangements for the bill outlined in clause 2. The Committee **draws this matter to the attention of the Minister** for any appropriate action.

*The Committee makes no further comment on this matter.*

## **Reversal of onus**

### **Schedule 1, items 9 and 14**

As a general principle in criminal law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt. This is reflected in the December 2007 Minister for Home Affairs updated *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. However, the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum. This is especially the case where the standard of proof is 'legal' (on the balance of probabilities) rather than 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out). In both circumstances, if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

Items 9 and 14 seek to add defences in relation to the existing offences of using fuel oil above the prescribed sulphur limit. In relation to these defences the defendant will bear an 'evidential' burden. The explanatory memorandum demonstrates that the information required is peculiarly within the knowledge of the defendant. At page four the explanatory memorandum describes that it is reasonable for this burden to be placed on the defendant as he or she 'would easily be able to demonstrate what steps he or she took' to obtain appropriate fuel oil and the absence of appropriate options, or that he or she 'contacted a prescribed officer and, where required, the government of a foreign country.'

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

**Strict liability**

**Schedule 1, items 35 and 36, proposed subsections 26FES, 26FET and 26FEV**

In December 2007, the Minister for Home Affairs published an updated *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to the attention of Senators any provisions in bills which create strict and absolute liability offences. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

These items seek to introduce new strict liability offences for breaches of documentation and record keeping requirements. The explanatory memorandum refers to this Committee's Sixth Report of 2002 and the *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and observes for each proposed offence (at pp 7, 8 and 9 respectively) that these matters are straightforward for the defendant to demonstrate but would be difficult for the prosecution and that they are consistent with other offences of a similar nature.

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

## **Social Security and Family Assistance Legislation Amendment (Weekly Payments) Bill 2010**

Introduced into the House of Representatives on 10 February 2010

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill provides for weekly payments to be made under the *Social Security (Administration) Act 1999* for a 'class of persons' who receive a social security periodic payment, family tax benefit or baby bonus and is also intended to include people who are assessed as being vulnerable, such as those who are homeless or at risk of homelessness.

The bill also makes minor technical corrections.

### **Merits review**

#### **Schedule 1, Part 1, items 3 and 5**

Items 3 and 5 provide in relation to the family tax benefit and the baby bonus respectively that the Secretary may determine that a claimant who is a member of a class of persons under specified subsections 'has weekly instalment periods'. In both cases, the Secretary must subsequently revoke a determination to this effect if he or she is satisfied that the claimant is no longer a member of a class of persons specified under the relevant subsection.

Neither the bill nor the explanatory memorandum provide information about whether or not the Secretary is required to provide reasons for the revocation of a determination or whether the revocation is reviewable. The Committee **seeks the Minister's advice** as to whether merits review is available in relation to these provisions and, if not, what the rationale is for this approach.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

**Retrospective application**  
**Schedule 1, Part 1, item 7**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes the explanation (at p.3 of the explanatory memorandum) that the amendments proposed in this bill clarify 'that social security periodic payments may be paid on a weekly basis in respect of a 14-day instalment period to vulnerable individuals' and 'in practice, weekly payments will only be offered after discussion with the person concerned.'

In relation to this particular item, the explanatory memorandum states (at p. 6) that it provides that 'people who have already been determined to be eligible for baby bonus or maternity immunisation allowance may be subject to the new payment arrangements.'

*As there will be no detrimental effect on any person, the Committee makes no further comment on this item.*

## **Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010**

Introduced into the House of Representatives on 4 February 2009

Portfolio: Finance and Deregulation

### **Background**

This bill is a part of a package of three bills which give effect to Government decisions in 2008 and 2009 to establish governance arrangements for the Commonwealth superannuation schemes that are effective and consistent with the broader superannuation industry.

The bill contains a number of transitional provisions to deal with matters arising from the amendments in the bill, the *Governance of Australian Government Superannuation Schemes Bill 2010* and the *ComSuper Bill 2010*. These transitional provisions are intended to address any impact on the entitlements of scheme members and the operation of the respective superannuation schemes from the reforms being made by the package of three Bills.

As part of modernising civilian superannuation arrangements the Bill also makes amendments to:

- facilitate public sector employees being able to consolidate their superannuation savings under the management of CSC, should a decision be made to allow this in the future. Any decision in this regard would be subject to Parliamentary scrutiny;
- allows for Parliamentary scrutiny of Deeds made under the *Military Superannuation and Benefits Act 1991*, which is consistent with the requirement applying to Deeds made under the *Superannuation Act 1990*; and
- validates the past payment of fees made by the trustee boards to the Auditor-General for the audit of financial statements related to the respective superannuation funds.

## Insufficient Parliamentary scrutiny

### Various

A key aspect of this bill is described in the explanatory memorandum (at p.4) as being to:

- facilitate public sector employees being able to consolidate their superannuation savings under the management of CSC, should a decision to be made to allow this in the future. Any decision in this regard would be subject to Parliamentary scrutiny.

The explanatory memorandum does not identify whether a future decision would be facilitated through consideration of primary legislation, or whether it will be proposed in delegated legislation. The Committee is concerned about whether this aspect of the bill should be deferred until the key issue of whether public sector employees can consolidate their superannuation under the management of CSC is settled.

Therefore, the Committee **seeks the Minister's advice** on whether consideration has been given to deferring the amendments relating to this issue for consideration with the question of whether public sector employees can consolidate their superannuation under the management of CSC; and whether the ability to consolidate will be proposed in primary or delegated 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.*

### Wide delegation of power

#### Schedule 1, Part 1, item 201

Item 201 will allow the Minister to delegate his or her powers to a director of CSC, the CEO of ComSuper or a staff member of ComSuper.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the

categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case the explanatory memorandum states that the 'amendment is consequential on the establishment of CSC as the responsible trustee and the abolition of the position of Commissioner for Superannuation and replacement with the position of CEO of ComSuper.' However, beyond being consistent with the existing practice the explanatory memorandum does not provide a justification for authorising the Minister to delegate Ministerial powers so broadly.

Therefore, the Committee **seeks the Minister's advice** about the rationale for the authority for a Minister to delegate his or her powers to a 'staff member of ComSuper' and whether consideration was given to limiting the powers that might be delegated or confining the delegation to members of the Senior Executive Service.

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

### **Retrospective application**

**Schedule 2, Part 3, items 8, 10, 11 and 12; Schedule 2, Part 7, item 20; Schedule 2, Part 7, item 27**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

To ensure continuity the provisions in schedule 2, part 3, items 8, 10, 11 and 12 will allow for previous conduct, or references to the Commissioner for Superannuation, to have effect as if they were done, or refer to, CSC or ComSuper. The Minister can vary the application of these provisions so that they do not apply to some specified circumstances. The explanatory

memorandum (at pages 33 to 36) repeats the scope of these provisions, but does not outline the expected or intended effect they will have. In particular, given the retrospective nature of these items, the explanatory memorandum does not discuss whether they will or could disadvantage people. The Committee prefers that a more substantive explanation is provided in the explanatory memorandum when clauses will have a retrospective effect, but as these appear to be routine makes no further comment.

Item 20 allows instruments created after 1 July 2010 (the intended date of effect of these amendments) and before 1 July 2011 to have effect from 1 July 2010. The explanatory memorandum states that this will not affect the rights or impose liabilities on any person, but 'is intended to provide for the updating of provisions in instruments that refer to the abolished MSB Board, the Authority and the Commissioner for Superannuation.'

Item 27 corrects an error in the *Auditor-General Act 1997* which required the Auditor-General to audit the financial statements of the Australian Government superannuation funds, but there was no express provision enabling the Auditor-General to charge fees for the audits undertaken (see the explanatory memorandum at p. 42).

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

## **Tax Laws Amendment (2010 GST Administration Measures No.1) Bill 2010**

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Treasury

### **Background**

This bill amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) which arose from the recommendations of the Board of Taxation in its review of Goods and Services Tax (GST) administration.

Schedule 1 amends the GST Act to ensure that the appropriate amount of goods and services tax (GST) is collected and the appropriate amount of input tax credits claimed in situations where there are payments between parties in a supply chain which indirectly alter the price paid or received by the parties for the things supplied.

Schedule 2 amends the goods and services tax (GST) law to clarify the rules in the GST law for attributing input tax credits to tax periods.

*The Committee has no comment on this bill.*

## **Tax Laws Amendment (2010 Measures No.1) Bill 2010**

Introduced into the House of Representatives on 10 February 2010  
Portfolio: Treasury

### **Background**

This bill amends various taxation and superannuation laws to implement a range of improvements to Australia's tax laws.

Schedule 1 amends the *Superannuation Guarantee (Administration) Act 1992* (SGA Act 1992), the *Retirement Savings Accounts Act 1997* (RSA Act 1997), the *Superannuation Industry (Supervision) Act 1993* (SIS Act 1993), the *Income Tax Assessment Act 1936* (ITAA 1936) and the *Taxation Administration Act 1953* (TAA 1953) to support the Government's 2008-09 Budget measure to provide a free superannuation clearing house service for small businesses. The measure is designed to reduce the cost and paperwork burden to small businesses of complying with their superannuation obligations.

Schedule 2 amends the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Income Tax Assessment Act 1936* (ITAA 1936) to protect the deductions of investors in forestry managed investment schemes (MIS) where the four-year holding period rules are failed for reasons genuinely outside the investor's control.

This Schedule also amends the *Taxation Administration Act 1953* (TAA 1953) to maintain the capacity of the Commissioner of Taxation (Commissioner) to apply for civil penalties against the promoters of affected schemes, notwithstanding the amendments to the four-year rules.

Schedule 3 amends the *Income Tax Assessment Act 1997* (ITAA 1997) to allow eligible Australian managed investment trusts (MITs) to make an irrevocable election (that is, choice) to apply the capital gains tax (CGT) provisions as the primary code for the taxation of gains and losses on disposal of certain assets held as passive investments (primarily shares, units and real property). If a MIT is eligible to make an election and it has not done so, then

any gains or losses on the disposal of eligible assets (excluding land, an interest in land, or an option to acquire or dispose of such an asset) will be treated on revenue account.

This Schedule also clarifies the taxation treatment of ‘carried interest’ units in MITs. These units will effectively be treated on revenue account in the hands of the unit holder.

Schedule 4 amends Subdivision 61-J of the *Income Tax Assessment Act 1997* (ITAA 1997) by introducing an income test into the eligibility criteria for the entrepreneurs’ tax offset (ETO). The income test will restrict the eligibility of individuals whose income is over a threshold amount of income for ETO purposes (\$70,000 if they are single and \$120,000 if they have a family).

Schedule 5 amends the *Income Tax Assessment Act 1997* (ITAA 1997) to:

- clarify the operation of certain aspects of the consolidation regime; and
- improve interactions between the consolidation regime and other parts of the law.

Schedule 6 makes miscellaneous amendments to the taxation laws. Most of them are of a minor nature.

### **Retrospective application**

#### **Schedule 5, items 17(1), 55, 57, 117, 119, 131, 136, 152, 154, 193, 196 and Schedule 6, item 106**

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. Where proposed legislation has a clear retrospective application, the Committee considers that the explanatory memorandum should set out in detail the reasons for that retrospectivity.

These provisions seek to implement amendments to the operation of existing taxation arrangements with retrospective effect. The Committee is pleased to note that the explanatory memorandum provides an individual explanation about each of these provisions and describes the effect of them as being beneficial to the taxpayer.

*The Committee makes no further comment on these provisions.*

**Reversal of onus of proof**  
**Explanatory memorandum**  
**Schedule 6, item 104**

At common law the prosecution bears the persuasive burden of proving the guilt of the accused beyond reasonable doubt, but the Committee has observed an increasing use of statutory provisions imposing on the accused the burden of establishing a defence to the offence created by the statute in question and the use of presumptions which have a similar effect.

In cases where the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused, the committee has agreed that the burden of adducing evidence of that defence or matter might be placed on the accused. However, provisions imposing this burden of proof on the accused should be kept to a minimum, take into account the December 2007 *Guide to Framing Commonwealth Offences, Civil Penalties, and Enforcement Powers*, and the explanatory memorandum should describe the reason for the reversal of onus in each instance. Whether the standard of proof is 'legal' (on the balance of probabilities) or 'evidential' (pointing to evidence which suggests a reasonable possibility that the defence is made out) if the defendant meets the standard of proof required the prosecution then has to refute the defence beyond reasonable doubt.

Section 284-75 establishes administrative penalties for specified prohibited conduct (such as making false or misleading statements or failing to lodge a return on time). Item 104(6) outlines a proposed defence to these provisions when it did not involve recklessness or an intentional disregard for a taxation law. Item 104(7) states that a defendant bears an 'evidential' burden in relation to relying on the proposed defence.

The Committee could not locate a statement in the explanatory memorandum explaining item 104 and in particular the justification for placing the burden for this evidential matter on the defendant. Although reasons for the approach are apparent to it, the Committee expects that an explanatory memorandum will address all items in a bill and will explain reversals to the onus of proof. The Committee **seeks the Treasurer's advice** about whether the explanatory memorandum addresses these issues.

## **Wild Rivers (Environmental Management) Bill 2010**

Introduced into the House of Representatives on 8 February 2010

By The Hon A J Abbott

### **Background**

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

### **Explanatory memorandum**

This bill, introduced as a private Member's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. While noting that the second reading speech provides some explanation of the background, intent and operation of the bill, the Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents can assist in the interpretation of bills, and ultimately, Acts. The Committee **seeks the Leader of the Opposition's advice** as to whether an explanatory memorandum could be provided.

*The Committee makes no further comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009**

On 4 February 2010, the Senate agreed to six government and 10 opposition amendments to the bill and the House of Representatives also agreed to these amendments. None of the amendments agreed to fall within the Committee's terms of reference.

### **Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009**

In *Alert Digest No.13* the Committee drew to the attention of the Attorney-General to the retrospective application of various provisions. The Committee noted the Attorney-General's advice (see Report No. 1 of 2010) that he has instructed the Department to include relevant information in the explanatory memorandum which explains the reasons for the use of retrospective application in the bill.

On 4 February 2010, the Senate agreed to 10 government amendments to the bill and the House of Representatives also agreed to these amendments. None of the amendments agreed to fall within the Committee's terms of reference.

A supplementary explanatory memorandum was also tabled which addressed the 10 amendments, but it did not include the relevant information explaining the use of retrospective application in the items raised in *Alert Digest No.13*. The Committee is disappointed that the information was not included.

### **Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009**

On 4 February 2010, the Senate agreed to one opposition amendment and two Australian Greens/Independent (Xenophon) amendments. On 11 February 2010, the House of Representatives agreed to the Opposition amendment, but disagreed with the other two amendments, which the Senate did not insist on.

The amendment agreed to does not fall within the Committee's terms of reference.

**Independent National Security Legislation Monitor  
Bill 2010 – (Previous title: National Security Legislation Monitor  
Bill 2009)**

In *Alert Digest No. 9 of 2009*, the Committee drew to the attention of the Cabinet Secretary to the following matters:

- the lack of any explanation for the need to expand or modify the scope of the definition by means of regulations, and does not give any indication of the circumstances where such expansion or modification may be required; and
- whether greater parliamentary scrutiny could be provided in relation to the Monitor's third function in paragraph 6(1)(c) of reporting on a reference given by the Prime Minister.

The Committee noted the Cabinet Secretary's advice (see Report No. 10 of 2009). On 3 February 2010, the Senate agreed to 20 government and five Australian Green amendments, a supplementary explanatory memorandum was also tabled. None of the amendments fall within the Committee's terms of reference.

## **BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION**

The Chairs and Deputy Chairs of Commonwealth, and state and territory Scrutiny Committees have noted (most recently in 2000) difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because 'national scheme' bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the identification of national schemes of legislation, the Committee's practice is to note bills that give effect to such schemes as they come before the Committee for consideration.

### **Healthcare Identifiers Bill 2010**

The bill implements a national system for consistently identifying consumers and healthcare providers and to set out clear purposes for which healthcare identifiers can be used. The this scheme originated from a February 2006 Council of Australian Governments (COAG) decision, which was reaffirmed in 2008 when COAG agreed to universally allocate a unique identifying number to each individual healthcare recipient in Australia.

On 7 December 2009, COAG signed a *National Partnership Agreement for E-Health*. This Agreement provides a framework for cooperative jurisdictional arrangements and responsibilities for e-health and sets out the objectives and scope for the Healthcare Identifiers Service, as well as relevant governance, legislative, administrative and financial arrangements.

## 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 – 42nd Parliament**

\* Indicates new entries

P Indicates bills passed by the Senate

N Indicates bills negated by the Senate

<b>P</b>	<b>Asian Development Bank (Additional Subscription) Bill 2009</b> — clause 6
<b>N</b>	<b>Australian Business Investment Partnership Bill 2009</b> — clauses 13 and 14
	<b>Australian National Preventive Health Agency Bill 2009</b> — clause 50 ( <b>SPECIAL ACCOUNT</b> : CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
<b>P</b>	<b>Automotive Transformation Scheme Bill 2009</b> — clause 10
<b>P</b>	<b>Car Dealership Financing Guarantee Appropriation Bill 2009</b> — clause 5
<b>N</b>	<b>Carbon Pollution Reduction Scheme Bill 2009</b> — subclauses 103B(5), 139(4) and 291(4)
<b>N</b>	<b>Carbon Pollution Reduction Scheme Bill 2009 [No. 2]</b> — subclauses 103B(5), 139(4) and 291(4)
<b>*</b>	<b>Carbon Pollution Reduction Scheme Bill 2010</b> — subclauses 103B(5), 139(4) and 291(4)

P	<b>COAG Reform Fund Bill 2008</b> — clause 5 ( <b>SPECIAL ACCOUNT:</b> CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
P	<b>Commonwealth Securities and Investment Legislation Amendment Bill 2008</b> — Schedule 1, item 10, subsection 5BA(7)
*	<b>ComSuper Bill 2010</b> — clause 21 ( <b>SPECIAL ACCOUNT:</b> CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
P	<b>Defence Home Ownership Assistance Scheme Bill 2008</b> — clause 84
P	<b>Dental Benefits Bill 2008</b> — clause 65
P	<b>Education Legislation Amendment Bill 2008</b> — Schedule 1, item 6, section 14B
P	<b>Fair Work Bill 2008</b> — subclause 559(4)
P	<b>Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008</b> — Schedule 1, item 29
P	<b>Federal Financial Relations Bill 2009</b> — clause 22
P	<b>Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009</b> — Schedule 4, subitem 2(3)
P	<b>Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008</b> — Schedule 1, item 49, section 54A, and Schedule 2, item 23, section 70E ( <b>SPECIAL ACCOUNTS:</b> CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
P	<b>Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008</b> — Schedule 1, item 79, section 94B ( <b>SPECIAL ACCOUNT:</b> CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
*	<b>Governance of Australian Government Superannuation Schemes Bill 2010</b> — paragraphs 33(1)(b), 33(2)(b), and 34(3)(a), and subsection 34(4)
P	<b>Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008</b> — Schedule 5, item 141, section 65A
P	<b>Guarantee of State and Territory Borrowing Appropriation Bill 2009</b> — clause 5
P	<b>Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008</b> — clause 5
P	<b>International Monetary Agreements Amendment (Financial Assistance) Bill 2009</b> — Schedule 1, item 4, subsection 8CA(4)

	<b>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009</b> – subclause 43(2), clause 70, and subclause 78(2)
<b>P</b>	<b>Nation-building Funds Bill 2008</b> — clauses 13, 61, 68, 75, 82, 132, 181, 188, 215 and 255 ( <b>SPECIAL ACCOUNTS:</b> CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
<b>P</b>	<b>National Consumer Credit Protection Bill 2009</b> — Schedule 1, subclause 115(2)
	<b>Occupational Health and Safety and Other Legislation Amendment Bill 2009</b> — Schedule 3, Part 2, subitem 10(5)
<b>P</b>	<b>Protection of the Sea Legislation Amendment Bill 2008</b> — Schedule 1, item 20, section 46N
<b>P</b>	<b>Safe Work Australia Bill 2008</b> — clause 64 ( <b>SPECIAL ACCOUNT:</b> CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> ) [bill laid aside by House of Representatives on 4 December 2008]
<b>P</b>	<b>Safe Work Australia Bill 2008 [No. 2]</b> — clause 64 ( <b>SPECIAL ACCOUNT:</b> CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )
<b>P</b>	<b>Schools Assistance Bill 2008</b> — clause 167
	<b>Textile, Clothing and Footwear Strategic Investment Program Amendment (Building Innovative Capability) Bill 2009</b> — Schedule 1, item 32, section 37ZO
<b>P</b>	<b>Uranium Royalty (Northern Territory) Bill 2008</b> — clause 18
<b>P</b>	<b>Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008</b> — Schedule 1, item 1
<b>P</b>	<b>Wheat Export Marketing Bill 2008</b> — clause 58 ( <b>SPECIAL ACCOUNT:</b> CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i> )

### Other relevant appropriation clauses in bills

<b>N</b>	<b>Household Stimulus Package Bill 2009</b> — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).
<b>P</b>	<b>Household Stimulus Package Bill (No. 2) 2009</b> — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).

<b>P</b>	<b>Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008</b> — Schedule 4, subitem 1(4): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).
<b>P</b>	<b>Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008</b> — Schedule 2, subitems 1(4) and 2(4), and Schedule 4, subitem 1(4): special appropriation clauses – for a finite period of time (i.e. for circumstances arising in a particular financial year).