

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

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## **Terms of Reference**

### **Extract from Standing Order 24**

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



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**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. 1) 2014-2015**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Finance

### **Background**

This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government.

The issues raised in relation to this bill apply generally to bills appropriating money for the ordinary annual services of the government, including Appropriation Bill (No. 5) 2013-2014.

### **Insufficient parliamentary scrutiny of legislative power Various provisions**

The inappropriate classification of items in appropriation bills as ordinary annual services when they in fact relate to new programs or projects undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (see Senate standing order 24(1)(a)(v)).

By way of background, under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation. Noting these provisions, the Senate Standing Committee on Appropriations and Staffing has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years (50<sup>th</sup> Report, p. 3).

The distinction between appropriations for the ordinary annual services of the government and other appropriations is reflected in the division of proposed appropriations into pairs of bills—odd-numbered bills which should only contain appropriations for the ordinary annual services of the government and

even-numbered bills which should contain all other appropriations (and be amendable by the Senate). However, the Appropriations and Staffing Committee has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure (45<sup>th</sup> Report, p. 2). The Senate has not accepted this assumption.

As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 (in accordance with a recommendation made in the 50<sup>th</sup> Report of the Appropriations and Staffing Committee), the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
- 2) That appropriations for expenditure on:
  - a) the construction of public works and buildings;
  - b) the acquisition of sites and buildings;
  - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
  - d) grants to the states under section 96 of the Constitution;
  - e) new policies not previously authorised by special legislation;
  - f) items regarded as equity injections and loans; and
  - g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

There were also two other parts to the resolution: the Senate clarified its view of the correct characterisation of payments to international organisations and, finally, the order provided that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as part of ordinary annual services. (*Journals of the Senate*, 22 June 2010, pp 3642–3643).

The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

...completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas. (45<sup>th</sup> Report, p. 2).

Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on individual assessment as to whether an appropriation relates to a new program or project, continues and appears to be reflected in the allocation of some items in the most recent appropriation bills. For example, it seems that the initial expenditure in relation to the following items may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 1) 2014-2015 which is not amendable by the Senate):

- Infrastructure Growth Package — Western Sydney Infrastructure Unit — establishment (2014-15 Budget Paper No. 2, p. 177)
- Solar Towns — establishment (2014-15 Budget Paper No. 2, p. 110)
- Stronger Relationships Trial (2014-15 Budget Paper No. 2, p. 211)
- Students First — Early Language Learning Australia — trial (2014-15 Budget Paper No. 2, p. 90)
- Tasmanian Major Projects Approval Agency — establishment (2014-15 Budget Paper No. 2, p. 171)

The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill that is not for the ordinary annual services of the government (45<sup>th</sup> Report, p. 2).

**The Scrutiny of Bills Committee notes the 2010 Senate resolution outlined above and, in particular, that the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all**

**matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects. The committee therefore seeks the Minister's advice as to whether, and if so what, consideration has been given to addressing this issue.**

*Pending the Minister's reply, the committee draws Senators' attention to this issue, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

## **Appropriation Bill (No. 2) 2014-2015**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Finance

### **Background**

This bill seeks to appropriate money out of the Consolidated Revenue Fund for services that are not the ordinary annual services of the Government.

*The committee has no comment on this bill.*

## **Appropriation Bill (No. 5) 2013-2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Finance

### **Background**

This bill seeks to appropriate additional money out of the Consolidated Revenue Fund for the ordinary annual services of the government, in addition to the appropriations provided for by the *Appropriation Act (No. 1) 2013-2014* and *Appropriation Act (No. 3) 2013-2014*.

The general issues raised in relation to Appropriation Bill (No. 1) 2014-2015 (see pages 1 to 4) apply to all bills appropriating money for the ordinary annual services of the government, including this bill.

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

## **Appropriation Bill (No. 6) 2013-2014**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Finance

### **Background**

This bill seeks to appropriate additional money out of the Consolidated Revenue Fund for certain expenditure, in addition to the appropriations provided for by the *Appropriation Act (No. 2) 2013-2014* and *Appropriation Act (No. 4) 2013-2014*.

*The committee has no comment on this bill.*

## **Appropriation (Parliamentary Departments) Bill (No. 1) 2014-2015**

Introduced into the House of Representatives on 13 May 2014

Portfolio: Finance

### **Background**

This bill seeks to appropriate money out of the Consolidated Revenue Fund for expenditure in relation to the parliamentary departments.

*The committee has no comment on this bill.*

## **Australian Renewable Energy Agency (Repeal) Bill 2014**

Introduced into the House of Representatives on 19 June 2014

Portfolio: Industry

### **Background**

This bill seeks to disband the Australian Renewable Energy Agency by repealing the *Australian Renewable Energy Agency Act 2011*.

*The committee has no comment in relation to this bill.*

## Carbon Farming Initiative Amendment Bill 2014

Introduced into the House of Representatives on 18 June 2014

Portfolio: Environment

### Background

This bill seeks to amend the *Carbon Credits (Carbon Farming Initiative) Act 2011*, the *National Greenhouse and Energy Reporting Act 2007*, the *Australian National Registry of Emissions Units Act 2011* and the *Clean Energy Regulator Act 2011* to provide for the establishment of the Emissions Reduction Fund.

### Delegation of legislative power

#### Schedule 1, item 14

This item proposes to expand section 308 of the CFI Act to give the Minister a general power to make legislative rules. Under the existing provisions of the Act, there is already a provision enabling regulations to be made under the Act.

There is a general discussion and justification of this amendment in the explanatory memorandum, which also addresses a number of related changes given the new rule-making power. According to the explanatory memorandum (at p. 74):

The CFI Act provides for regulations to apply, adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time. The bill will extend this provision to include the legislative rules, to allow the content of regulations to be migrated to legislative rules over time. This will help to alleviate the workload of the Federal Executive Council relating to the making of regulations. The regulations, legislative rules and methodology determinations deal with highly technical matters, often requiring cross-references to Australian or international standards, industry databases, models and methodologies. Including the content of these documents in subordinate legislation would make those instruments unwieldy, by expanding their volume considerably and requiring frequent updating.

The explanation raises a number of scrutiny issues for consideration by the committee. The first relates to the migration of the content of regulations into the content of rules. The second relates to possible uncertainty that may be introduced by the introduction into the legislation of two general powers to make legislative instruments (i.e. which include powers to prescribe matters 'necessary and convenient for carrying out or giving effect' to the Act). The third issue relates to the incorporation of instruments in writing as they exist from time to time.

In relation to the first issue, 'migrating the content of regulations into legislative rules over time' (p. 74), the committee has recently noted that this move away from prescribing matters by regulation will remove the additional layer of scrutiny provided by the Federal Executive Council approval process (*Alert Digest No. 5; Fifth report of 2014*). This aspect is also referred to in the explanatory memorandum in the context of reducing the council's workload (outlined above). The use of rules rather than regulations gives rise to scrutiny concerns about the appropriate delegation of legislative power and the opportunity for sufficient parliamentary scrutiny and, as this provision extends the circumstances in which rules will be used, it gives rise to related concerns. **The committee has raised similar issues in relation to a number of provisions in other bills and is awaiting responses from the relevant ministers. As the responses may be relevant to the committee's scrutiny of this provision, the committee draws the matter to the attention of Senators, and if necessary, will consider it further pending receipt of the information requested from other ministers.**

*The committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference and it may be considered to raise issues in relation to sufficiently subjecting the exercise of legislative power to parliamentary scrutiny (principle 1(a)(v) of the committee's terms of reference).*

With regard to the second issue the committee would consider it helpful if the relationship between rules and regulations under the Act could be further explained. Although it is noted in the explanatory memorandum that it is envisaged that at least some of the current content in the regulations will be migrated to the rules, it is unclear how much of the content. Given the possibility of conflict between the rules and regulations **the committee seeks**

**the Minister's advice as to whether consideration has been given to how this eventuality may be avoided or, if it arises, resolved.**

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

## **Delegation of legislative power—incorporating material by reference**

### **Insufficient parliamentary scrutiny**

#### **Schedule 1, item 14**

The third point concerns matters that may be prescribed by regulations or rules and which incorporate material contained in another document 'as in force or existing from time to time'. The explanatory memorandum (at p. 74) seems to suggest that the regulations, or rules, could include highly technical, complex and changeable matters that will not be included in the subordinate legislation itself.

The incorporation of legislative provisions by reference to other documents raises the prospect of changes being made to the law in the absence of parliamentary scrutiny. It is also possible that relevant information, including standards or industry databases, may not be publicly available or that they are only available if a fee is paid. The committee is concerned that such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms without charge. The explanatory memorandum includes a general justification for the approach (at p. 74), but lacks detail about specific instances. **The committee therefore seeks the Minister's further advice as to:**

- **why it is necessary to rely on material incorporated by reference; and**
- **if the approach is considered necessary, has consideration been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law.**

*Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference and to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

### **Delegation of legislative power**

#### **Schedule 1, item 151, proposed new section 60**

Item 51 provides for criteria for a 'fit and proper' person test to be prescribed by legislative rules. The Statement of Compatibility (at p. 17) notes the effect of this item but does not explain why the definition of this significant term is to be dealt with in the rules. As the committee prefers that important matters are included in primary legislation unless a comprehensive justification is provided, **the committee seeks the Minister's advice as to why these matters need to be dealt with in the rules and not in the primary legislation.**

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

## **Customs Tariff Amendment (Fuel Indexation) Bill 2014**

Introduced into the House of Representatives on 19 June 2014

Portfolio: Immigration and Border Protection

### **Background**

This bill is part of a package of four bills. The bill seeks to amend the *Customs Tariff Act 1995* to index the rate of excise-equivalent customs duty applying to fuels to assist in funding road infrastructure.

The bill also seeks to make consequential amendments to the *Customs Tariff Amendment (Taxation of Alternative Fuels) Act 2011* to increase excise-equivalent customs duty on liquefied petroleum gas, and compressed and liquefied natural gas, from 1 July 2015 as part of the final stage of the phase-in of taxation on gaseous fuels.

*The committee has no comment in relation to this bill.*

## **Excise Tariff Amendment (Fuel Indexation) Bill 2014**

Introduced into the House of Representatives on 19 June 2014

Portfolio: Immigration and Border Protection

### **Background**

This bill is part of a package of four bills. The bill seeks to amend the *Excise Tariff Act 1921* to index the rate of excise applying to fuels to assist in funding road infrastructure.

The bill also seeks to make consequential amendments to the *Excise Tariff Amendment (Taxation of Alternative Fuels) Act 2011* to increase excise-equivalent customs duty on liquefied petroleum gas, and compressed and liquefied natural gas, from 1 July 2015 as part of the final stage of the phase-in of taxation on gaseous fuels.

*The committee has no comment in relation to this bill.*

## **Fair Work (Registered Organisations) Amendment Bill 2014**

Introduced into the House of Representatives on 19 June 2014

Portfolio: Employment

An identical bill was introduced into the House of Representatives on 14 November 2013 and the committee commented on the bill in *Alert Digest No. 9 of 2013*. The Minister's response to the committee's concerns was then published in its *Fourth Report of 2014*.

### **Background**

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

- establish an independent body, the Registered Organisations Commission, to monitor and regulate registered organisations with amended investigation and information gathering powers;
- amend the requirements for officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- amend existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

### **Trespass on personal rights and liberties—penalties (civil penalties) Various**

One of the clear objectives of the bill is to increase maximum penalties for breaches of civil penalty provisions across the RO Act and to introduce criminal offences for serious breaches of officers' duties as well as in relation to offences associated with the conduct of investigations. At various points in the explanatory material (e.g. the RIS at page 10 and the statement of compatibility at page 5) it is suggested that the approach to obligations and

penalties has been ‘modelled’ on the approach taken under the Corporations legislation. Although the explanatory memorandum does not explain how this is achieved or the extent to which particular amendments are similar to or different from those in the context of corporate regulation, the statement of compatibility does seek to justify the approach at a general level.

In relation to the increase of **civil penalties**, it is noted in the statement of compatibility that:

- (1) the ‘maximum penalty is equivalent to that applicable under the Corporations Act and many organisations have command of considerable resources similar to that of many companies’;
- (2) the maximum penalty is subject to a threshold test which mirrors the protection in subsection 1317G(1) of the Corporations Act, such that only ‘serious contraventions’ of civil penalty provisions will attract the maximum penalty (see item 4 schedule 2 of the bill);
- (3) there is no provision for imprisonment for non-payment of a penalty; and
- (4) the increases in penalties ‘reflect the seriousness of the provisions by reference to the objective of ensuring better financial management of organisations’ (at pages 8 and 9).

**In light of these matters, the committee leaves the question of whether the increases to civil penalties in the bill are appropriate to the consideration of the Senate as a whole.**

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

### **Trespass on personal rights and liberties—penalties (new offence provisions)**

#### **Various**

In the committee’s consideration of the previous bill, the committee noted that the statement of compatibility lists the **new offence provisions** which the bill proposes to introduce into the RO Act (at page 8, under the heading ‘Right to the presumption of innocence and other guarantees), but unfortunately the explanatory material provided little explanation of the specific proposals

included in the bill. The committee therefore sought clarification from the Minister as to (1) the extent of similarities between these offences and offences under the Corporations Act, (2) whether the penalties are in any instance higher than in relation to offences under the Corporations Act; and (3) particularly whether the increase proposed by item 228 (proposed subsection 337(1)) for the offence of failing to comply with a notice to attend or produce to 100 penalty units or imprisonment for 2 years, or both is higher than other similar offences and the justification for the proposed approach.

In the *Guide to Framing Commonwealth Offences* it is suggested that the maximum penalty for non-compliance with attend or produce notices should 'generally be 6 months imprisonment and/or a fine of 30 penalty units'. As further noted in the *Guide* this is the penalty imposed by, for example, subsection 167(3) the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* and section 211 of the *Proceeds of Crime Act 2002*. In this context the term of imprisonment in the current bill is proposed to be increased to four times the recommended level.

In response to the committee's request for clarification the Minister provided a table which sets out the proposed new offence provisions and their corresponding provisions in the Corporations Act or the ASIC Act. The Minister stated that the relevant provisions of the bill largely replicate the provisions of these Acts. The table is available on pages 26–32 of the Minister's correspondence which was attached to the committee's *Fourth Report of 2014*.

The Minister also provided a table which compares the penalties for the proposed offences in the bill and corresponding offences under the Corporations Act and the ASIC Act. The Minister stated that the penalties are largely the same for the corresponding offences under the Corporations Act or ASIC Act. However, the Minister noted that the penalties for strict liability offences under item 223 (relating to the conduct of investigations) have not replicated imprisonment terms but have instead increased the maximum pecuniary penalty to 60 penalty units. The Minister also stated that the penalty in relation to item 223 (proposed subsection 335F(2)) and item 230 (proposed subsection 337AA(2)) is greater than the equivalent ASIC Act penalty (5 penalty units) to 'ensure consistency with other similar offences under the Bill'. The table is available on page 33 of the Minister's correspondence which was attached to the committee's *Fourth Report of 2014*.

Finally, the Minister stated that the penalties for the offences proposed by item 228 (proposed subsection 337(1)) are the same as those for almost identical offences under subsection 63(1) of the ASIC Act. The Minister stated that this 'approach is consistent with the Government's policy for the regulation of registered organisations, namely that the penalties and offences under the ASIC Act are appropriate to enforce obligations arising from the RO Commissioner's proposed information gathering powers.'

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 131). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

### **Trespass on personal rights and liberties—strict liability Schedule 2, item 230, proposed section 337AA**

Proposed subsections 337AA(1) and (2) provide that certain offences in relation to the conduct of an investigation are strict liability offences. These are offences for:

- (a) failure to comply with a requirement to take an oath or affirmation (subsection 335D(1));
- (b) contravention of a requirement that questioning take place in private (subsection 335E(2));
- (c) failure to comply with a requirement in relation to a record of a statement made during questioning (paragraph 335G(2)(a));
- (d) contravention of conditions on the use of copies of records of statements made during questioning (section 335H); and

(e) failure to comply with a requirement to stop addressing an investigatory or questioning an attendee (subsection 335F(2)).

In justification of the use of strict liability, the statement of compatibility argues that:

1. each offence relates to a person's failure to comply with a requirement made of them relating to the conduct of an investigation;
2. there is a defence of reasonable excuse (though the evidential burden of proving this is placed on the defendant), and
3. the offences are 'regulatory in nature' and not punishable by a term of imprisonment.

The maximum penalty (60 penalty units) is the maximum recommended by the *Guide to Framing Commonwealth Offences* for strict liability offences.

Although the points made in the statement of compatibility are noted and the defence of reasonable excuse does ameliorate the severity of strict liability (point 2 above), the committee notes that the vagueness of this defence may make it difficult for a defendant to establish (this is also identified in the *Guide to Framing Commonwealth Offences*). In addition, given that the offences occur within the context of an investigator questioning a person (point 1 above) it is not clear why a requirement to prove fault would undermine the enforcement of the obligations (e.g. why strict liability is necessary).

In its consideration of the previous bill, the committee therefore sought a more detailed explanation from the Minister as to why strict liability is required to secure adequate enforcement of these obligations and, if the approach is to be maintained, whether consideration had been given to placing a requirement (where relevant) on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence.

The Minister stated in his response to the committee that the proposed strict liability offences replicate offences relating to enforcement of identical obligations under the ASIC Act (see item 230, proposed section 337AA of the Bill and sections 21, 22, 23, 24, 26 and 63 of the ASIC Act). The Minister noted that it is the government's view that a strict liability approach, following the ASIC Act, is appropriate to enforce obligations arising from the Registered Organisations Commissioner's proposed information gathering powers. In this respect, having regard to the *Guide to Framing*

*Commonwealth Offences* (p.24), the Minister stated that it is worthwhile to note that:

- the offence is not punishable by imprisonment and the fine does not exceed 60 penalty units; and
- taking into account the similarities between the regulation of the corporate governance of companies and registered organisations, strict liability is appropriate as it is necessary to ensure the integrity of the regulatory framework for registered organisations.

In relation to whether consideration had been given to placing a requirement on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence the Minister stated that the manner in which the RO Commission undertakes its investigations will be a matter for its own supervision. However, the Minister expects that the RO Commission will develop materials, such as guidelines, standard forms and educational material to deal with its approach to investigations, similar to the approach currently taken by ASIC.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee noted the Minister's expectation that the RO Commission will develop materials, such as guidelines, standard forms and education materials to deal with its approach to investigations. The committee also requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 133). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

**Trespass on personal rights and liberties—reversal of onus of proof  
Schedule 2, items 229, proposed subsections 337(2) to (4) and  
230, proposed subsection 337AB(2)**

The proposed subsection provides for a ‘reasonable excuse’ defence in relation to ‘obstructing a person’ in the exercise of a number of powers of investigation. The use of a defence shifts the burden of proof from the prosecution to the defence, and as noted above, the vagueness of the ‘reasonable excuse’ defence may make it unclear what a person must prove to rely on this defence. The explanatory material does not include a justification for placing an evidential burden of proof.

Similarly, defences proposed by item 229 (proposed subsections 337(2)-(4)) which relate to offences for failing to adequately comply with a notice to produce or attend do not explain the justification for placing an evidential burden of proof on the defendant.

The committee therefore sought the Minister's advice as to the justification for reversing the onus of proof for these provisions. In the Minister's response he noted that proposed subsections 337(2)-(4) and 337AB(2) replicate subsections 63(5)-(8) of the ASIC Act and that this aligns with the government's policy for the regulation of registered organisations (which is to ensure that the defences to the offences are the same as their parallel provisions under the ASIC Act, which also have an evidential burden of proof). In this respect the Minister noted that the *Guide to Framing Commonwealth Offences* (at p. 51) provides that an evidential burden of proof should generally apply to a defence.

The Minister stated that it is appropriate that the matters in proposed subsections 337(2)-(4) be included as offence-specific defences, rather than elements of the offence, as these matters are both peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters.

Further, the Minister stated that it is important that the committee have regard to the fact that these new offences (including proposed section 337AC, addressed below) are central to the investigative framework of the RO Commission. In this regard the Minister suggested that:

...recent investigations of the Fair Work Commission (FWC) into financial misconduct within certain registered organisations have demonstrated that the existing regulatory framework is not sufficient. Having an investigatory body with powers to prevent unnecessary frustrations of its legitimate functions as an investigator is central to remedying the insufficient framework and restoring the confidence of members that the management of registered organisations is sufficiently accountable and transparent and that their membership contributions are being used for proper purposes.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 135). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

### **Trespass on personal rights and liberties—reversal of onus of proof Schedule 2, item 230, proposed subsection 337AC(2)**

The subsection provides for a defence for a contravention of the offence of concealing documents relevant to an investigation if 'it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation under this Part'. In addition to placing the burden onto the defendant, a justification for placing the higher standard of a *legal* burden of proof was not located in the explanatory material. The committee therefore sought the Minister's advice as to the justification for these matters.

The Minister noted in his response to the committee that, in accordance with the government's policy, section 337AC replicates section 67 of the ASIC Act, which provides for a defence in identical terms to subsection 337AC(2) and a legal burden of proof. The Minister stated that the offence in proposed

subsection 337AC(1) is very important in terms of the integrity of the investigations framework under the bill, which is central to the bill's objectives and that the maximum penalty under subsection 337AC(1) reflects the seriousness of the offence.

The Minister further stated that it is appropriate that the matter referred to in proposed subsection 337AC(2) be included as an offence-specific defence with a legal burden of proof rather than an element of the offence as it is both peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish this matter.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 136). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

### **Trespass on personal rights and liberties—privilege against self-incrimination**

#### **Schedule 2, item 230, proposed section 337AD**

Subsection 337AD(1) provides that for the purposes of powers conferred under Part 4, Chapter 11 (as proposed to be amended), it is not a reasonable excuse for a person to fail or refuse to give information or produce a document or sign a record that doing so might tend to incriminate a person or make them liable to a penalty.

This abrogation of the important common law privilege against self-incrimination is justified on the basis that it pursues the objective of ensuring that offences under the RO Act can be properly investigated and that the limitation on the privilege is proportionate and reasonable to this objective because a *use* and *derivative use* immunity is provided for. It is noted however, that these immunities will only be applicable if a person ‘claims that the information, producing the document, or signing the record might tend to incriminate the person or make the person liable to a penalty’ (proposed subsection 337AD(2)).

This justification in the explanatory memorandum does little more than assert the importance of the objective of enforcing the legislation. The committee notes that it does not normally take the view that the inclusion of a *use* and *derivative use* immunity mean that no further justification for abrogation of the privilege is required. In addition, the requirement that a person ‘claim’ the privilege before responding to a request for information, a document or record is unusual and is not explained or justified in the explanatory memorandum or statement of compatibility. The committee therefore sought the Minister's further advice as to the justification for the proposed approach.

The Minister noted in his response to the committee that, in accordance with the government’s policy, proposed new section 337AD closely follows the privilege against self-incrimination in section 68 of the ASIC Act. The Minister stated that the proposed abrogation is necessary in order to ensure the RO Commissioner has all available evidence to enforce obligations under the RO Act. If the RO Commissioner is constrained in their ability to collect evidence, the entire regulatory scheme may be undermined.

In relation to the inclusion of a use immunity but not a derivative use immunity in proposed section 337AD the Minister stated that:

The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (ASC) (now ASIC) were amended to remove derivative use immunity. The explanatory memorandum to the Corporations Legislation (Evidence) Amendment Bill 1992 [at p. 1] provides that derivative use immunity placed:

*...an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity...*

The Minister stated that the government believes that the absence of a derivative use immunity, in relation to the information-gathering powers of the RO Commission, is reasonable and necessary for the effective prosecution of matters under the RO Act.

In response to the committee's question about the requirement that a person 'claim' the privilege before responding to a request for information the Minister stated that:

Following section 68 of the ASIC Act, the requirement to claim the privilege is procedurally important as it allows the RO Commissioner to obtain all information relevant to an investigation while still protecting the person the subject of the relevant notice against the 'admissibility' of the information provided pursuant to the notice in evidence in proceedings against the person under proposed subsection 337AD(3).

Generally, concerns about the requirement to claim an immunity focus on the assertion that failure to claim the privilege (either forgetting or being unaware of the privilege) could result in self-incrimination. There are, however, important safeguards which limit this risk. Proposed new subsection 335(3) provides that a person required to attend the RO Commission for questioning must be provided with a notice prior to the giving of information that:

- provides information about the 'general nature of the matters to which the investigation relates' (subsection 335(3)(a)); and
- informs the person that they may be accompanied by another person who may, but does not have to be, a lawyer (subsection 335(3)(b)); and
- sets out the 'effect of section 337AD' (subsection 335(3)(c)).

As individuals are informed about the type of questions they will be asked and the effects of section 337AD, they will know that they have the right to claim use immunity. Further, the fact that a person can have a lawyer present during questioning provides the person with the additional support needed if they are unsure whether a question presented to them may elicit self-incriminating information.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee noted the safeguards outlined by the Minister, but stated that it remains concerned about the requirement to claim the privilege or lose the ability to rely on it. The committee also requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 139). **The committee notes that this information is not in the explanatory**

**memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

**In relation to the substantive issues about these provisions, the committee draws this provision to the attention of Senators (particularly the requirement to claim the privilege or lose the ability to rely on it) and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

### **Trespass on personal rights and liberties—rules of evidence Schedule 2, item 230, proposed section 337AF-337AK**

These provisions establish rules relating to the admissibility of, and weight to be given, to specified evidence. The explanatory memorandum essentially restates the terms of the provisions and does not provide information as to the justification for the provisions or comparative information about their effect. In the committee's consideration of the previous bill the committee was particularly interested in whether the provisions are designed to broaden the scope of admissible evidence against a defendant and, if so, the rationale for the proposed approach. The committee therefore sought the Minister's advice as to the effect of, and rationale for, these provisions.

In response to the committee's request the Minister stated that these provisions replicate sections 76 to 80 of the ASIC Act, which have a long history in corporations legislation (see *Securities Industry Act 1980*, s 10A, 21, 23, 24, 25, 26 and 27, *Companies Act 1981*, s 299–301). The Minister further contended that, similar to the ASIC Act, it is not intended that these provisions will render evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding had proposed new Division 7 not been enacted (item 230, proposed section 337AL, which reflects section 83 of the ASIC Act).

The Minister's response explained that the proposed new sections 337AF and 337AG provide a means for the admissibility of statements made on oath or

affirmation by an attendee in an examination pursuant to paragraph 335(2)(c) of the Act. These provisions are facilitative and supplement the means available to adduce evidence of statements made at an examination as original evidence to prove the fact contained in the statement or to prove another fact in issue in the proceedings.

In relation to proposed section 337AF, the Minister stated that the section provides for the admissibility in evidence of statements made by an attendee in an examination pursuant to paragraph 335(2)(c) where the proceedings are against the attendee. The response pointed out that the admissibility of the statement in evidence is subject to the limitations in proposed paragraphs 337AF(1)(a)–(d), which protect the attendee against:

- self-incrimination;
- irrelevance;
- the statement being misleading by virtue of associated evidence not having been tendered; and
- the statement disclosing a matter in respect of which the person could claim legal professional privilege.

With regard to proposed section 337AG, the Minister's response restated that the explanation in the explanatory memorandum that the proposed section provides that if evidence by a person (defined as the 'absent witness') of a matter would be admissible in a proceeding, a statement that the absent witness made in an examination during an investigation that tends to establish that matter is admissible if it appears that the absent witness is unable to attend as a witness for the reasons set out in proposed subparagraphs 337AG(1)(a)(i)–(iii). The Minister added that such evidence will not be admissible if the party seeking to tender the evidence of the statement fails to call the absent witness as required by another party and the court is not satisfied of one of the matters in proposed subparagraphs 337AG(1)(a)(i)–(iii).

The response to the committee's concerns over proposed sections 337AH–337AJ again restated the information provided in the explanatory memorandum. The Minister explained that the proposed section 337AH provides for the weight a court is to give to evidence of a statement admitted under proposed section 337AG, and proposed section 337AJ provides for a pre-trial procedure for determining objections to the admissibility of statements made on oath or affirmation during an investigation.

In relation to proposed section 337AK the Minister's expanded on the explanation provided in the explanatory memorandum by stating that the proposed section facilitates admission into evidence of copies or extracts from documents relating to the affairs of an organisation as if the copy was the original document or the extract was the relevant part of the original document. The response argued that the proposed provision, which is based on section 80 of the ASIC Act, is important as where it is convenient to copy and return or take extracts from documents produced pursuant to a request made under paragraph 335(2)(b) of the RO Act, this can be done without difficulties relating to the admissibility of the copy or extract.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 141). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to whether the key information can be included in the explanatory memorandum.**

**In relation to the substantive issues about these provisions, 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 trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

### **Trespass on personal rights and liberties—coercive powers**

#### **Various**

The coercive powers contained in the bill are significant, including forced entry to premises. However, the statement of compatibility contains a relatively detailed justification of the investigation and information gathering powers, including the search and seizure powers contained in the bill. As detailed in the statement of compatibility (1) the powers are modelled on ASICs powers (though the extent of any departures is not clearly stated) and (2) there are a number of safeguards built into the exercise of the powers.

**In light of the discussion of these powers provided in the statement of compatibility and the safeguards, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

## **Fuel Indexation (Road Funding) Bill 2014**

Introduced into the House of Representatives on 19 June 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of four bills. The bill seeks to amend the *Fuel Tax Act 2006* to ensure that taxpayers use the same indexed rate of duty that was payable on fuel for determining the amount of their fuel tax credits.

The bill also seeks to make consequential amendments to the *Energy Grants (Cleaner Fuels) Scheme Regulations 2004* to clarify that the amount of the cleaner fuel rebates for biodiesel and renewable diesel are calculated by using the biodiesel duty rate that applied at the time when the cleaner fuel was entered for home consumption.

*The committee has no comment in relation to this bill.*

## **Fuel Indexation (Road Funding) Special Account Bill 2014**

Introduced into the House of Representatives on 19 June 2014

Portfolio: Treasury

### **Background**

This bill is part of a package of four bills. The bill seeks to amend the *Financial Management and Accountability Act 1997* to establish a Fuel Indexation (Road Funding) special account and to ensure that the net additional revenue from the reintroduction of fuel indexation is used for road infrastructure funding.

*The committee has no comment in relation to this bill.*

## **Migration Amendment (Protecting Babies Born in Australia) Bill 2014**

Introduced into the Senate on 18 June 2014

By: Senator Hanson-Young

### **Background**

The bill seeks to amend the *Migration Act 1958* to ensure that a child who is born in Australia is not classified to have ‘entered Australia by sea’ and is therefore not an ‘unauthorised maritime arrival’ subject to transfer to Australia’s offshore detention centres.

*The committee has no comment in relation to this bill.*

## **National Health Amendment (Pharmaceutical Benefits) Bill 2014**

Introduced into the House of Representatives on 18 June 2014

Portfolio: Health

### **Background**

This bill seeks to amend the *National Health Act 1953* (the Act) to increase patient co-payments and safety net thresholds for the Pharmaceutical Benefits Scheme and the Repatriation Pharmaceutical Benefits Scheme from 1 January 2015. It includes an increase to the:

- concessional patient co-payment by 80 cents;
- general patient co-payment by \$5.00;
- concessional safety net threshold by two prescriptions each year for four years, from 2015 to 2018; and
- general patient safety net threshold by 10 per cent each year for four years, from 2015 to 2018.

These increases are in addition to the usual Consumer Price Index indexation on 1 January each year under the Act.

*The committee has no comment in relation to this bill.*

## **Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014**

Introduced into the House of Representatives on 18 June 2014

Portfolio: Social Services

### **Background**

This bill seeks to amend various Acts relating to social security, family assistance, veterans' entitlements, military rehabilitation and compensation and farm household support to:

- cease payment of the seniors supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card from 20 June 2014;
- rename the clean energy supplement as the energy supplement, and permanently cease indexation of the payment from 1 July 2014;
- implement the following changes to Australian Government payments:
  - pause indexation for three years of the income free areas and assets value limits for all working age allowances (other than student payments), and the income test free area and assets value limit for parenting payment single from 1 July 2014;
  - index parenting payment single to the Consumer Price Index only, by removing benchmarking to Male Total Average Weekly Earnings from 20 September 2014; and
  - pause indexation for three years of several family tax benefit free areas from 1 July 2014.
- review disability support pension recipients under age 35 against revised impairment tables and apply the Program of Support requirements from 1 July 2014;
- limit the six-week overseas portability period for student payments from 1 October 2014;
- extend and simplify the ordinary waiting period for all working age payments from 1 October 2014; and

- maintain the family tax benefit Part A and family tax benefit Part B standard payment rates for two years from 1 July 2014.

The bill will also seek to add the Western Australian Industrial Relations Commission decision of 29 August 2013 as a pay equity decision under the *Social and Community Services Pay Equity Special Account Act 2012*, allowing payment of Commonwealth supplementation to service providers affected by the decision.

### **Retrospective commencement Schedule 1**

The amendments made by Schedule 1 commence on 20 June 2014. If the bill passes after this date, then the commencement will be retrospective. The background to the Schedule (explanatory memorandum p. 2) explains that no person's interests will be adversely affected:

The amendments made by this Schedule commence on 20 June 2014, although the amendments will generally only affect payment of the supplement from 20 September 2014, which is the next relevant quarter. Even if the commencement is retrospective in time, no person's interests will be adversely affected because of the retrospectivity. In the few cases where payment of the supplement has been made prior to Royal Assent (that is, where the person was qualified for the supplement after 20 June 2014 but ceased to be qualified for the supplement prior to Royal Assent), the rate of the supplement means that the amount of any debt resulting will be less than \$200, it would not be cost effective for the Commonwealth to take action to recover the debt, and hence the debt must be waived under section 1237AAA of the Social Security Act or section 206 of the Veterans' Entitlements Act.

The committee welcomes the inclusion of information addressing the effect of any retrospective commencement in the explanatory memorandum and thanks the Minister for it.

*In light of this explanation the committee has no further comment on this provision.*

**Delegation of legislative power—important matters in legislative instrument****Schedule 6, item 1, proposed subsection 19DA(3)**

This proposed subsection provides that the Secretary may, by legislative instrument, prescribe circumstances that are required for a person to, pursuant to subsection 19DA(1), qualify as experiencing a personal financial crisis. These prescribed circumstances will form part of the requirements necessary to establish an exception to ordinary waiting periods (that is, a period which must be served before certain allowances are payable). The explanatory memorandum does not explain why these matters, which may have an important impact on entitlements to benefits when a person is in severe financial crisis, cannot be provided for in the primary legislation. **The committee therefore 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 provision as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## **Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014**

Introduced into the House of Representatives on 18 June 2014

Portfolio: Social Services

### **Background**

This bill seeks to amend various Acts relating to social security, family assistance, veterans' entitlements and farm household support to:

- implement the following changes to Australian Government payments:
  - pause indexation for three years of the income free areas and assets value limits for student payments, including the student income bank limits from 1 January 2015;
  - pause indexation for three years of the income and assets test free areas for all pensioners (other than parenting payment single) and the deeming thresholds for all income support payments from 1 July 2017;
  - ensure all pensions are indexed to the Consumer Price Index only, by removing from 20 September 2017:
    - benchmarking to Male Total Average Weekly Earnings;
    - indexation to the Pensioner and Beneficiary Living Cost Index.
- reset the social security and veterans' entitlements income test deeming thresholds to \$30,000 for single income support recipients, \$50,000 combined for pensioner couples, and \$25,000 for a member of a couple other than a pensioner couple from 20 September 2017;
- generally limit the overseas portability period for disability support pension to 28 days in a 12-month period from 1 January 2015;
- exclude from the social security and veterans' entitlements income test any payments made under the new Young Carer Bursary Programme from 1 January 2015;

- include untaxed superannuation income in the assessment for the Commonwealth Seniors Health Card (with products purchased before 1 January 2015 by existing cardholders exempt from the new arrangements), and extend from six to 19 weeks the portability period for cardholders;
- remove relocation scholarship assistance for students relocating within and between major cities from 1 January 2015;
- cease pensioner education supplement from 1 January 2015;
- cease the education entry payment from 1 January 2015;
- extend youth allowance (other) to 22 to 24 year olds in lieu of newstart allowance and sickness allowance From 1 January 2015;
- require young people with full capacity to learn, earn or Work for the Dole from 1 January 2015;
- implement the following family payment reforms from 1 July 2015:
  - limit the family tax benefit Part A large family supplement to families with four or more children;
  - remove the family tax benefit Part A per-child add-on to the higher income free area for each additional child after the first;
  - revise the family tax benefit end-of-year supplements to their original values and cease indexation;
  - improve targeting of family tax benefit Part B by reducing the primary earner income limit from \$150,000 a year to \$100,000 a year;
  - limit family tax benefit Part B to families with children under six years of age, with transitional arrangements applying to current recipients with children above the new age limit for two years; and
  - introduce a new allowance for single parents on the maximum rate of family tax benefit Part A for each child aged six to 12 years inclusive, and not receiving family tax benefit Part B.
- increase the qualifying age for age pension, and the non-veteran pension age, to 70, increasing by six months every two years and starting on 1 July 2025; and

- remove the three months' backdating of the disability pension under the *Veterans' Entitlements Act 1986* from 1 January 2015.

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

#### **Schedule 9, proposed subsection 1157AB(3)**

This subsection provides that the Minister may, by legislative instrument, determine (a) the kind of social security pensions and benefits for the purposes of item 1 of the table in subsection (2) and (b) conditions for the purposes of that table item.

The table in subsection 1157AB(2) indicates that a person will not be subject to a Part 3.12B exclusion period if they are transferring from a pension or benefit of a kind determined by the Minister in a legislative instrument and where the Minister has determined conditions which have been met. Given the significance of the policy decisions as to when a person under 30 will be excluded from receipt of the Newstart allowance, it is unclear why these matters should not be dealt with in the primary legislation. **As such the committee seeks further advice as to the justification for these matters to be determined by legislative instrument rather than being included in the bill itself.**

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

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

#### **Schedule 9, proposed subsections 1157AC(3), 1157AE(4) and 1157AE(6)**

Proposed subsection 1157AC(3) provides that the Minister may, by legislative instrument, determine what previous periods of gainful work cause a reduced waiting period to apply, what particular kinds of gainful work do not cause a reduced waiting period to apply, and a method for working out the reduced period. Proposed subsection 1157AE(4) provides for the Minister to determine the extension of the exclusion period for failures to comply with requirements of an employment pathway plan, and proposed subsection

1157AE(6) may determine the method for working out the number of weeks a person's waiting period may be extended by as a penalty for providing false or misleading information.

Given the practical importance of these matters to eligibility to newstart allowance for affected persons and the committee's expectation that important matters will be included in primary legislation unless a comprehensive justification is provided, it is unclear why they should not be dealt with in the bill itself. This approach would have the advantage that Parliament would be better able to evaluate the overall policy approach envisaged by this schedule in relation to waiting periods for newstart allowances. **The committee therefore 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 1(a)(iv) of the committee's terms of reference.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014**

*[Digest 6/14 - response required]*

On 16 June 2014 the House of Representatives agreed to three Government amendments and the Minister for the Environment (Mr Hunt) tabled a supplementary explanatory memorandum and the bill was read a third time. The committee has no comment on this material.

### **Social Security Legislation Amendment (Increased Employment Participation) Bill 2014**

*[Digest 2/14 - no response required]*

On 16 June 2014 the Senate agreed to two Opposition amendments and the House of Representatives agreed to the Senate amendments and the bill was passed. The committee has no comment on this material.

## Provisions of bills which impose criminal sanctions for a failure to provide information

The committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that report, the committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The committee also recommended that such criteria be made available to ministers, drafters and to the Parliament.

The government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following table sets out penalties for 'information-related' offences in the legislation covered in this Digest. The committee notes that imprisonment is still prescribed as a penalty for some such offences.

Bill/Act	Section	Offence	Penalty
Fair Work (Registered Organisations) Amendment Bill 2014	Sch 2, item 228*	Failure to comply with a requirement to give information or produce a document	100 penalty units or imprisonment for 2 years, or both

\* This item seeks to amend the penalty for the existing offence in s 337 of the *Fair Work (Registered Organisations) Act 2009*.

## 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 committee's last Alert Digest.

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

Fair Work (Registered Organisations) Amendment Bill 2013

Fuel Indexation (Road Funding) Special Account Bill 2014

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

Nil