Senate Standing Committee

for the

Scrutiny of Bills

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Members of the Committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator Katy Gallagher	ALP, Australian Capital Territory
Senator the Hon Bill Heffernan	LP, New South Wales
Senator Rachel Siewert	AG, Western Australia

Secretariat

Ms Toni Dawes, Secretary
Mr Glenn Ryall, Principal Research Officer
Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Phone: 02 6277 3050
Email: scrutiny.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_scrutiny

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 or the provisions of bills not yet before 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 on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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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.

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Aboriginal Land Rights (Northern Territory) Amendment Bill 2015

Introduced into the House of Representatives on 24 June 2015
Portfolio: Indigenous Affairs

Background

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

- allow the Executive Director of Township Leasing, on behalf of the Commonwealth, to hold a sublease of Aboriginal land;
- enable the transfer of the sublease between the executive director and an Aboriginal and Torres Strait Islander corporation;
- provide for the Aboriginals Benefit Account to be used for payments in relation to the acquisition and administration of the sublease by an Aboriginal and Torres Strait Islander corporation or the executive director; and
- add parcels of land in the Wickham River area and in the Simpson Desert to be granted as Aboriginal land to the relevant Aboriginal Land Trusts.

The committee has no comment on this bill.

Acts and Instruments (Framework Reform) (Consequential Provisions) Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Attorney-General

Background

This bill amends various Commonwealth Acts.

Schedule 1 makes a number of technical amendments to various Acts which are consequential on the amendments made by the *Acts and Instruments (Framework Reform) Act 2015*. It also updates the drafting of provisions which deal with the application of the *Legislative Instruments Act 2003* to reflect amendments to that Act.

Schedule 2 makes amendments relating to rules of courts.

Schedule 3 makes amendments to provisions of Acts relating to the incorporation of administrative forms into instruments, and also minor technical corrections.

The committee has no comment on this bill.

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

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Introduced into the House of Representatives on 24 June 2015
Portfolio: Immigration and Border Protection

Background

This bill amends the *Australian Citizenship Act 2007* to provide for the cessation of Australian citizenship in specified circumstances where a dual citizen engages in certain conduct.

Trespass on personal rights and liberties—loss of citizenship without appropriate judicial process
Items 3 and 4, sections 33AA and 35

The purpose of these items includes providing for the cessation of Australian citizenship of persons who through their conduct are deemed to have acted inconsistently with their allegiance to Australia. The proposed amendments apply to a person who is an Australian citizen regardless of how the person became a citizen (including a person who became a citizen by birth) (see proposed subsections 33AA(4) and 35(3)). The provisions only apply to a person who is also a national or citizen of a country other than Australia (see proposed subsection 33AA(1) and paragraph 35(1)(a)).

Renunciation by conduct (proposed section 33AA)

Item 3 proposes to insert subsection 33AA(1) which provides that a person renounces their citizenship if they engage in conduct specified in subsection 33AA(2). Pursuant to these provisions, citizenship may be lost without the necessity for any judicial process. Subsection 33AA(2) specifies the following conduct:

- engaging in international terrorist activities using explosive or lethal devices;
- engaging in a terrorist act;
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- directing the activities of a terrorist organisation;

- recruiting for a terrorist organisation;
- financing terrorism;
- financing a terrorist; and
- engaging in foreign incursions and recruitment.

Subsection 33AA(3) provides that the words used in subsection 33AA(2) to specify the conduct which is taken as a renunciation of citizenship is to be understood as having the same meaning as in a number of offences in the *Criminal Code*. Given that the words used are defined in this way, renunciation of citizenship attaches to conduct that would be a ground for conviction of one of the listed offences.

However, although the specified conduct is defined by reference to offences specified in the *Criminal Code* it is unclear how, if at all, qualifications built into such offences (such as knowledge, intention or recklessness elements of the offence) condition the operation of subsection 33AA(1). Similarly, it is unclear—on the face of the legislation—whether the general provisions in the *Criminal Code* which relate to children are applicable (cf, explanatory memorandum, p. 10).

In addition, it is significant that the term 'engaging in foreign incursions and recruitment' is defined by reference to Division 119 of the *Criminal Code*. This Division captures a broad range of conduct, including:

- entering a foreign country with the intention of engaging in hostile activity, engaging in, or preparing to engage in, hostile activity (which includes intending to overthrow by force or violence the government of a foreign country; intimidating the public of a foreign country; and unlawfully destroying or damaging property belonging to the government of a foreign country) (*Criminal Code*, sections 119.1 and 119.4);
- entering or remaining in an area declared by the Foreign Affairs Minister (*Criminal Code*, section 119.2);
- providing or receiving military training (or being present at a meeting intending to provide or receive training), in order to prepare for engaging in hostile activity (*Criminal Code*, subsections 119.4(3) and (4));
- giving money, goods or services with the intention of supporting or promoting the offence of engaging in hostile activity (*Criminal Code*, subsection 119.4(5));

- allowing a building to be used to hold a meeting with the intention of committing, supporting or promoting military training or the giving of money or goods to support or promote engagement in hostile activity (*Criminal Code*, section 119.5); and
- publishing an advertisement or an item of news (for money or other consideration) and either being reckless as to whether it is for the purpose of recruiting persons to serve in any capacity with foreign armed forces; or the advertisement or news item contains information relating to where applications or information can be sought regarding serving with the armed forces in a foreign country; or relating to how a person can travel to another country in order to serve with the armed forces of a foreign country (*Criminal Code*, section 119.7).

Loss of citizenship in service of a declared terrorist organisation (proposed new section 35)

Item 4 proposes to insert a new subsection 35(1) which provides that a person ceases to be an Australian citizen if the person serves in the armed forces of a country at war with Australia or fights for, or is in the service of, a declared terrorist organisation where that conduct occurs outside Australia. Such conduct may also be the basis for a criminal prosecution for a terrorism offence.

Committee comment

Although citizenship rights have a statutory basis in Australia, it may be suggested that it misconceives the nature of citizenship (perhaps especially in relation to persons who have acquired citizenship by birth) to understand it as a privilege that may be removed or that will cease as a consequence of criminal misbehaviour, even if that misbehaviour is serious. Indeed, the deprivation of citizenship based on alleged or suspected criminal conduct may (like the deprivation of liberty based on a determination of criminal guilt) be an inherently judicial function, such that it can only be achieved if it is specified as a penalty that may be imposed if a person is convicted of a criminal offence. Regardless of any potential constitutional objections, however, serious issues of fairness arise given that a person may lose their citizenship on the basis of criminal conduct *without any of the protections associated with a criminal trial*.

The committee also notes that it does not consider that the 'automatic' or 'self-executing' nature of the cessation of citizenship provisions proposed by

items 3 and 4 obviates this question of fairness for two reasons. First, the practical reality is that an internal administrative process will necessarily precede the government treating a person as having lost his or her citizenship. In this regard, the process for 'operationalising' the Act (should the bill be passed) is outlined in a letter from the Deputy Secretary of the Department of Immigration and Border Protection to the Parliamentary Joint Committee on Intelligence and Security, dated 21 July 2015. The letter explains that implementation of the Act will involve the Department identifying dual nationals to whom one (or more) of the provisions relating to automatic citizenship apply. The Department notes that this will require close cooperation across government, including law enforcement and intelligence agencies. The Secretary of the Department will bring cases to the attention of the Minister.

The 'automatic' operation of the provisions has the result that an affected person is not afforded a hearing as part of that administrative process (see further comments below on natural justice). The result is an affected person is not entitled (at this point) to contest judgements about whether the cessation of citizenship provisions are triggered. Once a government official has reached a conclusion that citizenship has ceased under these provisions, then further decisions might be made which are premised on a person no longer being a citizen (for example, refusal of a passport application, cancellation of visa, and, ultimately, a deportation order).

Second, the lack of fairness involved in the loss of citizenship without protections associated with the application of the criminal judicial process is not cured by the capacity for an affected person to seek declaratory or injunctive relief. The statement of compatibility (at p. 31) states that:

> The government considers that the right to a fair trial and fair hearing are not limited by the proposal. The proposal does not limit the application of judicial review of decisions that might be made as a result of the cessation or renunciation of citizenship. In a judicial review action the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. A person also has a right to seek declaratory relief as to whether the conditions giving rise to the cessation have been met.

A person who is deprived of their citizenship through the operation of section 33AA or section 35 could, after receiving a notice from the Minister that they have ceased to be an Australian citizen (see proposed subsection 33AA(6) and subsection 35(5)) or some other indication from a government official that their citizenship has ceased, seek a declaration from a court that their conduct

has not triggered the operation of these provisions. In some circumstances, an injunction restraining decision-makers from making decisions which depend upon citizenship having ceased by operation of the proposed provisions could also be sought. Although, in such proceedings, the court would be the ultimate arbiter of whether the relevant facts have triggered the cessation of citizenship, this process would occur *after* a government official has signalled, in some way, that citizenship has been lost.

Indeed it is possible that a person may be unsuccessful in seeking a declaration that the provisions are not triggered and that their citizenship has therefore not ceased, even though they had been acquitted by a court of an offence relating to the same conduct. In a proceeding for declaratory relief the applicant would bear the onus of proof. That is, the affected person would need to establish, on the balance of probabilities, they did not engage in conduct that triggered the operation of the cessation provisions. Practical difficulties may arise in discharging this burden, the fairness of which is not addressed in the explanatory material. For example, requiring the applicant to prove a negative may not be reasonable or feasible in particular circumstances. Relatedly, evidence held by the government may be subject to a claim of public interest immunity if national security is implicated. In this context, it is suggested that the conclusion in the statement of compatibility that the proposal does not limit the right to a fair trial or fair hearing requires detailed further justification.

For these reasons, the possibility that an affected person may initiate proceedings for declaratory relief does not overcome the objections (stated above) about the lack of criminal judicial process preceding the cessation of citizenship and associated uncertainties concerning the specification of the relevant conduct.

Noting the above, the committee indicates its serious concern that a person will, under these proposed amendments, lose their citizenship on the basis of alleged or suspected criminal conduct in circumstances where:

- **it is unclear whether or how protections associated with particular offences (such as the fault elements of offences) will be applicable; and**
- **the usual protections associated with the criminal judicial process have not been afforded.**

The committee therefore seeks a detailed justification from the Minister which addresses the fairness of these provisions in light of the above concerns.

In addition, the committee also requests a detailed and particularised explanation as to why all of the conduct listed in subsection 33AA(2) is considered an appropriate basis for the loss of citizenship, especially as the loss is 'automatic'.

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

Trespass on personal rights and liberties—breadth and proportionality of application of provision
Item 5, proposed new section 35A

Loss of citizenship following conviction

This item inserts new section 35A that will provide for the cessation of citizenship if a person is *convicted* of specified terrorism and certain other offences. The proposed amendments apply to a person who is an Australian citizen regardless of how the person became a citizen (including a person who became a citizen by birth) (see proposed subsection 35A(4)). The provisions only apply to a person who is also a national or citizen of a country other than Australia (see proposed paragraph 35A(1)(b)). Although citizenship will cease under this provision only after a conviction is recorded, it remains the case that the loss of citizenship is a consequence of conviction rather than a penalty imposed on a person as part of an exercise of judicial power.

Additionally, the *breadth* of the category of offences is a matter of significant concern.

The explanatory memorandum gives a brief description of the 32 separate offences (listed in subsection 35A(3)) that trigger the automatic cessation of citizenship. The listed offences are broader than those in sections 33AA and 35. Importantly, not all of the offences relate directly to terrorist activities. For example, one of the listed offences relates to intentionally destroying or damaging any property belonging to the Commonwealth (*Crimes Act 1914*,

section 29). The maximum custodial penalty for the offences ranges from 5 years imprisonment to imprisonment for life.

The explanatory memorandum and statement of compatibility justify cessation of citizenship on the basis of conviction for one of the specified offences on the basis that they involve 'very serious conduct that demonstrates a person has repudiated their allegiance to Australia' (e.g. at p. 22). The rationale given for a person being deprived of their citizenship is that this will reduce the possibility for acts or further acts that harm Australians or Australian interests. The explanatory memorandum also suggests that the operation of this provision may have a deterrent effect above and beyond that already provided by the criminal law.

The loss of citizenship is a severe consequence (which may ultimately lead to a person being physically excluded from the Australian community). It is therefore unfortunate that the explanatory memorandum does not offer a particularised justification for the inclusion of the specified offences as providing a sufficient basis for cessation of citizenship. The explanatory memorandum makes no effort to explain the criteria or principles by reference to which offences are included or excluded for this purpose. The only justification provided is the blanket claim that the offences relate to 'very serious conduct'. Yet the range of penalties associated with the specified offences illustrates the bluntness of this claim (a maximum penalty of five years may not necessarily indicate 'very serious conduct' as it is usually understood). Moreover, some offences—such as destroying or damaging Commonwealth property—may be unconnected with terrorist activities and may (in the circumstances of a particular case) involve relatively minor conduct.

Given the automatic operation of this cessation provision, there is a significant possibility that the application of the law will not be proportionate to the circumstances of particular cases. The automatic operation of the provisions means there is no discretionary judgment exercised prior to the time that cessation of citizenship takes effect. (The Minister's discretionary power to exempt the operation of the cessation provisions, after citizenship has ceased by operation of law, is considered below.) Finally, it may be noted that the conduct relevant to some of the offences (such as urging or advocating violence or terrorism) relates to expression and communication. Whether or not the cessation of citizenship (and the possible exclusion from the Australian community) is appropriate in relation to such offences, given the

obvious implications for freedom of speech, is not a matter which is properly addressed in the explanatory material.

For these reasons, the committee seeks a detailed and particularised explanation from the Minister as to why conviction for each of the specified offences justifies the loss of citizenship. The committee requests that the explanation should at least consider the following issues:

- **the underlying principles used for determining which offences are included;**
- **why those principles justify the inclusion of the particular offence;**
- **whether it is possible that automatic cessation of citizenship on the basis of each offence may (in application to particular circumstances) be disproportionate in its application; and**
- **whether the cessation of citizenship in relation to conviction for particular offences is appropriate given the impact on freedom of speech.**

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

Trespass on personal rights and liberties and delegation of legislative power—breadth and proportionality of application of provision
Item 4, subsection 35(1)

As noted above, item 4 proposes to insert new subsection 35(1) which provides that a person ceases to be an Australian citizen if he or she serves in the armed forces of a country at war with Australia or fights for, or is in the service of, a declared terrorist organisation where that conduct occurs outside Australia. Such conduct would also clearly be a ground for conviction of an offence.

The explanatory memorandum notes that there are currently 20 organisations listed as terrorist organisations under the *Criminal Code* and that these are published on the Australian National Security government website.

Two scrutiny issues are of concern in relation to the specification of the conduct upon which citizenship ceases.

First, the operation of the provision relies upon a ministerial declaration of a terrorist organisation that is not a legislative instrument. In general, the committee prefers all elements of a criminal offence to be included in the primary legislation. The operation of this law does not by its terms impose criminal sanctions. Nevertheless, the operation of the provision imposes a very serious consequence (i.e. loss of citizenship) for anyone who is deemed to have engaged in the specified conduct (which may, if proven, also constitute criminal conduct). **The committee therefore seeks an explanation from the Minister in relation to the appropriateness of making these consequences reliant upon a ministerial declaration that is not subject to disallowance by the Parliament.**

Second, the provision extends not only to a person who fights for a declared terrorist organisation, but also to one who 'is in the service of' such an organisation. The explanatory memorandum states that the phrase 'in the service of' is not defined in the bill because it is intended that it be given its ordinary meaning. Understood this way, however, the provision has a very wide application and may capture conduct such as the provision of medical or other aid.

The committee considers that the explanatory materials do not sufficiently explain why such a broad application of the provision is appropriate or address circumstances in which the ('automatic') application of the provision may be disproportionate. The committee therefore seeks a more detailed explanation from the Minister in this regard. The committee notes that its scrutiny concerns in relation to the breadth of this provision has even greater force given that (as noted above) the law operates with respect to organisations identified by a ministerial declaration that is not disallowable by the Parliament.

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee's terms of reference, and may also be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

Exclusion of the right to be heard
Items 3, 4 and 5

Each of the cessation of citizenship provisions (proposed sections 35AA, 35 and 35A) take effect 'by operation of law and do not necessitate the Minister making a decision' (explanatory memorandum, p. 2). It is a person's own conduct or conviction for a specified offence that will result in the cessation of their citizenship. The provisions are described as 'self-executing' to the extent that they are deemed to operate without requiring an official decision that establishes the loss of citizenship. For this reason the provisions of the bill are described as operating 'automatically'.

The Minister must, if he or she becomes aware of conduct or a conviction which has resulted in the cessation a person's citizenship, 'give written notice to that effect at such time and to such persons as the Minister considers appropriate' (see proposed subsections 35AA(6), 35(5) and 35A(5)). However, such written notice is a recognition of cessation of citizenship not a determination that produces that result. Significantly, there is no requirement that a written notice from the Minister that citizenship has ceased must be given to the affected person as it may be that the Minister considers this to be inappropriate. It is therefore clearly intended that citizenship may be lost (pursuant to the 'automatic' cessation provisions) even though the Minister may be unaware of the relevant conduct and despite the fact an affected person has not been notified.

This proposed statutory scheme for the cessation of citizenship is beset with ambiguities concerning its practical operation. As noted above, the notion that these provisions (with the possible exception of section 35A which operates upon conviction for a specified offence) are self-executing belies the way in which the provisions will work in practice. Whether or not a person has engaged in the conduct required to trigger the operation of section 35AA and section 35 may well involve questions of disputed fact and judgment. For example, whether a person has engaged in a terrorist act or has recruited for a terrorist organisation so as to activate subsection 33AA(1) may be questions about which there is genuine dispute. Similarly, whether subsection 35(1) is triggered because a person has fought for, or acted in the service of, a declared terrorist organisation is not a conclusion that is self-certifying. An accusation that a person has acted in the service of a declared organisation does not establish the truth of the accusation.

The result is that until such time as a government decision-maker identifies conduct that they believe triggers these provisions the provisions will not have a practical effect. The practical reality is that a person who has engaged in the specified conduct will continue to be treated as a citizen until a government official (perhaps, but not necessarily, the Minister) has detected conduct which is believed to trigger the cessation of citizenship provisions. Indeed, this reality is implicitly recognised by subsections 35AA(6), 35(5) and 35A(5) which each provide that if the Minister becomes aware of conduct because of which a person has ceased to be an Australian citizen, the Minister must give written notice to that effect at such time and to such persons as the Minister considers appropriate.

From a scrutiny perspective, an unfortunate outcome of the application of the proposed legislative scheme is that a person may be deemed by government officials to have lost their citizenship without having been given any prior opportunity to contest the basis of this conclusion. Nor would a hearing in relation to this issue be required prior to a government official exercising a power (such as denying a passport application) on the basis that citizenship has been lost. This is a matter of grave scrutiny concern given the significance of interests involved and the importance of the right to a fair hearing. Indeed, the courts consider procedural fairness to be a fundamental principle of the common law. In part, the value of a affording a fair hearing to affected persons is the recognition that doing so increases the likelihood that the law will be correctly applied and discretionary decisions made on the basis of relevant information. '[T]he path of the law is', as Megarry J famously noted, 'strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change' (*John v Rees* [1970] Ch 345, 402).

It is clearly a purpose of sections 33AA and 35 to deprive a person of citizenship in the absence of a conviction for a specified offence. But the effect of these provisions is that a person may be considered to have lost their citizenship by the government (which exposes them to adverse decisions being made based upon this loss of citizenship) without that person having had the opportunity to contest the basis of the judgment that their conduct has indeed triggered the cessation provisions. Indeed, the problem is exacerbated by proposed subsections 33AA(12), 35(11) and 35A(11) which provide that section 39 of the ASIO Act is inapplicable to the new cessation provisions.

Section 39 of the ASIO Act prohibits a Commonwealth agency from taking action on the basis of preliminary advice from ASIO, subject to exceptions for temporary action in limited circumstances. No clear justification is given for excluding the operation of section 39 of the ASIO Act and thus, in effect, enabling the government to conclude the cessation provisions are triggered in the absence of a full security assessment from ASIO (noting that review rights exist in relation to such an assessment). (Although a person could seek a declaration that their conduct has not triggered the cessation of citizenship provisions or an order restraining the government from acting on the basis that their citizenship has ceased by operation of the provisions, it is not accepted—for reasons suggested above—that this possibility ameliorates the lack of fairness in the initial operation of the cessation provisions.)

The committee therefore seeks a further justification be from the Minister which addresses the lack of procedural fairness in the operation of the scheme in light of the above scrutiny concerns.

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

Exclusion of natural justice and limitation of judicial review—Minister's power to rescind a notice and exempt a person from the operation of the cessation provisions
Merits review
Items 3, 4 and 5

Where a notice has been issued under subsections 35AA(6), 35(5) and 35A(5), on the basis that the Minister has become aware of conduct because of which a person has ceased to become an Australian citizen, subsections 35AA(7), 35(6) and 35A(6) give a personal (i.e. non-delegable) discretionary power to the Minister to rescind the notice and exempt the person from the effect of the cessation of citizenship section in relation to the matters that were the basis for the giving of the notice. The power is to be exercised if the Minister considers it in the 'public interest' to do so. The Minister does not have a duty to consider whether to exercise the power, whether he or she is requested to do so by any person or in any other circumstance (subsections 35AA(8), 35(7) and 35A(7)). Subsections 35AA(10), 35(11) and 35A(11)

expressly exclude the rules of natural justice in relation to the powers of the Minister under this section.

Two further scrutiny concerns are raised by this complicated set of provisions.

First, the exclusion of natural justice in relation to the Minister's power to rescind a notice and exempt the person from the operation of the relevant cessation provision is not sufficiently justified as the explanatory materials simply repeat the effect of the provision.

As noted above, the existence of conduct which triggers the cessation of citizenship may be contested. The circumstances of particular cases will involve matters which are relevant to whether it is in the public interest to rescind the notice and exempt the affected person from the operation of the cessation of citizenship provision. **The committee therefore expresses its concern that the Minister's exercise of his or her power to rescind a notice and exempt the person from the operation of the cessation provisions need not be preceded by a fair, unbiased hearing. In light of this, the committee seeks a more detailed explanation from the Minister for the exclusion of natural justice in relation to the Minister's power to rescind a notice. The committee requests that the explanation address the justification for the exclusion of the fair hearing rule and the rule against actual and ostensible bias.**

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

Second, given the way in which the key elements of the cessation provisions fit together, the provisions (i.e. subsections 35AA(8), 35(7) and 35A(7)) which provide that the Minister has no duty to even consider the exercise of his or her substantive power to rescind a notice and exempt the person from the operation of the provision under which their citizenship has ceased are also of scrutiny concern. The effect of such 'no duty to consider' clauses is that the standard judicial review remedies of certiorari (to quash a decision) and mandamus (to require the making of a decision where there is a public duty to do so) would have no utility and would therefore be unavailable: see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 335. Although it is possible that a court could issue a declaration as to the lawfulness of the

exercise of the power not to rescind a notice and exempt the person from the relevant cessation of citizenship provision, such a remedy would not invalidate the decision. Further, a declaration would only be considered appropriate if the Minister had made a decision to consider whether to exercise the power (which he or she is not obliged to do) and then proceeded to make a legal error in the course of considering whether to exercise the power. Thus, if the Minister refused to even consider the exercise of the power, no judicial review remedy (including declaratory relief) would be available in relation to the exercise of this power to rescind a notice and exempt the person from the operation of the cessation provisions.

The substantive power (to rescind and exempt) is required as it provides the *only* mechanism available to counteract the extraordinary breadth of the cessation provisions (as there will clearly be situations where the cessation of citizenship provisions are overly-inclusive—as outlined above). However, the 'no duty to consider' provisions mean that the exercise of these powers will, for practical purposes, be beyond meaningful judicial supervision. Judicial review is not expressly excluded by these clauses but it is difficult to see how, if at all, judicial review would have any practical utility. Put differently, there are no meaningful jurisdictional limits to the exercise of these powers. Given this, the availability of judicial review does not provide any assurance that the powers will not be exercised arbitrarily.

In *Plaintiff M61* the High Court held that the similar 'no duty to consider' provisions in the *Migration Act 1958* (Cth) were not inconsistent with the minimum content of judicial review entrenched by section 75(v) of the Constitution. It should be noted, however, that the statutory context of those provisions was, in important respects, different to the 'no duty to consider' provisions included in this bill. In *Plaintiff M61* the substantive powers (to which the 'no duty to consider' provisions in the Migration Act were attached) were to exempt offshore visa applicants from the effect of provisions that prohibited them from making a visa application and which prevented the Minister from issuing a visa.

However, in the statutory context presented by this bill, the 'no duty to consider' clauses attach to a power to rescind a notice confirming that the government considers a person's citizenship has, by virtue of their conduct, ceased. This loss of citizenship, as explained above, is produced in circumstances where the affected person has not at any point in the decision-making process been afforded an opportunity to challenge the conclusion that

their conduct has triggered the provisions. This and other differences in the legislative context of these no duty to consider provisions may justify the conclusion that the practical exclusion of review is inconsistent with the entrenched minimum provision of judicial review (a level of review which the High Court treats as a fundamental element in the maintenance of the rule of law in Australia).

The committee therefore expresses its concern that it may be considered that the 'no duty to consider' provisions attached to the exemption power are unfair given that the cessation of citizenship occurs automatically and the result therefore is that the Minister's decision as to whether the operation of the exemption provision is appropriate is not subject to any meaningful judicial review. The committee requests a detailed justification from the Minister addressing the fairness of this position in light of the committee's comments.

Further, given the ineffectiveness of judicial review to maintain the rule of law in the administration of these powers, the committee seeks a justification as to why a mechanism for merits review has not been included in the bill in relation to the Minister's power to rescind a notice *and* exempt the person from the operation of the cessation provisions.

> *Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference, and may also make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Trespass on personal rights and liberties—uncertain operation of the law

As noted above, the cessation of citizenship provisions (particularly the provisions based on conduct, as opposed to conviction for a specified offence) are said to operate 'automatically'. The result is that a person may lose their citizenship without ever having been told of this. Further, even if the Minister believes that citizenship has ceased there is no obligation on him or her to give notice of this to an affected person. One of the core elements of the rule of law is that the content of the law is stated with sufficient clarity such that a person

is able to refer to the law as a guide to their conduct. Where the rights and interests affected are of great significance (as is the case with citizenship) the importance of knowing how the law may affect the right is magnified.

The committee is of the view that the proposition that a person may lose their citizenship through operation of law, in the absence of a decision that applies the law to their circumstances or even notifies them of the result, warrants further justification.

The bill also contains uncertainties about the legal consequences in relation to the practical operation of the loss citizenship following conviction provision. The bill does not expressly provide for the circumstance where a conviction may be set aside on appeal. Similarly, difficult questions of interpretation may arise where a person's citizenship is deemed to cease by virtue of their conduct but where that person is later acquitted of charges relating to the same conduct that has led to the laying of the criminal charges.

The committee therefore seeks the Minister's advice as to the rationale for the proposed approach and whether legislative guidance can be provided as to how these matters of concern will be addressed.

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

Australian Defence Force Cover Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Defence

Background

This bill is part of a package of three bills to establish new superannuation arrangements for people joining the Australian Defence Force (ADF) on or after 1 July 2016.

The bill establishes the Australian Defence Force Cover Scheme (ADF Cover) to provide ADF members with death and invalidity cover consistent with the benefits provided to members of the current Military Superannuation and Benefits Scheme.

Delegation of legislative power—standing appropriation
Insufficient Parliamentary scrutiny
Clause 60

Clause 60 provides generally for the payment of benefits authorised by the bill from the Consolidated Revenue Fund, without putting a limit on the maximum amount to be spent or defining the period in which payments can be made. This means that the provision is a standing appropriation. In its *Fourteenth Report of 2005*, the committee stated, at page 272, that:

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

The committee 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.

The committee is not questioning generally the ability for payments to be made, only whether the use of a standing appropriation is an appropriate mechanism. In scrutinising standing appropriations, the committee looks to the explanatory memorandum for an explanation of the reason for the proposed approach. In addition, the committee considers whether the bill:

- places a limitation on the amount of funds that may be so appropriated; and
- includes a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

In this instance the explanatory memorandum simply repeats the effect of the provision and does not address the matters outlined above. **The committee therefore seeks the Minister's advice as to the justification for including a standing appropriation in the bill and the exclusion of that appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations processes.**

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) and insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Australian Defence Force Superannuation Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Defence

Background

This bill is part of a package of three bills to establish new superannuation arrangements for people joining the Australian Defence Force (ADF) on or after 1 July 2016.

The bill will:

- establish the Australian Defence Force Superannuation Scheme (ADF Super) as an accumulation (or defined contribution) scheme available to either permanent ADF members or reservists on continuous full-time service; and
- enable ADF members to choose which superannuation scheme they belong to and give those members the ability to transfer their accumulated ADF Super benefits to a fund of their choice when they leave the ADF.

Inappropriate delegation of legislative power—Henry VIII clause Subclause 29(2)

Subclause 29(1) provides that rules (that is, delegated legislation) may make any provision that is necessary to enable ADF Super to satisfy any condition or requirements of the following laws:

i. the *Corporations Act 2001*;
ii. the *Family Law Act 1975*;
iii. the *Financial Institutions Supervisory Levies Collection Act 1998*;
iv. the *Income Tax Assessment Act 1936 or the Income Tax Assessment Act 1997*;
v. the *Superannuation Industry (Supervision) Act 1993*;
vi. the *Superannuation (Resolution of Complaint) Act 1993*; and
vii. the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

Subclause 29(2) provides that if rules are inconsistent with a provision of the Act, the rules prevail and the provision, to the extent of the inconsistency, is

of no effect. The effect is thus that the rules may override the primary legislation.

The explanatory memorandum provides the following justification (at paragraph 83):

> This provision is necessary because the conditions or requirements of the above laws are usually promulgated by regulations or other instruments made under those laws. Allowing rules to be made under this Bill would allow those conditions or requirements to be met more quickly than if Act amendments were required. It is intended that should it be necessary to make rules under this section, legislation would be introduced as soon as possible to give effect to the relevant provisions.

This justification is quite brief and may not be easily comprehended by a generalist reader. **As such, the committee seeks the Minister's more detailed explanation for the proposed approach. In particular, the committee is interested in information that addresses with more specificity the nature of the circumstances that may require that rules be enacted that operate to override the primary legislation.**

Further, given the apparent intention for any rules to then be addressed by the introduction of amending legislation as soon as possible, the committee seeks the Minister's advice as to whether consideration has been given to including a provision which would limit the operation of rules made under this provision to a specified period of time. This would allow any immediate issues to be addressed without leaving this broad authority to override primary legislation in place indefinitely.

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

Australian Government Boards (Gender Balanced Representation) Bill 2015

Introduced into the Senate on 24 June 2015
By: Senators Xenophon, Lambie, Lazarus and Waters

Background

This bill requires government boards to comprise of at least 40 per cent men and 40 per cent women. The bill also provides for annual reporting requirements in relation to the gender composition of government boards.

The committee has no comment on this bill.

Australian Radiation Protection and Nuclear Safety Amendment Bill 2015

Introduced into the House of Representatives on 18 June 2015
Portfolio: Health

Background

This bill amends the *Australian Radiation Protection and Nuclear Safety Act 1998* to:

- adjust the licensing regime by enabling the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) to regulate remediation activities involving contaminated legacy sites, issue time limited licences, and issue single licences for multiple activities;
- clarify the application of the Act to contractors and others working with Commonwealth entities;
- provide ARPANSA with increased capacity to respond to emergencies and with increased compliance monitoring and enforcement powers; and
- make technical and administrative amendments.

The committee has no comment on this bill.

Civil Law and Justice (Omnibus Amendments) Bill 2015

Introduced into the Senate on 25 June 2015
Portfolio: Attorney-General

Background

This bill amends:

- the *Administrative Appeals Tribunal Act 1975* in relation to:
  - notification of applications for review;
  - non-disclosure of certain information;
  - the method of giving documents or things for the purposes of proceedings;
  - tribunal members' powers to dismiss certain applications; and
  - the reinstatement of withdrawn applications; and
- the *Bankruptcy Act 1996* in relation to:
  - confidentiality requirements relating to statements of affairs;
  - removal of certain requirements to notify, and lodge requests with, the Official Receiver;
  - imposition of time limits for certain applications; and
  - removal of an obsolete reference; and
- the *Evidence Act 1995* to make a drafting change; and
- the *Federal Circuit Court of Australia Act 1999* to:
  - provide arresters with the power to use reasonable force to enter premises to execute an arrest warrant; and
  - remove an obsolete reference; and
- the *Federal Court of Australia Act 1976* in relation to:
  - the jury empanelment process;
  - the pre-trial process for indictable offences; and
  - technical amendments; and
- the *International Arbitration Act 1974* in relation to:
  - enforcement of foreign arbitral awards; confidentiality provisions to arbitral proceedings; and
  - technical amendments; and
- 10 Acts to make consequential amendments:

Trespass on personal rights and liberties—powers of arrest Schedule 1, item 37

The purpose of this item to authorise an arrester (as defined by subsection 113A(1)) to use such force as is reasonable and necessary in the circumstances to enter premises to execute an arrest warrant. The statement of compatibility (pp 6–7, 9–10) and explanatory memorandum (pp 19–21) give a detailed explanation for the approach. The provisions contain a number of limitations and safeguards and have been drafted consistently with the *Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers* (p. 20). They are also modelled on similar provisions in the *Federal Court of Australia Act 1976*, which were themselves modelled on the relevant sections of the *Crimes Act 1914*.

In the circumstances, 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 trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

Customs Tariff Amendment (Fuel Indexation) Bill 2015

Introduced into the House of Representatives on 23 June 2015
Portfolio: Immigration and Border Protection
Received Royal Assent 30 June 2015

Background

This bill is part of a package of four bills to re-introduce the biannual indexation of fuel excise and excise-equivalent fuel duties. This bill amends the *Customs Tariff Act 1995* (the Act) so that the rate of excise-equivalent customs duty applying to all imported fuels, with the exception of aviation fuel, crude oil and condensate, will be biannually indexed by reference to the Consumer Price Index.

The bill also makes consequential amendments to the Act by rounding the applicable duty rate of indexed fuels from three decimal places in the cent to one decimal place.

Retrospective commencement
Clause 2

This bill amends the *Customs Tariff Act 1995* to index the rate of excise-equivalent customs duty applying to fuels (other than aviation fuels). The effect of the bill is to validate the Customs Tariff Proposal (No. 1) 2014 which was tabled in the House of Representatives on 30 October 2014. The amendments will therefore apply to duty on domestically manufactured and imported fuel with effect from 10 November 2014.

As a matter of practice, the committee draws attention to any bill that seeks to have retrospective impact, looks to the explanatory memorandum for information about the justification for the proposed approach and the possible impacts of it, and will comment adversely where such a bill has a detrimental effect on people.

As this bill, and the other bills in the package, have already passed both Houses of the Parliament the committee makes no further comment.

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

Defence Legislation Amendment (Superannuation and ADF Cover) Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Defence

Background

This bill is part of a package of three bills. The bill provides for consequential amendments necessary to establish the ADF Super and ADF Cover arrangements.

The committee has no comment on this bill.

Excise Tariff Amendment (Fuel Indexation) Bill 2015

Introduced into the House of Representatives on 23 June 2015
Portfolio: Treasury
Received Royal Assent 30 June 2015

Background

This bill is part of a package of four bills to re-introduce the biannual indexation of fuel excise and excise-equivalent fuel duties. This bill amends the *Excise Tariff Act 1921* (the Act) so that the rate of excise-equivalent customs duty applying to all imported fuels, with the exception of aviation fuel, crude oil and condensate, will be biannually indexed by reference to the Consumer Price Index.

The bill also makes consequential amendments to the Act by rounding the applicable duty rate of indexed fuels from three decimal places in the cent to one decimal place.

Retrospective commencement
Clause 2

This bill amends the *Excise Tariff Act 1921* to index the rate of excise duty applying to fuels (other than aviation fuels). The effect of the bill is to validate the Excise Tariff Proposal (No. 1) 2014 which was tabled in the House of Representatives on 30 October 2014. The amendments will therefore apply to duty on domestically manufactured and imported fuel with effect from 10 November 2014.

As a matter of practice, the committee draws attention to any bill that seeks to have retrospective impact, looks to the explanatory memorandum for information about the justification for the proposed approach and the possible impacts of it, and will comment adversely where such a bill has a detrimental effect on people.

As this bill, and the other bills in the package, have already passed both Houses of the Parliament the committee makes no further comment.

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

Fairer Paid Parental Leave Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Social Services

Background

This bill amends the *Paid Parental Leave Act 2010* to:

- ensure that parents receive either Government-funded payments under the Paid Parental Leave scheme or employer-provided payments and not both from 1 July 2016;
- provide a top-up payment to parents who receive employer-provided payments of less than the total amount of parental leave pay under the Paid Parental Leave scheme to ensure they access the maximum rate from 1 July 2016; and
- make minor amendments, including providing backdating provisions so parents have time to lodge a claim in certain circumstances.

The committee has no comment on this bill.

Fuel Indexation (Road Funding) Bill 2015

Introduced into the House of Representatives on 23 June 2015
Portfolio: Treasury
Received Royal Assent 30 June 2015

Background

This bill is part of a package of four bills to re-introduce the biannual indexation of fuel excise and excise-equivalent fuel duties. The bill makes consequential amendments, including amending the *Fuel Tax Act 2006* to ensure that the road user charge rate that is determined is rounded in the same way as fuel duty rates are rounded.

Retrospective commencement
Clause 2

This bill makes consequential amendments in relation to the re-introduction of the biannual indexation of fuel excise and excise-equivalent fuel duties (provided for in the Customs Tariff Amendment (Fuel Indexation) Bill 2015 and the Exercise Tariff Amendment (Fuel Indexation) Bill 2015). The amendments will apply to duty on domestically manufactured and imported fuel with effect from 10 November 2014.

As a matter of practice, the committee draws attention to any bill that seeks to have retrospective impact, looks to the explanatory memorandum for information about the justification for the proposed approach and the possible impacts of it, and will comment adversely where such a bill has a detrimental effect on people.

As this bill, and the other bills in the package, have already passed both Houses of the Parliament the committee makes no further comment.

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

Fuel Indexation (Road Funding) Special Account Bill 2015

Introduced into the House of Representatives on 23 June 2015
Portfolio: Treasury
Received Royal Assent 30 June 2015

Background

This bill is part of a package of four bills to re-introduce the biannual indexation of fuel excise and excise-equivalent fuel duties. The bill establishes a special account to ensure that the net additional revenue from the reintroduction of fuel indexation is used for road infrastructure funding.

Retrospective commencement
Clause 2

This bill establishes a special account to ensure that the net additional revenue from the reintroduction of fuel indexation (provided for in the Customs Tariff Amendment (Fuel Indexation) Bill 2015 and the Exercise Tariff Amendment (Fuel Indexation) Bill 2015) is used for road infrastructure funding. The amendments will apply to duty on domestically manufactured and imported fuel with effect from 10 November 2014.

As a matter of practice, the committee draws attention to any bill that seeks to have retrospective impact, looks to the explanatory memorandum for information about the justification for the proposed approach and the possible impacts of it, and will comment adversely where such a bill has a detrimental effect on people.

As this bill, and the other bills in the package, have already passed both Houses of the Parliament the committee makes no further comment.

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

Gene Technology Amendment Bill 2015

Introduced into the House of Representatives on 18 June 2015
Portfolio: Health

Background

This bill amends the *Gene Technology Act 2000* to:

- discontinue quarterly reporting to the Minister;
- clarify which dealings may be authorised by inadvertent dealings licences;
- update advertising requirements for public consultations;
- remove information about genetically modified (GM) products authorised by other agencies from the Record of GMO and GM Product Dealings maintained by the Gene Technology Regulator;
- amend licence variation requirements; and
- make a number of technical amendments.

The committee has no comment on this bill.

Higher Education Support Amendment (New Zealand Citizens) Bill 2015

Introduced into the House of Representatives on 24 June 2015
By: Senator Carr

Background

This bill amends the *Higher Education Support Act 2003* to allow certain New Zealand citizens who are Special Category Visa holders to be eligible for HELP assistance from 1 January 2016.

The committee has no comment on this bill.

Migration Amendment (Regional Processing Arrangements) Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Immigration and Border Protection
Received Royal Assent 30 June 2015

Background

This bill amends the *Migration Act 1958* to provide statutory authority which applies with effect from 18 August 2012 where the Commonwealth has entered into an arrangement with another country with respect to the regional processing functions of that country.

Trespass on personal rights and liberties—retrospectivity

The amendments in this bill (which has received the Royal Assent) will commence from 18 August 2012. The explanatory memorandum (p. 4) states:

> The retrospective operation of these amendments is to put beyond doubt the Commonwealth's authority to take, or cause to be taken, actions in relation to regional processing arrangements or the regional processing functions of a country, and associated Commonwealth expenditure, from the date of commencement of the Regional Processing Act. The retrospective operation of these provisions will provide authority for all activity undertaken in relation to regional processing arrangements for the entire period these arrangements have been in place.

The purpose of proposed section 198AGA is to provide express statutory authority for the actions of the Commonwealth in relation regional processing functions commencing nearly 3 years ago. This authority will cover assistance provided by the Commonwealth to other countries to carry into effect arrangements for the processing and management of unauthorised maritime arrivals who have been taken to regional processing countries. It would also provide authority for the expenditure of Commonwealth money to facilitate such arrangements. The explanatory memorandum indicates that the 'retrospective operation of these provisions will provide authority for all activity undertaken in relation to regional processing arrangements for the entire period these arrangements have been in place' (p. 4).

Proposed new subsection 198AHA(2) appears to confer authority on the Commonwealth in very broad terms: if the Commonwealth 'enters into an arrangement with a person or body in relation to the regional processing functions of a country'. Subsection 198AHA(2) provides:

The Commonwealth may do all or any of the following:

(a) take, or cause to be taken, any action in relation to the arrangement or regional processing functions of the country;

(b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;

(c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

The breadth of power conferred by this provision is confirmed by proposed subsection 198AHA(5), which defines action as including 'exercising restraint over the liberty of a person'.

A core postulate of the Australian conception of the rule of law is that all government action be authorised by law. A corollary of this is that people are entitled to have the legality of any governmental interference with their rights and obligations determined by reference to the legality of government action at the time they allege their rights have been adversely affected.

To the extent that such authorisation for actions which affect individual rights or obligations is provided retrospectively, the claim that the governors (along with the governed) are bound by the law is weakened. Although it can be accepted that there will be rare circumstances in which unlawful government decisions and actions should be retrospectively validated, so doing necessarily undermines the legal system's adherence to these fundamental values.

In light of this, the committee is of the view that the explanatory memorandum should have set out the case for the necessity or appropriateness of the retrospective validation of government decision-making in sufficient detail for the Senate to make informed judgements about the proposed approach. In this instance, it is a matter of considerable concern that the proposed amendments are in response to court action commenced in the High Court of Australia, but which is yet to be decided. Notably, the explanatory memorandum does not refer to that context nor explain the nature of the litigation and the rights which the applicants seek to vindicate.

More generally, it is of concern that a major policy initiative lacks an appropriate legislative foundation. It is therefore of considerable concern to the committee that the justification for the proposal to retrospectively confer legislative authority on the Commonwealth can be described as brief and uninformative. Not only is there an absence of explanation of the background context (including litigation challenging the legality of the arrangements and the reasons why the government had considered that prior legislative authorisation for the arrangements was not required), but the fairness of retrospectivity in this context is also not addressed.

In addition, the committee does not consider that the fairness of retrospective validation on affected persons is adequately addressed by the conclusion in the statement of compatibility that the 'amendments in the Bill do not engage Australia's human rights obligations because the Government's position is that the Regional Processing Centres are managed and administered by the governments of the countries in which they are located, under the law of those countries'.

It is regrettable from a scrutiny perspective that the explanatory material accompanying this bill did not comprehensively describe the context, scope of, and justification for, the effect of the bill. Given the committee's concerns in this regard, although the bill has already been passed by the Parliament, as is its common practice, the committee still seeks the Minister's advice in relation to context, scope of, and justification for, the bill in light of the committee's comments above.

> *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.*

Shipping Legislation Amendment Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Infrastructure and Regional Development

Background

This bill provides a new framework for the regulation of coastal shipping in Australia including:

- replacing the existing three tiered licensing system with a single permit system available to Australian and foreign vessels, which will provide access to the Australian coast for a period of 12 months;
- establishing a framework of entitlements for seafarers on foreign vessels engaging or intending to engage in coastal shipping for more than 183 days;
- allowing for vessels to be registered on the Australian International Register if they engage in international shipping for a period of 90 days or more; and
- making consequential amendments and repealing the *Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Act 2012*.

The committee has no comment on this bill.

Social Security (Administration) Amendment (Consumer Lease Exclusion) Bill 2015

Introduced into the Senate on 24 June 2015
By: Senator Cameron

Background

This bill amends the *Social Security (Administration) Act 1999* to provide that consumer leases are excluded goods for the purposes of the income management regime.

The committee has no comment on this bill.

Social Services Legislation Amendment (Defined Benefit Income Streams) Bill 2015

Introduced into the House of Representatives on 23 June 2015
Portfolio: Social Services
Received Royal Assent 30 June 2015

Background

This bill amends the *Social Security Act 1991* to provide that the deductible amount for defined benefit income streams, excluding military defined benefits schemes, is capped at a maximum 10 per cent of the gross payments to an individual for the income year.

The committee has no comment on this bill.

Tax and Superannuation Laws Amendment (2015 Measures No. 2) Bill 2015

Introduced into the House of Representatives on 24 June 2015
Portfolio: Treasury

Background

This bill amends various Acts relating to taxation to:

- provide tax relief to taxpayers entering into certain arrangements in relation to mining, quarrying and prospecting rights and information;
- amend the company loss recoupment rules;
- extend the effective life of in-house software from four to five years;
- provide income tax look-through treatment for instalment warrants, instalment receipts, and other similar arrangements, and for certain limited recourse borrowing arrangements entered into by regulated superannuation funds.

The committee has no comment on this bill.

Tax Laws Amendment (Small Business Measures No. 3) Bill 2015

Introduced into the House of Representatives on 24 June 2015
Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* and the *Fringe Benefits Tax Assessment Act 1986* to:

- provide a 5 per cent tax offset (capped at $1000 per income year) to individuals who run small businesses with an aggregate annual turnover of less than $2 million, or who have a share of a small business income included in their assessable income;
- enable small businesses and individuals to immediately deduct certain costs incurred when starting up a business; and
- extend the fringe benefits tax exemption that applies to employers that provide employees with work-related portable electronic devices.

The committee has no comment on this bill.

Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015

Introduced into the House of Representatives on 24 June 2015
Portfolio: Treasury

Background

This bill amends the *Competition and Consumer Act 2010* and the *Australian Securities and Investments Commission Act 2001* to extend the consumer unfair contract terms protections to cover standard form small business contracts that are valued below a prescribed threshold.

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015

Introduced into the House of Representatives on 25 June 2015
Portfolio: Veterans' Affairs

Background

This bill amends the *Veterans' Entitlements Act 1986* and the *Military Rehabilitation and Compensation Act 2004* to:

- amend the Veterans' Vocational Rehabilitation Scheme;
- create a single appeal path for the review of original determinations; and
- expand the war graves regulation making power under the *Defence Act 1903* to include graves of service dependants buried in Terendak Military Cemetery in Malaysia.

The committee has no comment on this bill.

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

Voice for Animals (Independent Office of Animal Welfare) Bill 2015

Introduced into the Senate on 23 June 2015
By: Senator Rhiannon

Background

This bill establishes the Office of Animal Welfare as an independent statutory authority with responsibility for protecting animal welfare in Commonwealth regulated activities.

The committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Business Services Wage Assessment Tool Payment Scheme Bill 2014

[Digest 6/14 & 13/14 – Reports 10/14 & 1/15]

On 24 November 2014 the Senate agreed to 11 Government and three Palmer United Party amendments, and the Assistant Minister for Social Services (Senator Fifield) tabled a supplementary explanatory memorandum. The Senate also requested that three amendments be made to the bill by the House of Representatives.

On 15 June 2015 the Senate agreed to 28 further Government amendments and the Assistant Minister for Social Services (Senator Fifield) tabled a further supplementary explanatory memorandum.

On 16 June 2015 the House of Representatives made the amendments requested by the Senate and the bill was read a third time in the Senate.

On 17 June 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

Government amendment (22) on sheet HK115

The committee welcomes this amendment, which responds to the committee's concerns about the extent of the minister's power to make rules (delegated legislation). The amendment clarifies that certain significant matters (such as the creation of an offence or civil penalty) may not be addressed by the rules.

Copyright Amendment (Online Infringement) Bill 2015

[Digest 5/15 – no comment]

On 16 June 2015 the House of Representatives agreed to one Government amendment and the Minister for Communications (Mr Turnbull) presented a supplementary explanatory memorandum, and the bill was read a third time.

The committee has no comment on this amendment or the additional explanatory material.

Excise Tariff Amendment (Ethanol and Biodiesel) Bill 2015
[Digest 6/15 – no comment]

On 16 June 2015 the House of Representatives agreed to one Government amendment and the Parliamentary Secretary to the Minister for Trade and Investment (Mr Ciobo) presented a supplementary explanatory memorandum, and the bill was read a third time.

On 22 June 2015 the Senate agreed to one Government amendment and the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

The committee has no comment on these amendments or additional explanatory materials.

Governance of Australian Government Superannuation Schemes Legislation Amendment Bill 2015
[Digest 4/15 – no response required]

On 15 June 2015 the Senate agreed to one Opposition amendment and on the same day the House of Representatives agreed to the Senate amendment and the bill was passed.

The committee has no comment on this amendment.

Medical Research Future Fund Bill 2015
Medical Research Future Fund (Consequential Amendments) Bill 2015
[Digest 6/15 – no comment]

On 22 June 2015 the House of Representatives agreed to 22 Government amendments to the Medical Research Future Fund Bill and one Government amendment to the Medical Research Future Fund (Consequential Amendments) Bill. The Minister for Health (Ms Ley) presented a supplementary explanatory memorandum to the bills and both bills were read a third time.

Government amendment (19) on sheet HK145
New subsections 32D(6) and 32E(6)

This amendment inserts a new Part to establish the Australian Medical Research Advisory Board (Advisory Board), which will be responsible for developing the Australian Medical Research and Innovation Strategy (the Strategy) and the Australian Medical Research and Innovation Priorities (the Priorities).

The supplementary explanatory memorandum explains that the 'Strategy and Priorities have been declared as legislative instruments because there needs to be a high level of public transparency around these publications and around the direction of medical research funding' (p. 9). However, the Strategy and Priorities cannot be disallowed. The supplementary explanatory memorandum states that 'this approach enables the public and the Parliament to hold the Advisory Board and the Government accountable without impeding the Advisory Board's ability to perform its functions' (p. 9).

The committee welcomes an approach that will ensure that the Strategy and Priorities are subject to public transparency. However, the committee seeks further clarification from the Minister as to why disallowance of the Strategy and Priorities is inappropriate, including how provision for disallowance of these documents would impede the Advisory Board's ability to perform its functions.

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

Social Services and Other Legislation Amendment (Seniors Supplement Cessation) Bill 2014
[Digest 14/14 – no response required]

On 22 June 2015 the Senate agreed to two Government amendments and the Assistant Minister for Social Services (Senator Fifield) tabled a supplementary memorandum. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

Government amendment (1) on sheet ZA397

The committee welcomes this amendment which, in light of the time taken for passage of the bill, avoided the potential for a retrospective detrimental impact in relation to the measure in the bill (that is, the ceasing of payment of the seniors supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card).

Social Services Legislation Amendment (Fair and Sustainable Pensions) Bill 2015
[Digest 6/15 – no comment]

On 18 June 2015 the Minister for Social Services (Mr Morrison) presented a supplementary explanatory memorandum.

On 22 June 2015 the House of Representatives agreed to six Government amendments and the bill was read a third time.

The committee has no comment on these amendments or the additional explanatory material.

Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015
[Digest 6/15 – awaiting response]

On 16 June 2015 the House of Representatives agreed to 13 Government amendments, the Assistant Treasurer (Mr Frydenberg) presented a supplementary explanatory memorandum, and the bill was read a third time.

The committee has no comment on these amendments or the additional explanatory material.

SCRUTINY OF STANDING APPROPRIATIONS

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

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the committee's approach to scrutiny of standing appropriations are set out in the committee's *Fourteenth Report of 2005*.

Bills introduced with standing appropriation clauses in the 44th Parliament since the previous Alert Digest was tabled:

Australian Defence Force Cover Bill — Part 5, Division 3, clause 60

Fuel Indexation (Road Funding) Special Account Bill 2015 — Part 2, Division 1, clause 7 (**SPECIAL ACCOUNT**: CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*)

Other relevant appropriation clauses in bills

Nil

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