Senate Standing Committee for the Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator the Hon Ian Macdonald (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

Terms of Reference

Extract from Standing Order 24

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



TABLE OF CONTENTS

Commentary on bills

	Appropriation Bill (No.5) 2011-2012	1
	Appropriation Bill (No.6) 2011-2012	2
•	Appropriation Bill (No.1) 2012-2013	3
	Appropriation Bill (No.2) 2012-2013	۷
	Appropriation (Parliamentary Departments) Bill (No.1) 2012-2013	5
	Australian Citizenship Amendment (Defence Families) Bill 2012	6
	Australian Citizenship Amendment (Defence Service Requirement) Bill 2012	7
•	Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012	8
	Broadcasting Services Amendment (Digital Television) Bill 2012	Ģ
	Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012	11
	Clean Energy (Customs Tariff Amendment) Bill 2012	12
	Clean Energy (Excise Tariff Legislation Amendment) Bill 2012	13
•	Clean Energy Finance Corporation Bill 2012	14
	Clean Energy Legislation Amendment Bill 2012	16
	Corporations Amendment (Proxy Voting) Bill 2012	17
•	Crimes Legislation Amendment (Slavery, Slavery-like	
	Conditions and People Trafficking) Bill 2012	18
•	Do Not Knock Register Bill 2012	21
•	Fair Work (Registered Organisations) Amendment Bill 2012	23
•	Family Assistance and Other Legislation Amendment (Schoolkids Bonus Budget Measures) Bill 2012	25
	Financial Framework Legislation Amendment Bill (No.2) 2012	27
•	Greenhouse and Energy Minimum Standards Bill 2012	28

•	Bill 2012 Bill 2012	33
•	Health Insurance Amendment (Professional Services Review) Bill 2012	35
	Higher Education Support Amendment (Student Contribution Amounts and Other Measures) Bill 2012	40
	Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2012	41
	Income Tax (Income Tax (Seasonal Labour Mobility Program Withholding Tax) Bill 2012	42
	Legislative Instruments Amendment (Sunsetting Measures) Bill 2012	43
•	Malabar Headland Protection Bill 2012	44
•	Marine Safety (Domestic Commercial Vessel) National Law Bill 2012	45
	Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Bill 2012	54
•	Maritime Powers Bill 2012	55
	Maritime Powers (Consequential Amendments) Bill 2012	59
	Migration (Visa Evidence) Charge Bill 2012	60
	Migration (Visa Evidence) Charge (Consequential Amendments) Bill 2012	61
	National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2012	62
•	National Integrity Commissioner Bill 2012	63
•	Navigation Bill 2012	70
	Navigation (Consequential Amendments) Bill 2012	76
	Parliamentary Counsel and Other Legislation Amendment Bill 2012	77
	Passenger Movement Charge Amendment Bill 2012	78
	Pay As You Go Withholding Non-compliance Tax Bill 2012	79

• 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.

•	Privacy Amendment (Enhancing Privacy Protection) Bill 2012	80
	Social Security and Other Legislation Amendment (2012 Budget and Other Measures) Bill 2012	83
•	Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012	84
•	Superannuation Legislation Amendment (Stronger Super) Bill 2012	85
	Superannuation Supervisory Levy Imposition Amendment Bill 2012	87
•	Tax Laws Amendment (2012 Measures No.2) Bill 2012	88
•	Tax Laws Amendment (2012 Measures No.3) Bill 2012	91
•	Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No.1) 2012	93
	Tax Laws Amendment (Income Tax Rates) Bill 2012	95
	Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2012	96
•	Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Bill 2012	97
	Commentary on amendments to bills	100
	 Aviation Transport Security Amendment (Screening) Bill 2012 Coastal Trading (Revitalising Australian Shipping) Bill 2012 Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Bill 2012 Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 Corporations Amendment (Future of Financial Advice) Bill 2012 Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012 	
	- Federal Financial Relations Amendment (National Health Reform) Bill 2012	
	- National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012	
	 Shipping Reform (Tax Incentives) Bill 2012 Shipping Registration Amendment (Australian International Shipping Register) Bill 2012 	

• The Committee has commented on these bills

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- Tax and Superannuation Laws Amendment (2012 Measures No.1) Bill 2012
- Tax Laws Amendment (Income Tax Rates) Bill 2012
- Tax Laws Amendment (Shipping Reform) Bill 2012
- Telecommunications Interception and Other Legislation Amendment (State Bodies) Bill 2012

Bills giving effect to National Scheme of Legislation 103 Scrutiny of standing appropriations 104

Senate Standing Legislation Committee Inquiries

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

• The Committee has commented on these bills

This Digest is circulated to all Honourable Senators.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Appropriation Bill (No.5) 2011-2012

Introduced into the House of Representatives on 8 May 2012 Portfolio: Finance and Deregulation

Background

This bill proposes a total appropriation of \$250.3 million from Consolidated Revenue Fund for the ordinary annual services of the government in addition to those provided in the 2011-2012 Budget.

Appropriation Bill (No.6) 2011-2012

Introduced into the House of Representatives on 8 May 2012 Portfolio: Finance and Deregulation

Background

This bill proposes a total appropriation of \$140.5 million from Consolidated Revenue Fund for the services that are not the ordinary annual services of the government in addition to those provided in the 2011-2012 Budget.

Appropriation Bill (No.1) 2012-2013

Introduced into the House of Representatives on 8 May 2012 Portfolio: Finance and Deregulation

Background

This bill appropriates \$73.5 billion to meet payments for the ordinary annual services of the government for the financial year ending 30 June 2013.

Additional appropriations Clause 13

Clause 13 enables the Finance Minister to provide additional appropriations for items when satisfied there is an urgent need for additional expenditure (known as an AFM). Subclause 13(4) of the bill provides that a determination made by the Finance Minister is not disallowable, despite the fact it is a legislative instrument. The explanatory memorandum at page 16 justifies this approach on the basis that 'disallowance would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.

The amount of additional expenditure that can be determined under this AFM provision is capped at \$295 million and the Finance Minister can only make a determination if satisfied there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, due to an omission or understatement or because of unforeseen circumstances.

This issue also arises in relation to other appropriation bills.

The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Appropriation Bill (No.2) 2012-2013

Introduced into the House of Representatives on 8 May 2012 Portfolio: Finance and Deregulation

Background

The bill provides for appropriations totalling \$7.2 billion from the Consolidated Revenue Fund for services that are not the ordinary annual services of the government and it also proposes amendments to the *Commonwealth Inscribed Stock Act 1911*.

Appropriation (Parliamentary Departments) Bill (No.1) 2012-2013

Introduced into the House of Representatives on 8 May 2012 Portfolio: Finance and Deregulation

Background

This bill appropriates \$174.5 million to meet the expenses of the parliamentary departments for the financial year ending 30 June 2013.

Australian Citizenship Amendment (Defence Families) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Immigration and Citizenship

Background

This bill amends the *Australian Citizenship Act 2007* to enable certain family members of current and future overseas lateral recruits to the Australian Defence Force (ADF) to satisfy the relevant defence service residence requirement and be eligible for conferral of Australian citizenship at the same time as the enlisted ADF member.

Australian Citizenship Amendment (Defence Service Requirement) Bill 2012

Introduced into the House of Representatives on 21 May 2012 By: Mr Robert

Background

This bill amends the *Australian Citizenship Act 2007* to ensure that spouses and dependent children of Australian Defence Force (ADF) lateral transfer members are eligible for citizenship at the same time as the ADF lateral member.

Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Attorney-General

Background

This bill amends the Australian Human Rights Commission Act 1986 to:

- establish the statutory office of Children's Commissioner in the Australian Human Rights Commission to:
 - promote awareness and discussion of issues affecting children;
 - conduct research and education programs;
 - consult directly with children and representative organisations; and
 - examine Commonwealth legislation, policies and programs that relate to children's human rights.

Trespass on personal rights or liberties Schedule 1, item 5

Proposed section 46ML contains a provision which requires Commonwealth agencies to give information or to produce documents to the Children's Commissioner where such information or documents are relevant to one of the Commissioner's functions.

The Statement of Compatibility, at page 4 of the explanatory memorandum, argues that the right to privacy of individuals will be protected by ensuring that when government agencies provide information or documents to the Commissioner, the information or documents do not reveal the identity of a particular individual unless the individual has consented to the giving of the information or the production of the document (new subsections 46ML(4) and 46ML(5)).

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

Broadcasting Services Amendment (Digital Television) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Broadband, Communications and the Digital Economy

Background

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

- facilitate earlier access, in particular circumstances, to the digital commercial satellite television services licensed under section 38C of the BSA (known as the Viewer Access Satellite Television (VAST)) in areas where it is considered viewers will not be able to receive adequate reception of all the applicable terrestrial digital commercial television services at the time of digital switchover;
- allow for retransmission services provided digitally by third parties who represent commercial television broadcasting licensees to be taken into account by a scheme administrator when administering a conditional access scheme for the VAST services, and by the Australian Communications and Media Authority when it makes a declaration that an area is service-deficient (so that viewers in the area can access the VAST services);
- enable the VAST licensees to provide their digital commercial television satellite services to specified external Territories of Australia;
- allow licensees in the Remote Central and Eastern Australia terrestrial licence areas to nominate multiple places in their licence area by which their compliance with time-based broadcasting obligations will be assessed, so that those licensees can accommodate different input feeds from the VAST services for their terrestrial transmitters in different parts of their licence area;
- provide the Minister with greater flexibility to vary the timing of a simulcast period relating to a metropolitan or regional licence area, so that the variation may be more than three months earlier or later than the period originally specified;

• provide the Minister with greater flexibility to vary the timing of when a local market area becomes a digital-only local market area, so that the variation may be more than three months earlier or later than the time originally specified.

Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012

Introduced into the House of Representatives on 30 May 2012 Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Broadcasting Services Act 1992* to provide for greater access to free-to-air and subscription television for the hearing impaired.

Clean Energy (Customs Tariff Amendment) Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Home Affairs

Background

This bill is part of a package of three bills. This bill amends the *Customs Tariff Act 1995* to ensure that non-transport use of compressed natural gas is exempt from customs duty.

Clean Energy (Excise Tariff Legislation Amendment) Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Treasury

Background

This bill is part of a package of three bills. This bill amends the *Excise Tariff Act 1921* to ensure that non-transport use of compressed natural gas is exempt from excise duty.

Clean Energy Finance Corporation Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Treasury

Background

This bill establishes the following:

- Clean Energy Finance Corporation (the Corporation), a body corporate and Commonwealth authority under the *Commonwealth Authorities and Companies Act 1997*;
- Clean Energy Finance Corporation Special Account for the purposes of the *Financial Management and Accountability Act 1997*;
- Board of the Corporation with statutory responsibility for decision making and managing investments; and
- Chief Executive Officer of the Corporation.

Incorporating material by reference Clause 4, definition of 'GFS Australia'

In clause 4 of the bill, 'GFS Australia' is defined by reference to the 'publication of the Australian Bureau of Statistics known as *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, as updated from time to time'. The definition further provides that the updating takes the form of 'new versions' of the publication and when material in the current version is updated by other publications of the Australian Bureau of Statistics. Furthermore, 'GFS system' is defined as having 'the same meaning as in GFS Australia'.

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

- why it is necessary to define this term by reference to a publication that may be updated from time to time as this approach may be thought to undermine the capacity of Parliament to scrutinise changes which may affect how the law is understood; and
- whether the Australian System of Government Finance Statistics: Concepts, Sources and Methods and updates are publicly available, especially updates which are included in other publications of the ABS, and if so, are they free or is a charge involved.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle I(a)(v) of the Committee's terms of reference.

Incorporating material by reference Clause 4, definition of 'Climate Change Convention'

The same issue arises in relation to the definition of 'Climate Change Convention', though the circumstances are different. In this instance the term is defined by reference to the *United Nations Convention on Climate Change* as amended and in force for Australia from time to time. It is clear that the text of the Convention is publicly and readily available and **the Committee** leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle I(a)(v) of the Committee's terms of reference.

Clean Energy Legislation Amendment Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Climate Change and Energy Efficiency

Background

This bill is part of a package of three bills. The bill amends the following:

- Clean Energy Act 2011 and the Fuel Tax Act 2006 to reflect changes in coverage arrangements for gaseous fuels from 1 July 2013;
- National Greenhouse and Energy Reporting Act 2007 to streamline requirements for nominations;
- Carbon Credits (Carbon Farming Initiative) Act 2011 to simplify the process of finalising methodology determinations by clarifying the material to be used by the Domestic Offsets Integrity Committee in making determinations; and
- Australian National Registry of Emissions Units Act 2011 to increase the amount of time during which the Clean Energy Regulator may defer giving effect to a transfer instruction from 48 hours to five business days;

The bill also amends Australian National Registry of Emissions Units Act 2011 and the Clean Energy Regulator Act 2011 to provide for the sharing of relevant and appropriate information between the Clean Energy Finance Corporation (CEFC) and the Australian Renewable Energy Agency and the CEFC and the Clean Energy Regulator in specified circumstances.

Corporations Amendment (Proxy Voting) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* to clarify that the chair of an annual general meeting can vote undirected proxies in a non-binding shareholder vote on remuneration where the shareholder provides express authorisation.

Crimes Legislation Amendment (Slavery, Slaverylike Conditions and People Trafficking) Bill 2012

Introduced into the House of Representatives on 30 May 2012 Portfolio: Attorney-General

Background

This bill amends the *Criminal Code* and the *Crimes Act 1914* to:

- establish new offences in the Criminal Code of forced labour, forced marriage, organ trafficking, and harbouring a victim;
- ensure the slavery offence applies to conduct which renders a person a slave, as well as conduct involving a person who is already a slave;
- extend the application of the existing offences of deceptive recruiting and sexual servitude so they apply to non-sexual servitude and all forms of deceptive recruiting;
- increase the penalties applicable to the existing debt bondage offences, to ensure they are in line with the serious nature of the offences;
- broaden the definition of exploitation under the Criminal Code to include all slavery-like practices;
- amend the existing definitions to ensure the broadest range of exploitative conduct is criminalised by the offences, including psychological oppression and the abuse of power or taking advantage of a person's vulnerability; and
- improve the availability of reparations to victims.

Undue trespass—definition of offences Schedule 1, item 8, proposed 270.1A

This item includes a definition of coercion. A number of the serious offences introduced by this bill depend on the prosecution being able to prove that a particular purpose was achieved on the basis of coercion. Coercion is defined very broadly to include force, duress, detention, psychological oppression, abuse of power, and taking advantage of a person's vulnerability. The

explanatory memorandum offers the following justification for this approach (at page 10):

...investigations into slavery and slavery-like offences have revealed that the exploitation of many victims in Australia does not involve adduction, violence or physical restraint. Rather, offenders often use subtle, non-physical means to obtain a victim's compliance, such as psychological oppression, the abuse of power or taking advantage of a person's vulnerability. In these circumstances, it has proved challenging to convince juries that the offender's conduct constitutes the offence.

The Committee notes the breadth of the definition, but in the circumstances leaves to the Senate as a whole the question of whether the proposed approach is appropriate.

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

Undue trespass—reversal of onus Schedule 1, item 8, proposed subsection 270.7B(4)

This provision creates a defence of reasonable excuse in relation to the offence of being a party to a forced marriage. The defendant bears an evidential burden of proof in relation to establishing whether a reasonable excuse exists. The justification offered for this approach is that 'the elements needed to establish a reasonable excuse would likely be peculiarly within the knowledge of the defendant, and it would be significantly more difficult for the prosecution to disprove than for the defendant to establish' (see the explanatory memorandum at page 27).

Although this point carries considerable force, it remains the case that the circumstances which would enable the defence to be pleaded are very openended. As such it may be unclear to a defendant what they need to establish. Given the seriousness of the offence and the fact it carries a penalty of 4 years imprisonment (or 7 years for an aggravated offence), the Committee seeks the Attorney-General's advice as to whether consideration has been given to alternative methods of protecting victims while ensuring fairness for defendants, such as providing examples of what would constitute a reasonable excuse.

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

Undue trespass on personal rights and liberties—absolute liability Schedule 1, item 18, proposed subsection 271.7F(3)

This provision creates a new offence of harbouring a victim to assist a third person with a related offence. Absolute liability attaches to an element of the offence, which is that the third person offence (the related offence) must be an offence against specified parts of the bill (Division 270, or 271 apart from section 271.7F(3)).

As the explanatory memorandum states, at page 50, the 'application of absolute liability to this element of the offence means that there is no fault element for the physical element...and that the defence of mistake of fact....would not be available to the defendant'. However, the explanatory memorandum does not indicate why the application of absolute liability is considered appropriate.

Although the Committee has accepted in the past that absolute liability is appropriate in some circumstances, it routinely requests that explanatory memoranda justify the approach whenever absolute liability is proposed. The Committee therefore seeks the Attorney-General's advice as to the rationale for the proposed approach.

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

Do Not Knock Register Bill 2012

Introduced into the House of Representatives on 21 May 2012 By: Mr Georganas

Background

This bill sets up a scheme to enable individuals to opt out of receiving unsolicited marketing calls to residential and government addresses.

Inadequate explanatory memorandum

Unfortunately this bill was not accompanied by a satisfactory explanatory memorandum. Although the explanatory memorandum contains a Statement of Compatibility with Human Rights (SOC), the explanatory memorandum does no more than set out briefly the overall purpose of the bill.

In particular, it is the Committee's view that the explanatory memorandum should address the justification for various delegations of legislative power (for example, subclause 5(5), subclause 12(b), and Schedule 1 clause 5 of the bill), the justification of any reversal of the burden of proof (subclause 8(6)), and the level of penalties prescribed. The Committee therefore seeks the Member's advice as to whether an amended explanatory memorandum addressing these issues can be provided.

Undue trespass on rights and liberties Schedule 1

Insofar as the bill prohibits persons from making unsolicited 'marketing calls' (i.e. visits) to residential and government addresses, it may be thought to infringe on a number of practices that rely on the freedom to communicate views and beliefs about politics and religion. The Bill contains a number of exemptions in Schedule 1 which allow 'designated' marketing calls to ensure political parties, independent members of parliament, political candidates and their delegates can make door to door visits. Also included are exemptions ensuring political, religious and not for profit organisations are not prevented from making door to door visits.

The SOC asserts that these exemptions ensure that the rights in issue are not impinged. However, the Committee's view is that neither the explanatory

memorandum nor SOC engage with the relevant issues in an appropriate level of detail. The precise nature of the exemptions is not elucidated and neither is the question of whether the exemptions are over or under-inclusive adequately addressed. The Committee therefore requests the Member's detailed advice as to the rationale and justification for the proposed approach.

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

Privilege against self-incrimination Schedule 4, clause 6

Subclause 6(1) of Schedule 4 provides that an 'individual is not excused from giving information or evidence or producing a document or a copy of a document' to the Registrar if required to do so pursuant to clause 3 of Schedule 4 'on the ground that the information or evidence or the production of the document or copy might tend to incriminate the individual or expose the individual to a penalty'. Subclause 6(2), however, provides that the evidence can only be used for the purposes of the Act or proceedings relating to the Act and 'is not admissible in evidence against the individual in criminal proceedings'.

As explained in A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, the Committee expects the explanatory material to clearly explain why the privilege has been overridden. Although the SOC deals with this matter it does little more than repeat the effect of the clause. The Committee therefore seeks the Member's advice as to why this approach is appropriate in the circumstances and, in particular, whether the use immunity applies only in relation to criminal proceedings and whether it is appropriate to include a derivative use immunity for criminal and civil proceedings.

Pending the Member's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle I(a)(i) of the Committee's terms of reference.

Fair Work (Registered Organisations) Amendment Bill 2012

Introduced into the House of Representatives on 31 May 2012 Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the Fair Work (Registered Organisations) Act 2009 (RO Act) to:

- require that the rules of all registered organisations deal with disclosure of remuneration, pecuniary and financial interests;
- increase the civil penalties under the RO Act;
- enhance the investigative powers available to Fair Work Australia under the RO Act; and
- require education and training to be provided to officials of registered organisations about their governance and accounting obligations.

Abrogation of the privilege against self-incrimination Reversal of onus Schedule 1, item 29

Proposed subsection 337AA(1) sets out a range of civil penalty provisions in relation to the obligation on a person to comply with a requirement made under proposed subsection 335A(2) (for the purpose of gathering further information). Proposed subsection 335(4) provides for a reasonable excuse defence, however, an evidential burden is placed on the defendant (proposed subsection 335(5)). The explanatory memorandum does not address the appropriateness of this reversal of the onus of proof, especially in light of the fact that defendants may not be clear as to what circumstances constitute a reasonable excuse.

Similarly, the explanatory memorandum, at page 15, merely repeats the effect of proposed subsections 335(6) and 335(7) in relation to the abrogation of the privilege against self-incrimination. Even where the abrogation of the

privilege is subject to a derivative use immunity the Committee expects to see a strong justification provided by the explanatory memorandum. The Committee therefore seeks the Minister's advice as to the justification for this proposed reversal of onus and abrogation of the privilege against self-incrimination.

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

Delegation of legislative powers Schedule 1, item 36, proposed subsection 343(3A)

This item inserts a new subsection enabling the General Manger's information gathering functions or powers to be delegated to an SES employee or class of employees prescribed by the regulations or to 'any other person or body the General Manager (GM) is satisfied has substantial or significant experience or knowledge in at least one of' a number of listed fields.

The explanatory memorandum states, at page 16, that a 'range of safeguards are included in the bill to ensure accountability where the inquiry or investigation function is delegated, e.g. while the delegate of the GM will be able to obtain information in the same way as the GM...a notice to produce documents or attend to provide information will only be able to be issued by the GM or an SES Officer'. In addition, the power to delegate to 'any person' is limited by the requirement that the GM be satisfied that the person has substantial or significant experience or knowledge. However, this is a subjective rather than objective requirement. Given the significance of the power the Committee seeks the Minister's advice as to what other accountability mechanisms are included in relation to the delegation of this power and whether there is scope to strengthen or extend these safeguards (for example, by including reporting on the exercise of the power to the Parliament).

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

Family Assistance and Other Legislation Amendment (Schoolkids Bonus Budget Measures) Bill 2012

Introduced into the House of Representatives on 9 May 2012 Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the A New Tax System (Family Assistance Act) 1999, A New Tax System (Family Assistance Act) 1999, Social Security Act 1991, Social Security (Administration) Act 1999 and the Veterans' Entitlements Act 1986 to:

- provide for the schoolkids bonus (\$410 per child in primary school and \$820 per child in high school to be paid in January and July each year from 2013);
- remove the Education Tax Refund (ETR) for the 2011-12 financial year and onwards; and
- provide for a one-off transitional lump sum ETR payment (\$409 per child in primary school and \$818 per child in high school) in June 2012.

The bill also makes consequential amendments to the *Income Tax Assessment Act 1997*.

Delegation of Legislative Power Part 2, item 2

Part 2 of Schedule 1 of this bill provides for the creation of an administrative scheme for Education Tax Refund payments. The purpose of the scheme is to ensure that persons who may not be able to access an ETR under the new scheme provided for by this bill, but who would have been entitled to assistance under the Education Tax Refund, can receive an appropriate ETR payment. The Minister may, by legislative instrument, establish the administrative scheme. Item 2 of Part 2 provides that the scheme may only provide for payments to be made in circumstances in which the Minister determines that the replacement of the Education Tax Refund with the new ETR scheme does not 'produce appropriate results'. It is also the case that any

administrative scheme can only provide for payments to be made in the financial year beginning 1 July 2011. Finally, item 3 indicates a number of matters that may be dealt with in the scheme. As it is evident that the scheme is envisaged as a transitional measure and is designed to avoid anomalous results in moving from one set of administrative arrangements for providing assistance for educational expenses of school children to another, the Committee makes no further comment.

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

Financial Framework Legislation Amendment Bill (No.2) 2012

Introduced into the House of Representatives on 30 May 2012 Portfolio: Finance and Deregulation

Background

This bill amends 21 Acts across 6 portfolios to regularise Commonwealth payments supported by special appropriations (including Special Accounts) consistent with legislative requirements and section 83 of the Constitution.

Greenhouse and Energy Minimum Standards Bill 2012

Introduced into the House of Representatives on 30 May 2012 Portfolio: Climate Change and Energy Efficiency

Background

This bill establishes a national framework for regulating the energy efficiency of products supplied or used within Australia. The national framework will replace seven state and territory legislative frameworks.

In July 2009 the Council of Australian Governments (COAG) issued the National Strategy on Energy Efficiency with a commitment to establish national legislation for efficiency standards and labelling, and to expand the scope of the Equipment Energy Efficiency Program.

Strict liability Clauses 16 to 19, and clause 144

The explanatory memorandum, at page 20, contains a comprehensive justification of the approach taken to the offences established by clauses 16 to 19 relating to the use of GEMS products (see also the Statement of Compatibility with Human Rights). In summary, the justification for the approach is that strict liability offences are considered crucial to effective enforcement, persons supplying GEMS products will be placed on fair notice of their obligations, the defence of honest and reasonable mistake remains available, and also that there is a 'high public interest' in promoting energy efficiency and reducing greenhouse gas emissions. It is also argued that it will often be impractical to recall non-compliant products, supplied in breach of legislative standards and requirements.

A similar issue arises in relation to clause 144, which has the effect of imposing a strict liability standard in relation to proceedings for civil penalties. The explanatory memorandum, at page 62, points to the same general justifications given in relation to the strict liability offences provided for in the bill.

In light of the comprehensive justification of the proposed approach, the Committee leaves the question of whether it is appropriate to the consideration of the Senate as a whole.

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

Reversal of onus Clauses 16 to 19

Clauses 16 and 17 of the bill also contain provisions which provide that a defendant who asserts a particular factual matter (that the product was second-hand) bears an evidential burden of proof in relation to this matter. Clauses 18 and 19 have a similar provision which places an evidential burden of proof on defendants in relation to whether a product was supplied in Australia. This approach to the burden of proof is justified in the Statement of Compatibility with Human Rights and the explanatory memorandum (at page 24) by reference to the fact that the matters are uniquely within the accused person's knowledge and on the basis that proving these matters should be comparatively easy for the defendant. The justification offered is consistent with the *Guide to Framing Commonwealth Offences*, and the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Delegation of legislative power Clause 23

This clause empowers the Minister to make a GEMS determination to regulate one or more classes of products that use energy or attract the amount of energy used by another product. These determinations are central to the reach of the regulatory scheme. The explanatory memorandum states, at page 26, that the 'parameters of product classes are not defined in the Act due to the variety of products that may be regulated but will be clearly established in

each determination'. The approach adopted is 'currently used in the existing E3 Program' (being replaced by this bill) and 'ensures that determinations can set requirements that are appropriate and adapted to each product class' (see the explanatory memorandum at page 26). It is also noted that clauses 24 to 27 of the bill give statutory guidance to the nature of the requirements to be included within GEMS determinations.

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

Broad discretionary power Clause 45

This clause provides that the GEMS Regulator may impose written conditions on a product model's registration, but the bill does not seek to define the scope of the power. The explanatory memorandum states, at page 35, that the conditions 'must be reasonably adapted and appropriate to give effect to the purposes or provisions of the Act to be valid'. In essence this suggests that conditions must be proportionate to the purposes to be achieved by the legislation.

However, although broad statutory powers which delegate legislative power to regulate for particular purposes are sometimes read so as to require that they be exercised in a proportionate way, the standard of judicial review applied to administrative powers only requires that the decision not be so unreasonable that no reasonable decision-maker could have so exercised the power. It is true that the power could not be exercised for purposes which are thought to be unauthorised for the legislation, but the Committee is concerned to ensure that any conditions are directly proportionate. The Committee therefore seeks the Minister's advice as to whether consideration has been given to including in the legislation a requirement that conditions be 'reasonably adapted and appropriate'.

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

Undue trespass—natural justice Clauses 49 and 54

These clauses provide, respectively, for the suspension and cancellation of a product model's registration. These decisions would be reviewable under Part 9 of the bill which provides for internal review and AAT review. However, the statutory powers do not expressly provide for procedural fairness (i.e. natural justice) prior to the exercise of these powers. As such obligations are not clearly excluded by the statute, the exercise of these powers would be subject to the common law requirements for a fair hearing and impartial hearing. Nevertheless, it would be helpful if a statement to this effect was included in the explanatory memorandum to confirm that the legislation is not intended to (impliedly) exclude the common law rules of natural justice. The Committee therefore requests the Minister's consideration to including this information in the explanatory memorandum.

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

Insufficiently defined administrative powers—delegation Clause 80

This clause enables the GEMS Regulator to delegate functions and powers under the Act to Commonwealth, State or Territory officers. Delegates must be officers or employees of the Commonwealth, a State or a Territory.

The explanatory memorandum has a detailed explanation as to why the breadth of this power is justified. In particular it is argued that limiting the power to delegate by requiring that the delegate be an SES officer is impractical given to the wide ranging administrative tasks and the number of occasions on which the powers of the Regulator need to be exercised. It is also argued that it is appropriate to delegate powers to state and territory officers so that the program retains the expertise of the officers currently working in the existing E3 program and the cooperative development of the national scheme. In light of the justification provided, the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Undue trespass on personal rights and liberties—privacy Clause 162

This clause enables the GEMS Regulator to publicise, in any way he or she thinks appropriate, matters of fact connected with the enforcement of the legislation (including proven civil and criminal contraventions of the Act, issuance of infringement notices, and injunctions. The explanatory memorandum includes a detailed explanation as to why it is thought that publicising this information serves the public interest. The justification includes: the promotion of transparency in the work of the Regulator; the implications the information has for other regulated persons and consumers; and deterrence (see the explanatory memorandum at page 66). The Committee leaves to the question of whether the proposed approach, which uses publicity as a regulatory tool, is appropriate to the consideration of the Senate as a whole.

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

Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012

Introduced into the House of Representatives on 30 May 2012 Portfolio: Climate Change and Energy Efficiency

Background

This bill imposes registration fees to be charged on businesses registering regulated products as required under the Equipment Energy Efficiency Program.

Delegation of legislative power Clauses 8 and 9

Clause 8 permits the regulator to specify fees by legislative instrument. The fees are imposed, for constitutional purposes, as a tax. Clause 9 permits the legislative instrument to specify fees by nominating an amount to be paid or a method or formula for calculating registration fees. Although subclause 9(2) enables the Regulator to consider the costs of processing registration applications and compliance monitoring in relation to GEMS products, subclauses 9(3) and (4) make it clear that fees need not be limited to considerations concerning the costs associated with product registration.

The explanatory memorandum, at page 5, states that this 'is not intended to mean that fees are not fundamentally a cost recovery mechanism, but that the costs recovered under registration fees need not be related to these activities only' and may relate to other program activities. The explanatory memorandum also states that although a maximum fee is not specified in the legislation, 'the Act clarifies that registration fees are for the purpose of cost recovery, meaning registration fees should never exceed the reasonable costs taken into account when specifying the amount of registration fees'. However, the clause itself does not clearly limit fees to cost recovery. In particular subclause 9(3) states that the matters which the GEMS Regulator may consider in specifying an amount or method to calculate fees is not limited to the cost recovery matters specified in subclause 9(2). Given that the legislation contains neither a maximum level of fees nor a formula for the calculation of fees, the Committee seeks the Minister's advice as to whether consideration might be given to an amendment to the bill which

clarifies the intention that registration fees are limited to cost recovery purposes.

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

Health Insurance Amendment (Professional Services Review) Bill 2012

Introduced into the House of Representatives on 9 May 2012 Portfolio: Health and Ageing

Background

This bill responds to the Full Federal Court decision in *Kutlu* v *Director of Professional Services Review* (2011) 197 FCR 177 by validating certain acts. It also amends the *Health Insurance Act 1973* in relation to:

- the judgments in *Daniel* v *Health Insurance Commission and Others* (2003) 200 ALR 379 and *Kelly* v *Daniel* (2004) 134 FCR 64 by requiring the Chief Executive Medicare to request the Director of Professional Services Review to review services by a person if the services have been provided in circumstances that constitute a prescribed pattern of services;
- allied health practitioners; the meaning of service; the extension of time in certain circumstances for final reports and determinations; the Professional Services Review Committee or Determining Authority not continuing an investigation in certain circumstances; and
- the date of effect for final determinations; referrals to the Medicare Participation Review Committee; referrals to appropriate regulatory bodies; disqualified practitioners; and details to be included in patient referrals.

The bill also makes technical amendments consequent on the *Legislative Instruments Act 2003*.

Retrospective validation of decisions Schedule 1

Schedule 1 of this bill includes provisions which operate to validate actions taken by invalidly constituted Professional Services Review (PSR) Committees. In *Kutlu v Director of Professional Services Review* [2011] FCAFC 94 the Full Court of the Federal Court of Australia unanimously held that the Minster's failure to comply with statutory requirements to consult the Australian Medical Association prior to appointing a medical practitioner to

be a member of the Professional Services Review Panel or as a director of the Panel had the consequence that (i) the appointments were invalid, and (ii) that any decision made by a Committee constituted by persons invalidly appointed were also invalid.

The explanatory memorandum states at page 1 that the amendments ensure that 'actions taken under Part VAA, VB or VII of the HIA [Health Insurance Act] and any flow on acts that have been brought into question as a result of the Kutlu decision, are treated as valid and effective and are to be taken always to have been valid and effective'. The validating provisions do not apply 'to parties to proceedings for which leave to appeal to the High Court of Australia has been given on or before the commencement of this Schedule' (explanatory memorandum at page 12) and the provisions in item 2 of Schedule 1 enable the Director of the PSR to re-refer matters to a new PSR Committee if, either before or after the commencement of item 2, [relevant] proceedings ... have been finally determined by a court in favour of the person under review on the grounds that, or on grounds that include the ground that, a person not appointed, or [not] validly appointed, as a Panel member or Deputy Director under the HIA' (explanatory memorandum at page 12).

The retrospective validation of decisions involved in these provisions is addressed in the Statement of Compatibility with Human Rights (SOC). The SOC claims at page 7 that Schedule 1 of the bill seeks to 'recreate rights and liabilities that but for the invalid appointments would have been established as a result of the findings made by the invalidly constituted PSR Committees'. The SOC appears to proceed on the basis that 'no human rights objections' will generally be raised in relation to such provisions (see page 6). More particularly, in relation to whether the right to a fair trial is affected, it is argued that the bill has a legitimate objective in 'ensuring that a technical error in the appointment process of the PSR Panel and Deputy Director does not expose the public to the risks of inappropriate practice' and that the approach is 'reasonable, necessary and proportionate' to this objective (see page 7).

The Committee draws attention to proposed retrospective legislation where the provisions may, or will, have a detrimental effect on individuals. In addition, the Committee takes the view that retrospective legislation should be clearly justified in the explanatory memorandum. There are a number of aspects of the Federal Court's reasoning in *Kutlu* which are of relevance to a

consideration of the adequacy of the justification of the approach taken in Schedule 1 of the bill. (The Committee also notes that the High Court has granted special leave to appeal from this decision.)

Although the Federal Court recognised that the invalid decisions produced by invalidly constituted committees may cause public inconvenience, the Court's reasons are clearly inconsistent with characterisation of the consultation requirement as a mere technicality. The general purposes of the review scheme included the promotion of public confidence in decisions reached, but the Court also emphasised a legislative intention to promote confidence of the regulated professions and individual professionals in the system [Kutlu [20]].

While the Court accepted that the views of the AMA are not determinative of the question of whether a person can be appointed, it was emphasised that the advice of the AMA is a mandatory relevant consideration—that is, a matter which the Minister must consider prior to making an appointment. It was also argued that the conclusion that consultation with the AMA was an essential element of valid appointments was consistent with the text of the legislation which provided that 'the Minister *must* consult' '*before*' making an appointment. The Court also emphasised the 'scale of the breaches' of the Act. In addition, the Court noted that the statutory requirements were not difficult to comply with and that political responsibility for any inconvenience lay with the decision-maker.

In light of the emphasis in the SOC that the bill is intended to ensure the protection of the public the Committee, further justification for the conclusion that the bill has a legitimate objective and that the approach is 'reasonable, necessary and proportionate' would be of assistance to the Committee to assess the proposed approach against its terms of reference. In addition, further information about extent of any public inconvenience created by Ministers' failures to comply with the legislation and the number of persons who may be adversely affected would assist the Committee in assessing whether the approach is proportionate in light of the significant affects that adverse committee decisions may have on those directly affected. Also relevant is whether the Department has already taken steps to minimise public inconvenience prior to the introduction of this legislation and whether any alternative solutions have been considered. For these reasons, the Committee seeks the Minister's further advice about these matters and the justification of the proposed approach.

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

Delegation of Legislative Power Schedule 2, item 6

Item 6 of schedule 2 of the bill introduces a new section 82A, which concerns the meaning of the term 'prescribed pattern of services'. The Professional Services Review Committee may review the provision of such services. Proposed section 82A enables the regulations to prescribe the circumstances in which services are rendered or initiated so as to amount to a prescribed pattern of services. Subsections 82A(2) and (3) make it clear that the regulation making power for this purpose is a flexible one. Prescribed circumstances may relate to practices of practitioners in a particular profession or a sub-group of a particular profession. It is also the case that they may relate to circumstances which include the provision of services of more than a specified number, or more than a specified number of services of a particular kind, on each of more than a specified number of days during a period of a specified duration.

The explanatory memorandum at page 17 justifies this flexibility by reference to the 'significant variation' that 'exists in the way in which different health professions and individual specialties within professions practice and that the point at which the quality of the clinical service provided to patients may be undermined varies between professions and specialties'. In the Committee's view, the appropriateness of providing for the details of a 'prescribed pattern of services' through delegated legislation in general appears to be justifiable given that what amounts to inappropriate clinical practice in particular professions is likely to be subject to variations and, also, a matter where it may be appropriate for regulation to be responsive to changing practices. Thus, the Committee leaves to the Senate as a whole the question of whether the proposed approach is appropriate.

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

Delegation of Legislative Power Schedule 2, items 16 and 17

Item 16 of Schedule 2 of the bill introduces a provision that has the effect of enabling the Minister to determine, by legislative instrument, new categories of health professionals to be a *practitioner* for the purposes of the Professional Services Review Scheme. The reason for enabling the Minister to broaden the definition of practitioner in this way is to implement a recommendation of the Review of the *Professional Services Review Scheme—Report of the Steering Committee—May 2007*, which recommended that all 'allied health groups who are eligible to provide services that attract a Medicare benefit' be included in the scheme (see the explanatory memorandum at 19). The explanatory memorandum lists a number of health services providers which can provide services within the meaning of the HIA, but who cannot currently be reviewed under the Professional Services Review Scheme. Although the argument for broadening the definition of practitioner is clear, it is less clear why this needs to be achieved through a delegation of legislative power to the Minister and the explanatory memorandum does not address this point.

The same issue also arises in relation to item 17 in relation to the definition of *profession*.

The Committee therefore seeks the Minister's advice as to why the health providers that should be included in the review scheme, and vocations determined to be a profession for the purposes of the review scheme, cannot be provided for in the primary legislation.

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

Higher Education Support Amendment (Student Contribution Amounts and Other Measures) Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Industry, Innovation, Science, Research and Tertiary Education

Background

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

- increase the maximum student contribution amount for units of study in mathematics, statistics and science for all domestic students from 1 January 2013; and
- remove eligibility for Commonwealth supported places and the Higher Education Loan Program (HELP) schemes for Australian citizens who do not intend to reside in Australia during their course.

Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill amends the *Income Tax (Managed Investment Trust Withholding Tax) Act 2008* to increase the managed investment trust final withholding tax rate to 15 per cent to fund payments made in relation to income years commencing on or after 1 July 2012.

Income Tax (Income Tax (Seasonal Labour Mobility Program Withholding Tax) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill is part of a package of three bills. This bill imposes a 15 per cent withholding tax on income derived by non-resident workers participating in the program from 1 July 2012.

Legislative Instruments Amendment (Sunsetting Measures) Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Attorney-General

Background

This bills amends the Legislative Instruments Act 2003 to:

- repeal spent and redundant instruments and provisions up to 10 years earlier than is provided for under the existing sunsetting regime;
- provide greater certainty about what instruments sunset and when they sunset, and provide staged sunsetting dates for older instruments;
- enable the Attorney-General to align sunsetting dates of related legislative instruments to enable thematic reviews to be conducted; and
- clarify the requirements for explanatory material for instruments, including instruments that are remade following a review.

Malabar Headland Protection Bill 2012

Introduced into the House of Representatives on 9 May 2012 Portfolio: Special Minister of State

Background

This bill provides for the protection of environmental, heritage and cultural features contained in the Malabar Headland, New South Wales following divestment to New South Wales.

Incorporating material by reference Part 2, item 9

Item 9 of the bill requires New South Wales to manage transferred Malabar headland property, or to cause it to be managed, in accordance with regulations prescribed for this purpose. Subclause 9(3) provides that regulations made for this purpose may 'apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or writing, as existing at a particular time'. The explanatory memorandum indicates at page 11 that this provision 'is intended to allow the regulations to apply a plan of management agreed between the Commonwealth and the NSW Government for the purposes of a deed of transfer of the property'. Subclause 9(4) requires that such a document be posted on the Department's website.

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

Marine Safety (Domestic Commercial Vessel) National Law Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Infrastructure and Transport

Background

This bill creates a single national maritime regulator and national safety system for domestic commercial vessel safety in Australia.

On 19 August 2011 the Council of Australian Governments (COAG) Inter-Governmental Agreement (IGA) on Commercial Vessel Safety Reforms was signed. The bill replaces eight existing federal, state and territory regulators with one National Marine Safety Regulator, the Australian Maritime Safety Authority.

Delayed Commencement Clause 2

The substantive provisions in the bill will commence on a day to be proclaimed or after 12 months the Act receives Royal assent. Normally, the Committee prefers to see Acts commence within 6 months of Royal Assent. Although the explanatory memorandum discusses the possibility of commencement by Proclamation, it does not address the reasons for delaying commencement for up to 12 months. Although it is accepted that there are likely to be legitimate reasons for delay in this instance, the Committee requests the Minister's advice as to the rationale for the proposed approach.

Incorporating material by reference Clause 12

This clause provides for a definition of the phrase 'corresponding State-Territory Law'. Subclause 12(1) provides for the Minister to make a legislative instrument which declares a law of a State or the Northern Territory to be such a law, and this may be done by reference to the law 'as amended from time to time'. The Committee consistently comments on the incorporation of material by reference as it has the effect of limiting parliamentary scrutiny. However, in the current circumstances it may be

considered to be a necessary element of a national scheme of the nature being introduced by this bill and the Committee notes that the law will be publicly available. The Committee therefore leaves to Senate as a whole the question of whether the proposed approach is appropriate.

The Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle I(a)(iv) and may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle I(a)(v) of the Committee's terms of reference.

Adequacy of merits review Clause 16

Subclause 16(2) provides that decisions made by the National Regulator in the performance of a function or the exercise of a power conferred by a corresponding State and Territory law may be reviewed by the AAT if (a) the law under which the decision was made provides for AAT review and (b) the decision is declared by the regulations to be a reviewable State-Territory decision for the purposes of this section. The explanatory memorandum discusses the clause, at page 17, but does not give any explanation which would enable the Committee to consider whether decisions that should appropriately be subject to merits review will, in fact, be reviewable decisions. The Committee therefore requests the Minister's advice and assurance as to whether merits review will be appropriately available.

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

Delegation of Legislative Power Schedule 1, clauses 7 and 8

This clause defines 'domestic commercial vessel'. Subclause 7(5) enables the regulations to specify whether particular vessels or types of vessels are domestic commercial vessels or not. Although the explanatory memorandum, at page 24, acknowledges that this is a 'significant power', it states (i) that the

intended scope of the definition is set out in the clause, and (ii) any 'addition to this definition will be by unanimous agreement by all SCOTI [Standing Council on Transport and Infrastructure] Ministers'.

A similar issue arises in relation to the definition of vessel in clause 8 of Schedule 1. By subclause 8(3), regulations may provide that specified things or classes of things are, or are not, vessels. The explanatory memorandum, at page 25, gives two examples of particular specific marine structures which will be included (a moored structure used for tourism purposes) or excluded (pens used for aquaculture) by regulations.

The Committee prefers not to see important matters, especially those which may affect the scope of application of the legislation, being dealt with by regulation, but notes the useful explanations in the explanatory memorandum. In the circumstances the Committee leaves the question of whether the proposed approach is appropriate to Senate as a whole.

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

Insufficiently defined power – delegation Schedule 1, clause 11

This clause enables the National Regulator to delegate powers and functions to an employee of a Commonwealth or to a State or Territory agency (with their consent). The explanatory memorandum, at page 26, notes that in practice the powers will be delegated to the head of each marine safety agency in the States and Territories, who in turn would sub-delegate them to appropriate officers (as authorised by subclause 11(3). The explanatory memorandum describes the overall approach as 'fundamental to the service model for the day-to-day operation of the National System', and provides considerable detail as to the requirements for instruments of delegation, which are said to be consistent with section 34AA of the *Acts Interpretation Act* 1901 (see page 26 of the explanatory memorandum).

The question of accountability arrangements in relation to decisions made by delegates who are officers of a State or Territory agency is of particular interest to the Committee. In relation to this issue, the explanatory

memorandum makes two main points (at page 26). First, the National Regulator will provide directions to promote appropriate standards and consistency. Secondly, decisions made by officers who are employed by the States and Territories will not be excluded from administrative law accountability mechanisms. The basis for this claim is that the National Regulator will be 'required to respond to applications for external review of the delegate's decision' because decisions of delegates are deemed to be decisions of the National Regulator by operation of paragraph 34AB(c) of the *Acts Interpretation Act 1901*.

Paragraph 34AB(c) of the *Acts Interpretation Act 1901* (Cth), provides that 'a function or power so delegated, when performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed or exercised by the authority [i.e. the principal]'. To the Committee's knowledge there has been little judicial discussion of the meaning and effect of this provision. However, it seems probable that the provision means that in litigation either the principal or delegate could be nominated as the defendant. Furthermore, although there are older cases which cast doubt on the extent to which State decision-makers exercising Commonwealth powers would be subject to judicial review jurisdiction under s 75(v) of the Constitution (and section 39B of the *Judiciary Act*), it is doubtful whether this position would be maintained where a state officer exercises powers delegated to them under Commonwealth law. Also, such powers would be reviewable under the *ADJR Act*. For these reasons, **the Committee leaves to Senate as a whole the question of whether the proposed approach is appropriate**.

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

Penalties for Offences Various

The explanatory memorandum, at page 12, gives a general justification for the various penalty provisions. It is stated that the 'penalties in the Bill generally reflect the community's view that any person who has a work-related duty of care, but does not observe it, should be liable to a criminal sanction for placing another person's safety at risk'. The approach is said to be consistent with international practice and the *Work Health and Safety Act 2011*. It is

further stated that the maximum penalties provided for in the Bill 'reflect the level of seriousness of the offences and have been set at levels high enough to cover the worst examples of offence'. In the circumstances, the Committee leaves the question of whether the proposed approach is appropriate to Senate as a whole.

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

Strict liability Various

The bill contains many strict liability offences. The explanatory memorandum gives a global justification for the approach as follows: 'The application of strict liability to certain offences has been carefully considered during the drafting of the Bill and most strict liability offences are subject to other qualifiers, such as reasonable practicability, due diligence or reasonable care (see page 11). The Bill also makes reference in relevant clauses to section 6.1 of the Criminal Code, which provides further details on strict liability.'

The Committee notes that the penalties associated with the strict liability offences do not exceed 60 penalty units. However, given that proof of fault is one of the most fundamental protections in our system of criminal law the Committee is concerned about an approach that takes a 'blanket' justification of the strict liability offences in the bill. The Committee's view is that it is highly desirable that explanatory memoranda deal with the issue with more detail and specificity. Even if a particular justification for the use of strict liability is repeated or cross-referenced, dealing with each provision on its own merits (as opposed to offering a global justification) ensures that appropriate consideration has been given to the issues in each instance. The Committee draws its views on this issue to the Minister's attention and leaves to Senate as a whole the question of whether the proposed approach is appropriate.

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

Reversal of onus Various

There are various instances where the bill imposes an evidential burden of proof on the defendant in relation to a 'reasonable excuse defence'. The explanatory memorandum states, at page 12, that this 'is because the defendant is the only person in the circumstances with the relevant knowledge able to provide evidence of any reasonable excuse for refusing or failing to meet the relevant duty or obligation'. The Committee notes its concern that an evidential burden is being placed on defendants in relation to a defence of uncertain application, but leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Entry Search and Seizure Powers: various issues

The Statement of Compatibility with Human Rights states that the bill has been drafted consistently with the principles set out in *The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. It is also stated that the enforcement powers are equivalent to those provided in other Commonwealth legislation.

In a number of respects, the approach taken to enforcement is such that the Committee expects strong justification to be given and in general the SOC provides such justification. Nonetheless, a number of issues are noted. **First**, the bill provides for entry and search powers without warrant (Subdivision B of Schedule 1). However, as noted in the SOC, the *Guide* indicates that search and entry powers without warrant may be justifiable in a number of limited circumstances. More particularly, it is noted that such powers may be appropriate where 'the inherent mobility' of a particular conveyance means that there may not be time, or it would be impractical to obtain a warrant. As domestic vessels fall into this category and because 'the nature of commercial activities undertaken by these vessels often means that they do not follow any predictable pattern or timetable' the SOC argues that the approach is proportionate.

The SOC also points to an exception in relation search and entry powers in relation to licensed premises, where a person who obtains a licence or registration can be taken to accepting entry to their premises for the purposes of ensuring compliance with legislative requirements or registration conditions. (The full arguments are at pages 7 and 8 of the SOC.) The Committee understands the detailed explanation offered for these powers, but seeks the Minister's advice as to whether consideration has been given to establishing an oral 'authorisation' system similar to the arrangements in the Maritime Powers Bill, including a requirement for 'authorisations' to be recorded as soon as practicable (discussed below in relation to the Maritime Powers Bill).

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

Secondly, clause 100 permits a marine safety inspector without a warrant to seize, secure or take a sample of a thing found on a domestic commercial vessel if the inspector reasonably believes that the thing is evidential material and either a warrant cannot be practically obtained or the action is serious and urgent (to prevent concealment, loss or destruction of the thing). In general, the Committee prefers seizure to only be allowed under a warrant, even if search and entry has been authorised in the absence of a warrant. The explanatory memorandum, at page 59, states that this 'provision is intended to be used where it is impractical to obtain a warrant, such as in remote locations with little or no mobile phone coverage that would make it impossible to obtain such a warrant in a reasonable time frame'. Subclause 100(6) requires that a marine safety inspector who exercises the powers under this clause must give the national regulator a description of the exercise of the power and grounds for his or her belief. In these circumstances, the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Thirdly, clause 102 of schedule 1 of the bill provides that a person commits an offence if they do not comply with a requirement to give specified forms of assistance (by reference to clauses 99(2)(h), 99(2)(i) and 99(3)). Normally, an offence of failing to provide facilities and assistance should carry a maximum penalty of 30 penalty units (see the *Guide* at page 78). The maximum penalty set for this offence, however, is 60 penalty units. However, having regard to

the fact that the nature of the requirements (to demonstrate the operation of machinery or equipment or to manoeuvre the vessel in particular ways) may impact on the safety and welfare of persons on board the vessel (in addition to the efficacy of monitoring compliance), the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Fourthly, Clause 91 of Schedule 1 provides for the appointment of marine safety officers. Such officers can exercise the powers of enforcement specified in the bill, though the instrument of appointment may limit the powers which an officer may exercise (subclause 91(2)). Subclause 91(3) provides that the National Regulator must not appoint a person as a marine safety inspector unless satisfied that the person has suitable qualifications or experience to properly exercise the powers of an inspector. The Committee is concerned about the lack of legislative detail as to the required attributes or qualifications inspectors should have. Marine safety officers may be empowered to exercise search, entry and seizure powers without warrant. Further, such officers are authorised (clause 107) to use such force against persons as is necessary and reasonable in the circumstances. The Committee therefore seeks the Minister's advice as to whether consideration has been given to including more detail in the Bill, or to including a legislative requirement for the Minister to issue guidelines with further specifications as to appropriate qualifications and experience for marine safety officers.

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

Delegation of Legislative Power Clause 162

This clause provides that the regulations may prescribe penalties. Although penalties are limited to not more than 50 penalty units in relation to offences against the regulations, subclause 162(2) enables the regulations to prescribe civil penalties of up to 500 penalty units in the case of a body corporate and 100 penalty units in any other case. Although these higher penalties attach to civil penalty provisions rather than criminal offences, they are significant penalties and as the explanatory memorandum, at page 81, merely restates the

effect of the provision, the Committee seeks the Minister's advice as to the justification for the proposed approach.

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

Incorporating material by reference Schedule 1, clause 164

This clause enables Marine Orders (i.e. legislative instruments which are not regulations) to apply, adopt or incorporate any matter in another written instrument in force or existing from time to time. The explanatory memorandum states, at page 83, that this 'is an important provision as it will enable the national application of those technical standards adopted by Transport Ministers', which will be part of the process of setting agreed national standards. Although the Committee often comments adversely on provisions that seek to incorporate material by reference, in this instance it appears to be a central part of the overall national regulatory scheme this bill seeks to put in place and the Committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle I(a)(v) of the Committee's terms of reference.

Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Infrastructure and Transport

Background

This bill provides for consequential amendments to the *Australian Maritime Safety Authority Act 1990* (AMSA Act) and the Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (the National Law).

Schedule 1 of the Bill amends the AMSA Act to include definitions defined in the National Law and to reflect the agreement reached in the Council of Australian Government's (COAG) Intergovernmental Agreement (IGA) on Commercial Vessel Safety Reform.

Schedule 2 of the Bill repeals the existing offences and penalties for the general safety duties in the National Law and replaces them with provisions that mirror the provisions of Part 2 of the *Work Health and Safety Act 2011*.

Maritime Powers Bill 2012

Introduced into the House of Representatives on 30 May 2012 Portfolio: Attorney-General

Background

This bill provides for a single standard framework for authorising and exercising maritime enforcement powers.

Undue trespass on personal rights and liberties—warrants not required to exercise coercive powers Clauses 35 and 25

The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers recommends that coercive powers (entry, search and seizure powers etc) should ordinarily be conducted under a warrant. The explanatory memorandum, at page 35, accepts that clause 35, which provides that a maritime officer is not required to obtain a warrant to exercise any power under this Act, is inconsistent with this general principle. Nevertheless it is argued that a similar power exists in the existing legislation which is being replaced by this bill. Moreover, attention is directed to the context of maritime enforcement which frequently occurs in remote locations, and is often isolated from the support normally available to land based operations. Further the bill points to the fact that the bill establishes a system of 'authorisations' (to be obtained in general by the most senior maritime officer available) which 'provides for a degree of oversight in relation to the exercise of powers under the Bill'. It is also noted that the Guide indicates that an exception to the requirement for a warrant is often accepted in relation to conveyances which are inherently mobile. The Committee therefore leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

However, it is noted that authorisations, which enable the exercise of maritime powers, need not be issued in writing (clause 25). The explanatory

memorandum gives a justification for this based on the fact that authorisation may need to be made urgently in a maritime environment. The explanatory memorandum also indicates that an authorising officer may be required to give evidence about the existence and nature of an orally made authorisation for the purposes of prosecuting an offence that was enforced under the bill (see page 31). However, if it is not possible to issue the authorisation in writing, it may be thought desirable for written records to be kept soon after an authorisation is made to facilitate transparency of decision-making in this context. The Committee therefore seeks the Attorney-General's advice as to whether consideration has been given to including further procedures in the bill for the authorisation scheme, for example a requirement that oral authorisations be recorded as soon as practicable.

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

Undue trespass—nature of enforcement powers Clause 29

Clause 29 makes it clear that a maritime officer may exercise maritime powers to ensure the safety of the officer or any other person without authorisation. This power is not dependent on the officer having a suspicion on reasonable grounds, in line with the recommendation of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* for the exercise of enforcement powers. Nevertheless, as noted by the explanatory memorandum, at page 32, the maritime officer would only be able to 'exercise the powers for the purpose of ensuring the safety of the officer or another person'. Furthermore, it is said that the power would often need to exercised in urgent or emergency circumstances. The Committee notes this information, and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

However, the Committee also seeks the Attorney-General's advice as to whether there are any subsequent reporting requirements on the use of maritime powers without authorisation.

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

Undue trespass—use of force against persons Clause 37

Subclause 37(1) provides that, in exercising any of the powers under the bill, a maritime officer may use such force against a person or thing as is necessary and reasonable in the circumstances. Subclause 37(2) provides additional safeguards in using such force. In particular, persons must not be subjected to greater indignity than is necessary and reasonable. Further officers must not do anything likely to cause the death of, or grievous bodily harm to a person (unless the officer reasonably believes that doing so is necessary to protect life or to prevent serious injury to another person).

The explanatory memorandum argues that this approach limits the use of 'high degrees of force' to situations of self-defence or defence of others. It is also noted that the use of force provision adopts the same approach as that taken in the *Crimes Act 1914*. The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Undue trespass—privacy and search powers Clauses 59, 61 and 62

These clauses enable maritime officers to conduct searches of places and persons. Clause 62 provides that a frisk search must be conducted by a person of the same sex as the person being searched except where a maritime officer or other suitable person of the same sex is not available (including a person who agrees to a request to assist a maritime officer (pursuant to section 38(5)(a)).

Although these powers clearly engage the right to privacy, the explanatory memorandum, at page 48, notes that the powers are similar to those that exist in the current legislation being replaced. More significantly, the Statement of

Compatibility with Human Rights argues that the conduct of searches of persons and places pursuant to an authorisation is necessary in the 'interests of Australia's national security, including border protection and combating transnational crime, and to protect safety by searching, for example, for concealed weapons'. For this reason it is concluded in the explanatory memorandum that the limits on the right to privacy are not arbitrary and are proportionate to legitimate ends. The Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Maritime Powers (Consequential Amendments) Bill 2012

Introduced into the House of Representatives on 30 May 2012 Portfolio: Attorney-General

Background

This bill repeals maritime enforcement powers in a number of Acts which overlap with the powers in the Maritime Powers Bill 2012.

Migration (Visa Evidence) Charge Bill 2012

Introduced into the House of Representatives on 9 May 2012 Portfolio: Immigration and Citizenship

Background

This bill is the principal bill in package of two bills which will:

- impose a charge in relation to requests for evidence of visas;
- establish a charge limit of \$250 for a visa evidence request made in the 2012-13 financial year; and
- provide for indexation of the charge limit in later financial years.

Migration (Visa Evidence) Charge (Consequential Amendments) Bill 2012

Introduced into the House of Representatives on 9 May 2012 Portfolio: Immigration and Citizenship

Background

This bill is the second bill in a package of two bills. This bill amends the *Migration Act 1958* to:

- enable a non-citizen visa holder, or certain other persons on behalf of the visa holder, to request to be given a prescribed form of evidence of a visa and require that person to pay the visa evidence charge;
- provide that the amount of charge be prescribed in the regulations and must not exceed the charge limit;
- insert a regulation making power in relation to various matters relating to the charge; require an officer to give a person evidence of a visa within a reasonable time after they have made a request and paid the charge; and
- allow the minister to direct that a specified document is not to be taken to be a passport or travel document for the purposes of the regulations.

National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Health and Ageing

Background

This bill amends the National Health Act 1953 to:

- introduce a new pricing structure for pharmaceutical items supplied under the Pharmaceutical Benefits Scheme (PBS); and
- enable medicines to be listed for supply only via PBS prescriber bags.

National Integrity Commissioner Bill 2012

Introduced into the House of Representatives on 28 May 2012 By: Mr Bandt

Background

This bill is substantially similar to a bill that was introduced into the Senate by Senator Bob Brown on 30 September 2010. This *Digest* includes the Committee's previous comments to the extent that they are applicable to this bill.

This bill seeks to establish a National Integrity Commission, bringing together and co-locating the independent oversight functions for:

- the investigation and prevention of misconduct and corruption in all Commonwealth departments, agencies, federal parliamentarians and their staff;
- the investigation and prevention of corruption in the Australian Federal Police and the Australian Crimes Commission; and
- independent advice to Ministers and parliamentarians on conduct, ethics and matters of proprietary.

Statement of compatibility

The Committee notes that the bill was introduced without a statement of compatibility, which is required by the *Parliamentary Scrutiny (Human Rights) Act 2011*.

Possible undue trespass on personal rights and liberties Natural justice - right to a fair hearing Clause 31

Clause 31 of this bill provides that the National Integrity Commissioner must not disclose findings or opinions critical of an agency or a person in a report, unless an opportunity to be heard has been afforded. This requirement, to be afforded procedural fairness, is an express statement of what would otherwise be an implicit legal requirement (read into the legislation as a matter of statutory interpretation or as a common law requirement). However, subclause 31(2) states that a hearing is not required if the Commissioner is satisfied that a person (a) may have committed a criminal offence, contravened a civil penalty provision, could be subject to disciplinary proceedings or whose conduct could be grounds for the termination of their employment, and (b) that affording the statutory procedural fairness requirements may either compromise the investigation of a corruption issue or an action taken as a result of such an investigation. In effect, in particular circumstances the statute attempts to exclude an obligation to give a person a fair hearing prior to the completion of a report. Subclause 33(3) specifically provides that a report may recommend that a person's employment be terminated.

This raises a question of whether this provision unduly trespasses on a personal right, given that a fair opportunity to be heard is thought to be a fundamental common law right (see eg, *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 [14-15]).

Unfortunately, the explanatory memorandum does not adequately justify the exclusion of a fair hearing, but merely repeats the terms of the bill (at page 7). Although the Commission *may* decide to exclude from its report 'sensitive information' where it is desirable in the circumstances (subclause 33(4)), there is no requirement to do so in relation to critical findings or opinions which are contained in the report in relation to persons who have not been afforded a fair hearing. Although sensitive information which is excluded from the report must be included in a supplementary report (which sets out the information and the reasons for excluding it), only the primary report must be tabled in Parliament (see clause 157). Both the report and any supplementary report must be given to the Prime Minister, however, the Prime Minister is only under an obligation to table the report (at least in cases where a public hearing has been held).

Given the capacity of findings and opinions mentioned in subclause 31(2) to adversely affect a person's reputation (see *Ainsworth v Criminal Justice Commission (Qld)* (1992) 175 CLR 564) and the characterisation of the right to be heard as a fundamental common law right, the bill may, without further clarification, give rise to considerable interpretive difficulties in the courts. For example, it may be that a court could imply a right to be heard prior to the Prime Minister tabling a report in Parliament in relation to any critical

findings or opinions that had not been disclosed pursuant to subclause 31(2) and which was not excluded from the report as 'sensitive' information.

The Committee accepts that the need to preserve the efficacy of any continuing or future investigations in relation to corruption is clearly a legitimate public interest, but remains concerned as to whether there are sufficient protections in place to protect an individual who is not afforded a right to be heard. The Committee therefore requests the Private Member's advice as to the justification for the approach, whether additional protections can be included for an individual who is not afforded a right to be heard and whether consideration can be given to clarifying the intended operation of these provisions.

Pending the Private Member'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 I(a)(i) of the Committee's terms of reference.

Possible undue trespass on personal rights and liberties Right to representation Subclause 31(7)

Paragraph (b) of subclause 31(7) provides that a person who has a right to be heard 'may, with the National Integrity Commissioner's approval, be represented by another person'. Given the nature of the interests and rights at stake and the potential complexity of the issues which may be raised, there may be circumstances where a fair hearing will be compromised if a person is refused permission to be represented. **The Committee therefore requests the Private Member's advice as to the justification for the approach.**

Pending the Private Member'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 I(a)(i) of the Committee's terms of reference.

Abrogation of legal professional privilege Strict liability Penalty Clauses 46 to 48, and clauses 64 to 66

Subclause 43(5) of the bill states that for the purposes of sections 45 to 48, the powers to request or require a person to produce information/documents includes the power to request or require the production of materials that are subject to legal professional privilege. Although sections 46 and 47 indicate a person may refuse or fail to provide information on the ground of legal professional privilege, there are a number of limitations and the National Integrity Commissioner may, after considering materials over which privilege has been claimed, determine whether to accept or reject the claim. In relation to the production of a document or thing, a person may refuse a request if 'a court has found the document or thing...to be subject to legal professional privilege'. If the Commissioner accepts the claim of privilege they must 'disregard' the material. However, it is unclear what exactly this might mean. Clause 48 makes it an offence for a person to fail to comply with a request under clause 43 to produce documents or give information and the Commissioner has decided to reject a claim that the information or document is subject to legal professional privilege. The offence is punishable by a fine of \$1000 or 6 months imprisonment. The offences are strict liability offences (subclause 48(3)). However, they are subject to a reasonable excuse defence (subclause 48(4)).

Similar issues arise in relation to clauses 64, 65 and 66.

The Committee has long taken the view that legal professional privilege is a fundamental principle of the common law, and will closely examine legislation which removes or diminishes this right. Unfortunately, the explanatory memorandum (at pages 9, 10 and 21), is silent on the issues of the extent to which the legislation is intended to modify the applicable common law principles, the justification for these modifications, and whether the penalties for offences relating to claims for legal professional privilege are justified. In relation to the offence provisions, it is noted that no explanation of the need for strict liability is provided (a matter which is of continuing concern to the Committee), nor is it explained why it is appropriate to use a reasonable excuse defence (A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, at page 28, cautions against the use of such provisions as introducing uncertainty into the law). The absence of a

detailed treatment of these issues in the explanatory memorandum undermines the capacity of the Committee to adequately consider these clauses in the bill. The Committee therefore requests the Private Member's advice as to the justification for the approach taken in relation to these matters.

Pending the Private Member'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 I(a)(i) of the Committee's terms of reference.

Protection against self-incrimination Clauses 49 and 67

Clause 49 of the bill provides that the privilege against self-incrimination is abrogated in relation to requests to 'a person' for information, documents or things under clause 43. Failure to comply with such a request is an offence under clause 45, punishable by 2 years imprisonment. The privilege is not completely abrogated as it is subject to a 'use immunity' which means that self-incriminatory disclosures cannot be used against the person who makes the disclosure in criminal proceedings or other proceedings for the imposition or recovery of a penalty. However, this use immunity only applies if a person, prior to producing information or documents or things, claims that doing so may tend to incriminate or expose them to a penalty. The use immunity is stated as operating only as a 'direct' use immunity (i.e. applying in relation to court proceedings) and does not amount to a 'derivative' use immunity, which would prevent the use of the compelled information in the gathering of other evidence against the person. It is also the case that the use immunity will not be available in relation to a list of five proceedings (see paragraphs (c) to (g) of subclause 49(4)). The explanatory memorandum gives a general justification for the abrogation of the privilege as follows:

It is necessary to abrogate the privilege against self-incrimination to ensure that the National Integrity Commissioner can be given access to information, documents and things relevant to an investigation into a corruption issue. The inclusion of a use immunity in all but five limited cases provides a safeguard to persons that are required to answer questions or produce documents or information or things...that compliance with that request cannot be used against them in criminal proceedings or proceedings for the imposition or recover of a penalty...

The Committee has accepted that the privilege against self-incrimination is not absolute and the question of whether the competing interests are appropriately weighed will often be a matter best left to the Senate as a whole. However, the interest of having the Government properly informed will more likely be accepted as prevailing over the right of the individual to remain silent if it there is a clear justification offered. Unfortunately, the explanatory memorandum does not:

- (1) Indicate why the use immunity is only available to persons who make a prior claim that compliance with s 43 may tend to incriminate or expose them to a penalty. This is of concern as the application of the use immunity may depend on a person's access to legal advice.
- (2) Explain why a derivative use immunity is not appropriate. In the past the Committee has expressed concerns about the absence of derivative use immunity, notwithstanding the inclusion of a direct use immunity.
- (3) Explain why each of the exceptions to the general use immunity is justified.

The Committee therefore requests the Private Member's advice on these questions to better assess whether these clauses unduly trespasses on personal rights and liberties.

Pending the Private Member'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 l(a)(i) of the Committee's terms of reference.

Possible undue trespass on personal rights and liberties Clause 71

Clause 71 gives an 'authorised officer' the authority to execute an arrest warrant (subclause 71(1)) and, if the officer believes on reasonable grounds that a person is on any premises, to break and enter into those premises (subclause 71(2)). 'Authorised officers' may also apply for search warrants (including ordinary and frisk searches of the person) and carry out such searches (see clauses 78-87). 'Authorised officer' is defined in clause 110 to be a person who has been authorised by the National Integrity Commissioner to be such an officer and is either a staff member of the National integrity Commission whom the Commissioner considers has suitable qualifications or experience, or a member of the Australian Federal Police.

Although it is possible to identify circumstances in which an appropriate person may not be a current member of the AFP (for example, if they were a former member or a member of a State or Territory police force) it gives rise to concern that 'police powers' such as the powers of arrest and the power to conduct personal searches may be conducted by persons other than sworn police officers. At page 31 the explanatory memorandum notes that it is important that these powers be exercised by persons with the appropriate skills and character, but does not offer reasons as to why persons other than police officers may be required to exercise these powers, nor does it or the bill provide specificity about what constitutes 'suitable qualifications or experience'. The Committee therefore requests the Private Member's advice about whether this power could be limited to police officers or more legislative guidance could be provided to about appropriate qualifications and experience for these officers.

Pending the Private Member'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 I(a)(i) of the Committee's terms of reference.

No explanation for new search warrant powers Clause 78

Clause 78 authorises applications for warrants to search premises and persons. The Committee takes the view that any new powers to search persons require strong justification (and this view is outlined on page 107 of the *Guide*.) The Committee can understand that there may be reasons in which search warrants are considered justified, but expects that the reasons for proposed approach would be addressed in detail in the explanatory memorandum (see p 25).

If the bill proceeds to further stages of debate, the Committee **seeks further advice** on this issue to better assess whether this clause of the bill unduly trespasses on personal rights and liberties.

Pending the Private Senator'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.

Navigation Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Infrastructure and Transport

Background

This bill repeals the *Navigation Act 1912* and provides a new legislative framework to regulate international ship and seafarer safety, shipping aspects of protecting the marine environment and the actions of seafarers in Australian waters. The bill also gives effect to the relevant international conventions to which Australia is a signatory.

Broad discretion

Clauses 31, 32 and 44, subclauses 51(4), 100(2) and 132(2)

Clauses 31 and 32 enable AMSA to impose conditions on a seafarer certificate, but no guidance is provided about the nature of, or circumstances in which, conditions may be imposed.

The same issue arises in relation to other instances in which certificates may be issued, that is: clause 44, subclause 51(4), subclause 100(2) and subclause 132(2).

While the Committee notes that the exercise of these powers is subject to review by the Administrative Appeals Tribunal (clause 313), the Committee requests the Minister's advice as to whether consideration has been given to including statutory criteria to structure the exercise of this broad discretionary power while retaining appropriate flexibility.

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 I(a)(ii) of the Committee's terms of reference.

Reversal of onus—evidential burden Clauses 34, 36, 182, 194 and 263

Offences in clauses 35, 36 both include an exceptional circumstance defence. The explanatory memorandum states, at pages 18 to 20, that 'the reason for

the defendant bearing the burden is because the evidence of the offence is peculiarly within the defendant's knowledge and not available to the prosecution'.

Clause 182 creates an obligation to render assistance if requisitioned, but the obligation does not apply if 'special circumstances' exist which make it unreasonable or unnecessary for the master to respond as otherwise required. The explanatory memorandum states at page 48 that 'the burden of proof rests with the defendant for this offence because the evidence of the offence is peculiarly within the defendant's knowledge and not available to the prosecution'

Clause 194 creates an offence in relation to damage to navigation aids, but it does not apply if the person took all reasonable steps to avoid the damage. The explanatory memorandum at page 50 states that:

The burden of proof for the circumstances of a defence rests with the defendant for this offence because the evidence of the offence is peculiarly within the defendant's knowledge and not available to the prosecution.

Clause 263 creates an offence if a person fails to comply with a requirement to answer questions and produce documents unless the person has a reasonable excuse. The explanatory memorandum discusses this clause at page 64, but does not address this issue.

For all of these provisions the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Delegation of legislative power Subclause 51(2)

This provision provides that when making a determination declaring the skill levels and numbers of seafarers on vessels the AMSA must have regard to the matters prescribed by the regulations. As the Committee usually prefers that important matters are included in primary legislation when appropriate and as the explanatory memorandum does not indicate why these matters cannot be

included in the primary legislation the Committee seeks the Minister's advice as to the justification for the proposed approach.

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

Delegation of legislative power Subclauses 84(1) and 85(1)

The bill creates a strict liability offence if alcohol is detected above acceptable levels or if prescribed drugs are a present in the blood of a person. However, the unacceptable blood alcohol level or prescribed drugs are to be set in regulations. In general, the Committee prefers the content of an offence to be contained in primary legislation. Although there are legitimate exceptions to this approach, the Committee expects that the issue should be explicitly addressed in the explanatory memorandum, especially when, as in this case, the offence is one of strict liability. As the explanatory memorandum does not deal with the need to use regulations the Committee seeks the Minister's advice as to the justification for the proposed approach.

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

Entry without Warrant Clause 257

Clause 257 of the bill provides for maritime inspectors appointed by AMSA to board a vessel and exercise the monitoring powers under clause 259 for the purposes of determining whether the Act is being complied with or to assess the correctness of information provided in relation to the Act. This power replicates existing powers under the 1912 Act. The explanatory memorandum, at page 62, claims that the entry and search powers in the bill are based on 'internationally agreed laws, practice and procedures'. Further, it is argued that the power to conduct an inspection without a warrant is 'consistent with the exception provisions of the Commonwealth's criminal law policy regarding search and entry of conveyances, as obtaining a warrant prior to

entry to a vessel is impractical given the inherent mobility of a ship (see page 62). The requirement for a warrant, particularly one issued by a judicial officer, in such circumstances may in fact frustrate maritime law operations, because of geographic and temporal problems' (at page 62). The general approach to search and entry powers is also dealt with in the Statement of Compatibility with Human Rights. The approach is justified in part by reference to the general principles stated in the *Guide to Framing Commonwealth Offences*. In light of the explanation provided, the Committee leaves the question of whether the proposed approach is appropriate to consideration of the Senate as a whole.

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

Delegation of legislative power Various

The bill provides for various matters to be dealt with in the regulations. For example:

- Clause 57 provides that the regulations make provision in relation to keeping, retaining and producing records of service of seafarers;
- Clause 59 provides a regulation making power in relation to the hours of work and hours of rest of seafarers;
- Clause 61 provides that the regulations may make provision in relation to the provision of food and drinking water on board vessels;
- Clause 65 provides that the regulations make provision in relation to the health of seafarers;
- Clause 74 provides that the regulations make provision in relation to accommodation to be provided for seafarers;
- Clause 76 provides that the regulations make provision in relation to repatriation;
- Clause 76 provides that the regulations make provision in relation to complaints about employment;

- Clause 87 provides that the regulations make provision in relation to the authorisation of persons to conduct alcohol and drug tests, to operate equipment for that purpose, and practices and procedures relating to such testing (discussed further below);
- Clause 91 provides that the regulations make provision in relation to how to deal with the property of a deceased seafarer;
- Clause 112 provides that the regulations make provision in relation passenger and cargo operation;
- Clause 113 provides that the regulations make provision relating to overloading;
- Clause 125 provides that the regulations make provision in relation musters, drills and tests;
- Clause 163 provides that the regulations make provision in relation to compulsory pilotage; clause 164 is a regulation power relating to pilots and pilotage generally;
- Clause 188 provides that the regulations make provision in relation to aids to navigation; and
- Clause 213 provides that the regulations make provision in relation to vessel traffic services.

The explanatory memorandum merely restates the effect of such provisions. In a number of instances there is a regulation-making power which is clearly intended to give effect to an international agreement or standard, though the powers are stated in terms that go beyond this purpose. As the Committee expects that delegated legislation is used appropriately, it prefers that a justification is provided for its use in each instance to ensure that appropriate thought has gone into the proposed approach.

In particular, given the sensitive issues involved in clause 87 (which relates to conducting alcohol and drug tests), the Committee is particularly concerned to ensure that this delegation of power is appropriate and, if it is retained, that sufficient legislative safeguards for its use are in place. The Committee therefore seeks the Minister's advice as to the justification for the proposed approach in relation to these delegations of power, and particularly in relation to clause 87.

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

General Comment on Strict Liability Offences and Penalties

The bill contains many strict liability offences and includes significant penalties. These issues are dealt with at pages 6 and 7 of the explanatory memorandum. The general arguments for justifying strict liability are that 'people who are responsible for the safe operation of a vessel, such as vessel owners or Masters or other persons in control of aspects of the operation of a vessel, can be expected to be aware of their duties and obligations to meet safety and environmental standards that could affect persons on the vessel and the wider public'. Further, it is asserted that the 'application of strict liability to certain offences has been carefully considered during the drafting of the Bill and is consistent with the *Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers*' (at 6).

In relation to penalties, the explanatory memorandum emphasises the importance of deterrence given the environmental risks and risks to personal safety involved. In this context it is also argued that bill enables the courts to 'respond meaningfully and proportionally to the worst breaches' of the Act but also that civil penalties may also be appropriate in other circumstances.

In light of the explanation of these issues in the explanatory memorandum, the Committee leaves the question of whether the overall approach to criminal liability and penalties is appropriate to the Senate as a whole.

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

Navigation (Consequential Amendments) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Infrastructure and Transport

Background

This bill makes consequential amendments to legislation that relates to or references the *Navigation Act 1912* for definitions, application or exemption.

Parliamentary Counsel and Other Legislation Amendment Bill 2012

Introduced into the House of Representatives on 10 May 2012 Portfolio: Attorney-General

Background

This bill amends the:

- Parliamentary Counsel Act 1970 to transfer the functions of the Office of Legislative Drafting and Publishing to the Office of Parliamentary Counsel; and
- Acts Publication Act 1905 and Legislative Instruments Act 2003 to confer on the First Parliamentary Counsel certain functions previously undertaken by the secretary of the Attorney-General's Department.

The bill also makes consequential amendments in relation to the drafting of rules of court by amending the Family Law Act 1975, Federal Court of Australia Act 1976, Federal Magistrates Act 1999 and the Judiciary Act 1903.

Passenger Movement Charge Amendment Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Home Affairs

Background

This bill amends the Passenger Movement Charge Act 1978 to:

- increase the rate of the passenger movement charge (PMC) from \$47 to \$55 with effect from 1 July 2012; and
- introduce annual indexation of the PMC from 1 July 2013.

Pay As You Go Withholding Non-compliance Tax Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill imposes a pay as you go (PAYG) withholding non-compliance tax on directors and, in some circumstances, their associates where their company has a PAYG withholding liability for an income year and the director or associate is entitled to a credit for amounts withheld by the company during the income year.

Privacy Amendment (Enhancing Privacy Protection) Bill 2012

Introduced into the House of Representatives on 23 May 2012

Portfolio: Attorney-General

Background

This bill amends the *Privacy Act 1988* and various other Acts in response to the Australian Law Reform Commission's report number 108, *For Your Information: Australian Privacy Law and Practice*.

Schedule 1 amends the *Privacy Act 1988* to create the Australian Privacy Principles (AAPs) applying to both Commonwealth agencies and private sector organisations.

Schedule 2 amends the credit reporting provisions in the *Privacy Act 1988*.

Schedule 3 amends the *Privacy Act 1988* by replacing the provisions dealing with privacy codes and the Credit Reporting Code of Conduct with a new Part IIIB which deals with codes or practice under the AAPs and a code of practice concerning credit reporting.

Schedule 4 amends the *Privacy Act 1988* to clarify the functions and powers of the Information Commissioner and related matters including provisions on interferences with privacy.

Schedule 5 amends various other Acts that are consequential to the amendments in Schedules 1 to 4 of the bill.

Schedule 6 contains amendments to address transitional issues relating to the commencement of the new provisions.

Delegation of legislative power Schedule 1, item 81, proposed subsection 16A(2)

This proposed subsection allows the Commissioner to make rules, by legislative instrument, relating to the collection, use or disclosure of personal information that apply for the purposes of enabling the exception relating to missing persons. The explanatory memorandum indicates, at page 68, a

number of matters which the Commissioner's rules should address. The Committee prefers that important matters are included in primary legislation whenever this is appropriate and the Committee therefore seeks the Attorney-General's advice as whether consideration has been given to including such matters in the legislation.

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

Retrospective commencement Schedule 3, item 29, clause 26B

Subsection (3) of this clause indicates that a registered APP code may be expressed to take effect before the date it is registered under the Legislative Instruments Act 2003 (despite subsection 12(2) of that Act). The explanatory memorandum emphasises, at page 200, that a code cannot come into force before it is included on the Codes Register, and that 'this provision will provide certainty, for example, in circumstances where an APP code states that the period in which it is in force commences on the day it is included on the Codes Register, but there is a delay in registration under the Legislative Instruments Act'.

Given the fact such codes are subject to a double registration process (ie under the Codes Register and FRLI) and the fact that the Privacy Commissioner is responsible for the Codes Register, the Committee makes no further comment.

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

Penalty Schedule 4, item 50, clause 13G

This clause introduces a civil penalty for serious and repeated interferences with privacy (2000 penalty units). Although the key terms 'serious' and 'repeated' are not defined, this provision should be considered in the context of the overall regulatory strategy being implemented by the amendments. The amendments in this schedule respond to the ALRC recommendation that the Commissioner be able to escalate enforcement action should less coercive

strategies to promote compliance be unsuccessful. Furthermore, it is expected that the OAIC will develop enforcement guidelines which set out the criteria on which a decision to pursue a civil penalty will be made. In these circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Social Security and Other Legislation Amendment (2012 Budget and Other Measures) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends Social Security Act 1991 and various other related Acts.

Schedule 1 extends permanently the income test exemption for the Western Australian Government's Country Age Pension Fuel Card and the Cost of Living Rebate Scheme.

Schedule 2 will reduce the length of time from 13 to six weeks for people who travel overseas while receiving income support payments and family payments.

Schedule 3 amends the child age eligibility rule for family tax benefit Part A. From 1 January 2013, family tax benefit Part A will no longer be available for young people aged 18 or over unless they are in full-time study.

Schedule 4 corrects an inequity in the family tax benefit Part A from 1 July 2012, if an individual is privately collecting child support.

Schedule 5 allows an individual's percentage of care for child support and family tax benefit purposes to be based on the actual care of the child immediately, in special circumstances, such as where there is evidence of violence or other unusual behaviour.

Schedule 6 amends the clean energy low income supplement provisions to clarify the eligibility of a group of low-income families.

Schedule 7 makes minor amendments, including clarifying in the child support legislation the authority for the practice of automated decision-making using computer programs.

Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012

Introduced into the House of Representatives on 31 May 2012 Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the Social Security Act 1991 to:

- remove transitional arrangements from the parenting payment with effect from 1 January 2013;
- double the maximum reserve threshold for liquid assets to \$5,000 for singles without dependants or \$10,000 for others from 1 July 2013; and
- introduce a technical amendment to the definition of termination payment for the purposes of the income maintenance period.

Delayed Commencement

Schedule 2 raises the maximum cash reserves people can have before they can receive various benefits. The Schedule will not commence until July 2013, which appears to provide time for people to comply with the new requirements. Although this matter is not addressed in the explanatory memorandum, in the circumstances the Committee makes no further comment.

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

Superannuation Legislation Amendment (Stronger Super) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill introduces a framework to support the implementation of superannuation data and payment standards that will apply to specified superannuation transactions undertaken by superannuation entities and employers.

Delegation of legislative power – incorporating material by reference

Item 1, Schedule 1, proposed subsections 45B(7) and 34K(7)

The regulations made under proposed section 45B in relation to data and payment matters may, by this proposed subsection, apply, adopt or incorporate any matter contained in any other instrument as in force or existing from time to time. The explanatory memorandum, at page 15, justifies this delegation of legislative power by reference to the need to 'future proof the interactions between the superannuation data and payment regulations and standards and third party standards that are adopted or incorporated'. The example given is the Bulk Electronic Clearing System Direct Credit Standard.

Further, it is stated that 'without this flexibility, the superannuation and data payment regulations and standards would be compromised as it could only reference a third party standard that existed at a point in time' (see 1.39 of the explanatory memorandum).

The same issue also arises in relation to item 2, Schedule 1, proposed 34K(7).

The Committee understands this explanation, but also seeks the Minister's advice as to whether consideration has been given to including legislative requirements that instruments incorporated by reference be made readily available and amendments announced on an appropriate website to facilitate accountability and parliamentary scrutiny.

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

Strict Liability Schedule 1, Division 2

This proposed Division introduces a compliance regime that includes offences of strict liability. The Committee's Report 6/2001 on the *Application of Absolute and Strict Liability Offences in Commonwealth legislation* was considered in framing these offences (explanatory memorandum 1.49). The explanatory memorandum contains a detailed justification of the approach. In these circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Superannuation Supervisory Levy Imposition Amendment Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill amends the *Superannuation Supervisory Levy Imposition Act 1998* to provide the Treasurer with the ability to make a subsequent determination of the amount of the Superannuation Supervisory levy to be paid for a financial year.

Tax Laws Amendment (2012 Measures No.2) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill amends the following:

- Taxation Administration Act 1953 and four other Acts to:
 - extend the director penalty regime so that directors are personally responsible for their company's unpaid superannuation guarantee amounts;
 - make directors and their associates liable to pay as you go (PAYG) withholding non-compliance tax in certain circumstances;
 - and ensure that directors cannot discharge their director penalties by placing their company into administration or liquidation when PAYG withholding or superannuation guarantee remains unpaid and unreported three months after the due date;
- Income Tax Assessment Act 1997 and Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009 in relation to the taxation of financial arrangements consolidation interaction;
- *Income Tax Assessment Act 1997* to modify the consolidation tax cost setting rules and rights to future income rules; and
- Taxation Administration Act 1953 to make amendments consequential on the proposed Income Tax (Managed Investment Trust Withholding Tax) Amendment Act 2012.

Retrospective application Schedule 2

This Schedule makes amendments to the complex tax laws applicable in the context of the taxation of financial arrangements (TOFA). The amendments will commence immediately after the commencement of the laws being

amended (i.e. 26 March 2009). The explanatory memorandum accepts that the amendments commence and apply retrospectively. In justification of this approach the explanatory memorandum states, at page 97, that 'the amendments are largely technical amendments to correct parts of the law that did not give proper effect to the policy' of the laws introduced in 2009. Further it is argued that (1) the TOFA regime is 'a new and very complex part of the tax laws' and that shortly after its introduction the 'Government made it clear that technical amendments and further integrity measures may be necessary to ensure the law operates as intended', and (2) the Government announced its intention to make retrospective clarification where it became aware that the law could be productive of unintended outcomes. (see the explanatory memorandum at pages 97 and 98). The result is that the amendments may benefit some taxpayers and adversely affect others, 'depending on their circumstances'.

The Committee usually does not the regard complexity of the law and an indication from the government that retrospective change may be required as justifying retrospective legislation. In general, affected persons are entitled to rely on legislation as currently applicable, regardless of its complexity. The Committee is also interested to understand more about the extent of any detriment and therefore seeks the Treasurer's advice on this issue, such as an indication as to the number of taxpayers affected and the extent of likely detriment.

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

Retrospective application Schedule 3

The amendments in this schedule respond to an unanticipated outcome created by an amendment to the consolidation tax cost setting and rights to future income rules which was enacted in 2010. The amendments 'respond to the need to protect a significant amount of revenue that would otherwise be at risk, and to make the tax outcomes for consolidated groups more consistent with those for entities outside consolidation' (see the explanatory memorandum at page 103).

The 2010 amendments operated with retrospectivity back to 2002, and the proposed changes affecting a corporate acquisition will depend on the time that the acquisition took place. In particular 'different changes apply to acquisitions that took place before 12 May 2010, after 30 March 2011 (when the Board of taxation was asked to review the rules) and the intervening period' (see the explanatory memorandum at page 103). As the 2010 amendments operated with retrospective effect back to 2002, some of the amendments will operate with effect from that date to 'prevent the retrospective operation of unintended effects' and 'perceived weaknesses' in the earlier amendments. The changes for the intervening period will 'protect taxpayers who acted on the basis of the current law before the Board of Taxation review was announced' (see page 103). The final category of changes 'implement recommendations made by the Board of Taxation' and 'apply broadly to the period after 30 March 201(see page 104)'.

The amendments are complex and it is argued that the overall approach is justified by reference to a need to protect a significant amount of revenue and for consistency as between entities inside and those outside the consolidation regime.

It is unclear why the final category of changes (ie those which take effect from March 2011) should commence at that date given that the proposal was announced in November 2011 (see the explanatory memorandum at page 6). More broadly, the complexity of the changes makes consideration of the appropriateness of the retrospectivity involved in the application of the 'prerules' difficult. In particular the question of the extent and fairness of any detriment suffered by taxpayers is not as directly addressed in the explanatory memorandum as it might have been. It appears that the proposed amendments will remove retrospective benefits introduced by the 2010 amendments. In the circumstances the committee seeks the Treasurer's further advice in relation to (1) the issue of the commencement of the final category of changes and (2) the extent and fairness of any detriment.

Tax Laws Amendment (2012 Measures No.3) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill is part of a package of three bills in relation to the Seasonal Labour Mobility Program and other taxation matters. The bill amends the following:

- Income Tax Assessment Act 1936, Income Tax Assessment Act 1997, Income Tax (Transitional Provisions) Act 1997 and Taxation Administration Act 1953 to apply a new final withholding tax to income derived by non-resident workers participating in the Seasonal Labour Mobility Program;
- Excise Act 1901 and Excise Tariff Act 1921 to specify the circumstances where blending the same types of gaseous fuels or the same types of aviation fuels, which have been taxed at different rates, are not treated as excise manufacture and are therefore subject to additional duty;
- *Income Tax Assessment Act 1936* to retrospectively clarify that trust beneficiaries who are minors cannot receive the low income tax offset for unearned income earned through trust distributions; and
- Income Tax Assessment Act 1997 to provide income tax exemptions for clean energy payments made to recipients of payments made under certain schemes and makes the employment termination payment tax offset dependent on an individual's total taxable income.

Retrospective application Schedule 3

This Schedule amends the Income Tax Assessment Act 1936 to ensure that where a trustee is assessed on the income of a minor, the trustee will not have access to the low income tax offset in circumstances where the income is considered to be unearned income of that minor. The changes apply to assessments from the 2011-12 income year. The retrospective application date is said to be appropriate 'because the Government's announcement of the measure in the 2011-12 Budget made it clear that the new arrangements would

apply to all unearned income derived by minors, including through trusts' (see the explanatory memorandum at page 4). It is noted that it has been over a year since the proposal was announced.

The Committee has a long-standing concern with 'legislation by press release', particularly when there is a longer than 6 month delay between the time a proposal is announced and the proposal is enacted. In general citizens and taxpayers should be entitled to organise their affairs on the basis of legislation as enacted, not Government announcements about its intended legislative program. However, in the circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No.1) 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997*, *Income Tax (Transitional Provisions) Act 1997* and the *Taxation Administration Act 1953* to retrospectively:

- clarify that the internationally consistent transfer pricing rules contained in Australia's tax treaties and incorporated into Australian law provide assessment authority to address treaty related transfer pricing; and
- ensure that the tax treaty transfer pricing rules are applied in a manner consistent with the relevant OECD guidance material.

The bill also makes consequential amendments to the *Income Tax Assessment Act 1936*.

Retrospective application Schedule 1

The amendments in this schedule insert a new subdivision 815-A into the *Income Tax Assessment Act 1997*. The amendments 'confirm that the internationally consistent transfer pricing rules contained in Australia's tax treaties and incorporated into Australia's domestic law provide assessment authority to address treaty related transfer pricing' (see the explanatory memorandum at page 5). The amendments apply retrospectively from 2004. The explanatory memorandum contains a lengthy and detailed justification of the retrospective application in this bill. The explanatory memorandum indicates that the introduction of retrospective legislation needs a strong justification and explains the following main elements:

• There is a significant risk to revenue that is inconsistent with the Parliament's intention. In this respect the explanatory memorandum points to the 'plain words' of past amendments and explanatory memoranda to evidence this argument (see the explanatory memorandum

at pages 8 to 10). The conclusion reached is that if the law does not currently provide for treaty rules to have separate application for transfer pricing that 'this reflects inadequacy or errors in the drafting rather than the intention of parliament' (at page 10).

- The explanatory memorandum argues that, although it is not certain, there is a 'real possibility' that the amendments would merely confirm the state of the current law (see page 6). In relation to this argument, it is noted that there is little judicial commentary (and, it appears, no binding court decisions), and the ATO has publicly maintained a position reflected in the amendments proposed in this bill.
- The detrimental implications for taxpayers are also addressed in the explanatory memorandum (though without conceding that the amendments constitute a substantive change to the current position). First it is said that to 'the extent that [the amendments] provide for an alternative taxation power, that power is limited by international consensus', and any increase in Australian taxation will 'to some extent' be compensated by reductions in foreign taxation 'through mutual agreement procedures' (see pages 13 and 14). Secondly, it is argued that taxpayers and their advisers should have been 'aware of the public statements made by successive Australian governments and the Commissioner in respect of this area of the law'. It is also noted that the taxpayers likely to be affected are generally well served by specialist tax advisers on the relevant issues.

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

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

Tax Laws Amendment (Income Tax Rates) Bill 2012

Introduced into the House of Representatives on 24 May 2012 Portfolio: Treasury

Background

This bill is part of a package of three bills in relation to the Seasonal Labour Mobility Program and other taxation matters. The bill amends the *Income Tax Rates Act 1986* to merge the first two personal marginal tax rate thresholds for non-resident workers into a single threshold and align the rate for this new threshold with the second marginal tax rate for resident workers.

Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2012

Introduced into the House of Representatives on 10 May 2012 Portfolio: Treasury

Background

This bill amends the A New Tax System (Medicare Levy Surcharge-Fringe Benefits) Act 1999 and the Medicare Levy Act 1986 to:

- increase the Medicare levy and Medicare levy surcharge low-income threshold amounts for individuals, families and pensioners below pension age; and
- increase the phase-in limits as a result of the increased threshold amounts.

The bill also makes consequential amendments to the Clean Energy (Tax Laws Amendments) Act 2011.

Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Bill 2012

Introduced into the House of Representatives on 23 May 2012 Portfolio: Sustainability, Environment, Water, Population and Communities

Background

This bill amends the *Water Efficiency Labelling and Standards Act 2005* (the Act). The bill implements the response of the Standing Council on Environment and Water to the 2010 review of the Water Efficiency Labelling and Standards scheme.

The bill amends the Act to:

- allow the Commonwealth Minister to determine more details of the WELS scheme, particularly those relating to registration of products, through a disallowable legislative instrument;
- introduce additional compliance and enforcement options; and
- provide for orders to be given to persons that they remedy their non-compliance with the Act.

Delegation of Legislative power Schedule 1, item 2

This item repeals the existing scheme for the registration of Water Efficiency Labelling (WELS) products. Proposed subsection 26(1) requires the Commonwealth Minister to formulate a replacement scheme by legislative instrument. Subsection 26(4) provides that prior to formulating such a scheme, the Minister must have agreement from a majority of the participating States and Territories.

The rationale for the change in the legal foundations for the scheme (i.e. from being provided for in primary legislation of the Commonwealth and States) to being provided for by legislative instrument, is so a single legislative instrument can provide 'greater flexibility to vary the scheme when this is needed to maintain its effectiveness and efficiency' (see the explanatory memorandum at page 5).

The Committee generally prefers that important information is included in the primary legislation whenever this is appropriate. However, it is the clear intention of the bill to move to these new arrangements. In addition, the Committee also notes that a legislative instrument made under subsection 26(2) is a disallowable instrument (despite subsection 44(1) of the *Legislative Instruments Act 2003*) and the detailed explanation of leaving registration details to the subordinate legislation (at page 6 of the explanatory memorandum).

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

Trespass on personal rights and liberties – strict liability Schedule 2, proposed new sections 32A, 33, 34, 35, 36, 37, 37A, 38, 43A and 43B

The proposed provisions all apply strict liability in relation to the offences and civil penalties contained therein. The explanatory memorandum explains that this is part of an overall approach to improving compliance that includes the introduction of civil penalties and better targeted enforcement. The approach taken to the justification of the strict liability provisions appears to be consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and is the subject of detailed discussion in the explanatory memorandum (at pages 10 to 12). The penalties imposed are within the limits recommended by *Guide*. In the circumstances the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

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

Delegation of Legislative power Item 25, proposed subsection 40(1A)

This item enables the regulations to provide for an infringement notice scheme, whereby a person who is alleged to have contravened a civil penalty may pay a penalty as an alternative to proceedings in relation to the civil penalty. The Committee seeks the Minister's advice as to whether consideration has been given to limiting the amounts payable under such

a scheme in line with the approach recommended in the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

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

COMMENTARY ON AMENDMENTS TO BILLS

Aviation Transport Security Amendment (Screening) Bill 2012 [Digest 2/12 – response in 6th Report]

On 23 May 2012 the House of Representatives agreed to one Government amendment and tabled supplementary memorandum in response to an issue raised by the Committee. The Committee thanks the Minister for taking this action.

Coastal Trading (Revitalising Australian Shipping) Bill 2012 [Digest 5/12 – awaiting response]

On 31 May 2012 19 the House of Representatives agreed to 19 Government and one Opposition amendment and tabled a supplementary explanatory memorandum. The Committee has no comment on the additional material.

Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Bill 2012 [Digest 5/12 – no comment]

On 31 May 2012 the House of Representatives agreed to four Government amendments and tabled a supplementary memorandum and a correction to the explanatory memorandum. None of the material falls within the Committee's terms of reference.

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012

[Digest 1/12 & 5/12 [amendment] – waiting for response]

On 10 May 2012 a revised explanatory memorandum was tabled in the Senate. The Committee has no comment on the additional material.

Corporations Amendment (Future of Financial Advice) Bill 2012 [Digest 13/11 – no response required]

On 10 May 2012 the Senate tabled a revised explanatory memorandum. The Committee has no comment on the additional material.

Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012

[Digest 5/12 – no comment]

On 29 May 2012 the House of Representatives agreed to one Opposition amendment and the bill was read a third time. The Committee has no comment on the additional material.

Federal Financial Relations Amendment (National Health Reform) Bill 2012

[Digest 5/12 – no comment]

On 31 May 2012 the House of Representatives agreed to three Government amendments and tabled a supplementary explanatory memorandum. The Committee has no comment on the additional material.

National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012

[Digest 5/12 - response in 6th Report]

On 24 May 2012 the House of Representative tabled a supplementary explanatory memorandum. Then on 31 May 2012 the House of Representatives agreed to 21 Government amendments and the bill was read a third time. The Committee has no comment on the additional material.

Shipping Reform (Tax Incentives) Bill 2012

[Digest 5/12 – awaiting response]

On 31 May 2012 the House of Representatives agreed to five Government amendments and tabled a supplementary explanatory memorandum. The Committee has no comment on the additional material.

Shipping Registration Amendment (Australian International Shipping Register) Bill 2012

[Digest 5/12 – no comment]

On 31 May 2012 the House of Representatives agreed to nine Government amendments, tabled a supplementary explanatory memorandum and a correction to the explanatory memorandum. The Committee has no comment on the additional material.

Tax and Superannuation Laws Amendment (2012 Measures No.1) Bill 2012

[Digest 3/12 – no comment]

On 22 May 2012 the House of Representatives tabled a corrections to the explanatory memorandum and on the bill was read a third time. The Committee has no comment on the additional material.

Tax Laws Amendment (Income Tax Rates) Bill 2012 [Digest 6/12 – no comment]

On 30 May 2012 the House of Representatives agreed to seven Government amendments and tabled a supplementary explanatory memorandum. The Committee has no comment on the additional material.

Tax Laws Amendment (Shipping Reform) Bill 2012

[Digest 5/12 – no comment]

On 31 May 2012 The House of Representatives agreed to three Government amendments and tabled a supplementary explanatory memorandum. The Committee has no comment on the additional material.

Telecommunications Interception and Other Legislation Amendment (State Bodies) Bill 2012

[Digest 5/12 – no comment]

On 29 May 2012 the House of Representatives agreed to two Government amendments, tabled a supplementary explanatory memorandum and a correction to the explanatory memorandum, the bill was then read a third time. The Committee has no comment on the additional material.

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

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

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

Greenhouse and Energy Minimum Standards Bill 2012

Marine Safety (Domestic Commercial Vessel) National Law Bill 2012

Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Bill 2012

Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Bill 2012

SCRUTINY OF STANDING APPROPRIATIONS

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the Committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

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

Clean Energy Finance Corporation Bill 2012 2011 — Part 5, clause 45 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the Financial Management and Accountability Act 1997)

Other relevant appropriation clauses in bills in the $43^{\rm rd}$ Parliament since the previous $Alert\ Digest$

Nil