

**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 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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- **The committee has commented on these bills**

This Digest is circulated to all Honourable Senators.  
Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so.

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### **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.

## **Aviation Transport Security Amendment (Cargo) Bill 2015**

Introduced into the House of Representatives on 17 September 2015

Portfolio: Infrastructure and Regional Development

### **Background**

This bill amends the *Aviation Transport Security Act 2004* to:

- introduce a new aviation industry participant—an air cargo *Known Consignor*; and
- ensure that Australia’s air cargo security is aligned with international standards.

### **Delegation of legislative power**

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

#### **Item 23, proposed subsection 44C(3A)**

Proposed subsection 44C(3A) provides, to avoid doubt, that regulations or other legislative instruments dealing with the examination of cargo may provide for or require cargo to be opened, deconsolidated or unpacked. The examination of the cargo may be authorised regardless of consent given by the owner of the cargo or any other person.

The explanatory memorandum indicates that the purpose of examining cargo is to detect explosives and that the provision is intended to ‘alter any common law principles or fundamental rights that might otherwise exist in relation to opening cargo’ (at p. 10).

**The committee notes that the breadth of the power as currently drafted could give rise to the risk of undue trespass on common law principles or fundamental rights. The committee therefore seeks the Minister’s advice as to whether the power to make legislative instruments authorising the opening, deconsolidation or unpacking of cargo can be expressly limited to the intended purpose of detecting explosives.**

*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 and to delegate legislative powers inappropriately, in breach of principles 1(a)(i) and (iv) of the committee’s terms of reference.*

## **Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill amends the *Customs Act 1901* to introduce new rules of origin for goods that are imported into Australia from China to give effect to the China-Australia Free Trade Agreement.

### **Delegation of legislative power—incorporation by reference Schedule 1, item 1, proposed subsection 153ZOB(6)**

This provision provides that the regulations may adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time in the context of defining ‘Chinese originating goods’.

The explanatory memorandum (at p. 43) states that new subsection 153ZOB(6) is ‘included to ensure there is an appropriate delegation of legislative power should it be necessary in order to implement the Agreement to apply, adopt or incorporate an instrument or other writing that is not an Act or a disallowable legislative instrument.’ The example given is that ‘in implementing other free trade agreements, this provision has enabled the regulations to refer to the general accounting principles of a country other than Australia for the purposes of the regional value content calculations’.

The committee will have scrutiny concerns where provisions allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or

industry databases, is not publicly available or is available only if a fee is paid).

**The committee therefore seeks the Minister's advice as to whether a requirement that any material incorporated by reference be freely and readily available can be included in the bill.**

*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.*

## **Customs Amendment (Fees and Charges) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill amends the *Customs Act 1901* to:

- restructure current customs broker, depot and warehouse changes; and
- increase warehoused goods declaration processing fees.

*The committee has no comment on this bill.*

## **Customs Depot Licensing Charges Amendment Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill amends the *Customs Depot Licensing Charges Act 1997* to impose new charges on:

- an application for a warehouse licence and a customs broker licence; and
- an application for a variation to a warehouse licence.

The bill also consolidates existing charges payable in relation to warehouse licences and customs broker licences into one Act, and makes changes to the price of existing warehouse and customs broker licensing charges.

*The committee has no comment on this bill.*

## **Customs Tariff Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill amends the *Customs Tariff Act 1995* (the Act) to:

- provide free rates of customs duty on entry into force of the Agreement for most goods that are ‘Chinese originating goods’ in accordance with new Division 1L of Part VIII of the *Customs Act 1901*;
- maintain customs duty rates for certain ‘Chinese originating goods’ in line with the applicable concessional item;
- phase the preferential rates of customs duty for certain ‘Chinese originating goods’ to free by the fifth year of phasing; and
- create a new Schedule 12 in the Act to accommodate the preferential phasing and excise-equivalent rates of duty.

*The committee has no comment on this bill.*

## **Education Legislation Amendment (Overseas Debt Recovery) Bill 2015**

Introduced into the House of Representatives on 17 September 2015

Portfolio: Education

### **Background**

This bill amends the *Higher Education Support Act 2003* and the *Trade Support Loans Act 2014* to allow for the recovery of HELP and TSL debts from debtors who are residing overseas.

### **Trespass on personal rights and liberties—privacy Schedule 4**

Item 1 of Schedule 4 inserts a new exception to strict requirements under the *Taxation Administration Act 1953* that are designed to protect the confidentiality of taxpayer information. The effect of the item is that a taxation officer may disclose address, contact or income information to a foreign government agency or an entity acting on behalf of such an agency. Disclosure must be for the purposes of contacting the person with a view to recovering outstanding student loans.

**In light of the explanation for the approach in the statement of compatibility (at pages 5–6) 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 schedule 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.*

## **Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015**

Introduced into the House of Representatives on 17 September 2015

Portfolio: Education

### **Background**

This bill amends the *Education Services for Overseas Students Act 2000* to remove the requirement for:

- all providers to report all instances of student default within a very short timeframe;
- non-exempt providers to maintain an account in which all tuition fees paid prior to commencement of a course are held; and
- providers to enter into an agreement with each overseas student setting out the study periods for their enrolment and the tuition fees payable for each study period.

The bill also makes other changes, including:

- removes the definition of a ‘study period’, which set in place an arbitrary and prescriptive maximum period of study within a course of 24 weeks; and
- amends the current restriction on education providers receiving more than 50 per cent of tuition fees for a course (if the course is longer than 24 weeks duration) before the student commences the course.

*The committee has no comment on this bill.*

## **Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015**

Introduced into the House of Representatives on 17 September 2015

Portfolio: Education

### **Background**

This bill amends *Education Services for Overseas Students (Registration Charges) Act 1997* to remove the minimum two year period of registration for education institutions which provide education to international students.

*The committee has no comment on this bill.*

## **Environment Protection and Biodiversity Conservation Amendment (Prohibition of Live Imports of Primates for Research) Bill 2015**

Introduced into the Senate on 17 September 2015

By: Senator Rhiannon

The bill is identical to a bill introduced into the Senate on 22 November 2012. The committee made no comment on the 2012 bill.

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to ban the import of live primates into Australia for the purposes of research.

*The committee has no comment on this bill.*

## **Fair Work Amendment (Gender Pay Gap) Bill 2015**

Introduced into the Senate on 17 September 2015

By: Senator Waters

### **Background**

This bill amends the *Fair Work Act 2009* to reduce the gender pay gap by removing legal prohibitions on workers discussing their own pay.

*The committee has no comment on this bill.*

## **Food Standards Australia New Zealand Amendment (Forum on Food Regulation and Other Measures) Bill 2015**

Introduced into the House of Representatives on 17 September 2015

Portfolio: Health

### **Background**

This bill amends the *Food Standards Australia New Zealand Act 1991* to:

- reflect the change of name of the former Australia and New Zealand Food Regulation Ministerial Council to the Australia and New Zealand Ministerial Forum on Food Regulation;
- amend the Food Standards Australia New Zealand Board's composition and appointments process, in accordance with recommendations endorsed by the Forum on Food Regulation; and
- clarify procedures for food regulatory measures.

*The committee has no comment on this bill.*

## Health Legislation Amendment (eHealth) Bill 2015

Introduced into the House of Representatives on 17 September 2015

Portfolio: Health

### Background

This bill amends the *Personally Controlled Electronic Health Records Act 2012*, *Healthcare Identifiers Act 2010*, *Privacy Act 1988*, *Copyright Act 1968*, *Health Insurance Act 1973* and *National Health Act 1953* to:

- change the name of the Personally Controlled Electronic Health Records (PCEHR) system to the My Health Record system;
- enable opt-out trials to be undertaken for individuals;
- abolish the PCEHR Jurisdictional Advisory Committee and the Independent Advisory Council;
- introduce new civil and criminal penalties;
- amend the privacy framework; and
- amend mandatory data breach notification requirements for participants.

### Delegation of legislative power—important matters in regulations Schedule 1, item 34, proposed sections 20 and 25D

Proposed section 20 ‘broadens the power to allow for future regulations to be made allowing prescribed entities to collect, use, disclose and adopt identifying information and healthcare identifiers’ (explanatory memorandum, p. 54). The explanatory memorandum emphasises that this is only for limited purposes, which are specified in proposed subsection 20(3) which relate to ‘the provision of healthcare or to assist people who because of health issues, require support’ (p. 54).

The justification for the power in the explanatory memorandum points to examples of entities that could be authorised by this regulation-making power (such as the National Disability Insurance Agency and cancer registers). The explanatory memorandum states that the ‘new power has been designed to allow the appropriate collection, use, disclosure and adoption of healthcare identifiers and identifying information by entities like NDIA and cancer registers, within tight limits related to providing healthcare and assisting

individuals who require support because of health issues, without having to amend the Act each time a new entity needs to be authorised' (p. 54).

The same issue arises in relation to proposed section 25D.

**In light of the explanation provided, the committee notes these matters and 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 delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

**Trespass on personal rights and liberties—evidential onus  
Schedule 1, item 36, proposed subsections 26(3) and 26(4)**

Proposed section 26 provides that the use or disclosure by a person of any information obtained under the *Healthcare Identifiers Act 2010*, or a healthcare recipient's or individual healthcare provider's healthcare identifier, is prohibited unless an exception in proposed subsections 26(3) or 26(4) applies. The exceptions in subsection 26(3) relate to the use or disclosure of a healthcare identifier and the exceptions in subsection 26(4) relate to the use or disclosure of other information. A defendant bears an evidential burden in relation to the exceptions in these subsections.

Significant penalties apply for contravention of this provision—a civil penalty of up to 600 penalty units (currently \$108,000 for individuals and \$540,000 for bodies corporate) or a criminal penalty of up to two years' imprisonment and/or 120 penalty units (currently \$21,600 for individuals and \$108,000 for bodies corporate).

**Noting these significant penalties, and as there is no justification in the explanatory memorandum for placing an evidential burden on the defendant, the committee seeks the Minister's advice as to the rationale for the proposed approach, including whether the approach is consistent with the principles in relation to offence-specific defences outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).**

*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.*

## **Delegation of legislative power—incorporation of written instruments as they exist from time to time**

### **Schedule 1, item 105, proposed subsection 109(9)**

This subsection allows the Rules (delegated legislation) to incorporate other material which may change from time to time. The explanatory memorandum explains the approach as follows (pp 90–91):

The ability to incorporate in My Health Records Rules material that may change from time to time is important to ensure that the technical standards and security of the My Health Record system are maintained in rapidly changing environments. In particular, it is intended that some Australian standards and written security manuals issued by the System Operator may be incorporated into My Health Records Rules.

It would not be practical for the Rules to refer to such material as it exists at a particular point in time since it is likely to be subject to frequent change or may change at short notice. Without the amendment, participants in the My Health Record system may be forced to comply with outdated requirements. If standards and security manuals change and participants in the My Health Record system no longer comply, it may pose a security or privacy risk for the system. New subsection 109(9) therefore ensures ongoing compliance.

In practice, the System Operator would ensure that any such material that is referenced in the My Health Records Rules is made available to affected parties for free or at a minimal cost. Administrative arrangements would also be put in place to ensure that affected entities are given as much notice as possible of a change so they can ensure they comply with the new requirements when they take effect. There would also be a measure of common sense applied so that if material changed suddenly and affected entities had insufficient time to comply with the new requirements, they would not be penalised immediately.

The committee will have scrutiny concerns where provisions allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and

- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards or industry databases, is not publicly available or is available only if a fee is paid).

**The expected administrative arrangements and practices described in the explanatory memorandum are welcomed; nevertheless the committee seeks the Minister's advice as to whether a requirement that any material incorporated by reference be freely and readily available can be 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 delegated legislation**

### **Schedule 1, item 106**

Currently the My Health Record system operates on an opt-in basis. Part 1 of new Schedule 1 of the My Health Records Act provides for rule-making powers which would allow the Minister to make rules (delegated legislation) that will facilitate trials of an opt-out system for healthcare recipients.

The explanatory material provides a rationale for proposing trials of an opt-out approach. In short, it is intended to be undertaken to inform the government on future changes to the system to improve participation and usage. There is a rule-making power to determine where and in relation to what class or classes of healthcare recipients the trials will be conducted.

Clause 2 of Part 1 of Schedule 1 includes a rule-making power which would allow the Minister to make rules to apply the opt-out model nationally. Before doing so the Minister must consider the evidence obtained through the trials and any other matter relevant to the decision (subclause 2(2)). The Minister must also consult the Ministerial Council (subclause 2(3)).

Although the explanatory materials make a strong case for undertaking *trials* of an opt-out system, the difference between an opt-out system and the existing (opt-in) system is substantial. The two different approaches balance

individual interests in privacy of their health information and systemic benefits of the My Health record system in different ways.

Although the proposed opt-out system continues to include significant protections of the privacy interests of individuals and facilitates opt-out choices and therefore preserves individual choice to cancel participation in the system, the committee considers that a general change to an opt-out system is central to the regulatory design of the system and thus is a choice which is appropriately made by the Parliament rather than delegated to a Minister. **While it may be appropriate for delegated legislation to provide for the conduct of trials of the opt-out model, the committee seeks the Minister's justification as to why the ability to implement this significant policy change nationally is one that is appropriately made by the Minister making a legislative instrument (rather than the matter being considered by Parliament and the change being made through an amendment to the primary legislation).**

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

### **Delegation of legislative power—Henry VIII clause Schedule 1, subitem 136(3)**

Subitem 136(3) makes express provision for rules (delegated legislation) made for the purpose of subitem 136(2) to modify the operation of the *Healthcare Identifiers Act 2010*, the *Personally Controlled Electronic Health Records Act 2012*, and the *Privacy Act 1988*.

This provision is a 'Henry VIII clause', in that it may allow the Minister to modify the operation of the specified Acts by making rules (explanatory memorandum, p. 105). Although it is recognised that such clauses should in general be avoided, the explanatory memorandum (at p. 106) suggests that the clause is needed for transitional purposes and that it is consistent with similar rule-making powers in other amendment bills:

The purpose of this provision is to allow the Minister to deal with any unforeseen or unintended consequences that may arise at a later date, specifically regarding the opt-out trials and the changes in governance of the System Operator to the Australian Commission for eHealth. In particular, as

it is intended that the Australian Commission for eHealth will be made under the PGPA Act and PGPA Rules at a later date, this provision is intended to help avoid any unintended consequences from this change. The rule-making power provides legislative authority to address a range of practical situations that might arise with a transfer of functions or when a machinery of government change occurs. Where a rule is made that could potentially modify the application of an Act, which another Minister is responsible for, it is intended for those rules to be made only after that other Minister has been consulted.

Paragraph [136(4)(e)] prohibits the making of rules that directly amend the text of the Act. “Directly amend” means to make an amendment that would need to be incorporated in any reprint of the Act by the Government Printer (see section 2 of the *Acts Publication Act 1905*). Paragraph [136(4)(e)] does not prohibit a rule that modifies the effect of a provision, such as by providing that a provision has effect as if it had been amended in a specified way, but does not make a direct amendment of any Act.

Although it may be accepted that Henry VIII clauses may be appropriate in certain circumstances, the changes resulting from opt-out trials and any general future decision to apply the opt-out system nationally may be significant. **In these circumstances the committee seeks more information from the Minister, and examples of possible circumstances in which the power could be needed, to assist the committee in understanding why the clause is necessary.**

*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.*

[The committee notes that there are incorrect item references in the explanatory memorandum at pages 105–106 (for example, the explanatory memorandum incorrectly refers to subclause 136(3) as 128(3).]

## **Import Processing Charges Amendment Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

### **Background**

This bill amends the *Import Processing Charges Act 2001* to

- increase the import processing charges imposed on import and warehouse declarations communicated under the relevant provisions of the *Customs Act 1901*;
- remove the different charges that apply to import and warehouse declarations depending on the way in which the goods are imported into Australia; and
- introduce a consistent price differential between electronically and manually lodged import declarations of \$40.

*The committee has no comment on this bill.*

## Migration Amendment (Charging for a Migration Outcome) Bill 2015

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

### Background

This bill amends the *Migration Act 1958* to introduce:

- a new criminal offence and a civil penalty provision which will allow sanctions to be imposed on sponsors and other third parties who engage in ‘payment for visas’ activity;
- a new civil penalty provision which will provide for a fine to be imposed on visa applicants or holders, or other third parties, who offer to provide, or provide, a benefit as part of a ‘payment for visas’ arrangement; and
- a new discretionary power to consider cancellation of a temporary or permanent visa where the visa holder has engaged in ‘payment for visas’ activity.

### Merits review

#### Item 1, proposed subsection 116(1AC)

This provision seeks to introduce a discretionary power for the Minister to consider cancellation of a temporary or permanent visa where the visa holder has engaged in ‘payment for visas’ activity. **The committee seeks the Minister’s advice as to whether merits review will be available in relation to decisions made pursuant to subsection 116(1AC).**

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

**Trespass on personal rights and liberties—abrogation of privilege against self-incrimination****Items 5, 14 and 15**

The effect of item 5 is to enable the powers of an inspector under Subdivision F of division 3A of Part 2 of the Migration Act to be exercised for the purpose of investigating whether a person has contravened a criminal or civil penalty provision in relation to a sponsored visa. Expanding the powers of an inspector will allow information to be gathered in relation to whether a person who is or was an approved sponsor has engaged in ‘payment for visas’ activity that constitutes an offence or contravenes a civil penalty provision in relation to sponsored visas. As noted by the explanatory memorandum (at p. 6) current section 140XG relevantly provides that a person is required to produce a record or document to the inspector even if this might tend to incriminate the person or expose the person to a penalty.

Item 14 seeks to amend section 487C(2)(d) in Division 2 of Part 8E of the Act by inserting “or D” after the words “Subdivision C”. The effect of this amendment is that information or a document required to be given by a person under section 487B may be used in criminal proceedings against the person in relation to a sponsorship-related offence under new Subdivision D of Division 12 of Part 2 of the Act, but is not admissible evidence against the person in any other criminal proceedings.

Similarly, item 15 seeks to amend paragraph 487C(2)(e) in Division 2 of Part 8E of the Act by inserting the words “sponsorship-related provision or a” before the words “work-related provision”. The effect of this amendment is that information or a document required to be given by a person under section 487B may be used in civil proceedings against the person in relation to an alleged contravention of a sponsorship-related provision under new Subdivision D of Division 12 of Part 2 of the Act, but is not admissible evidence against the person in any other civil proceedings

The statement of compatibility addresses this abrogation of the privilege against self-incrimination in the following terms (pp 33–34):

The purpose of the investigations powers in the proposed Bill is to enable the Department to identify and gather evidence in relation to ‘payment for visas’ conduct. The only persons who possess critical information and documents relevant to “payment for visas” conduct are the individual who offers/provides a benefit, or who receives/requests a benefit, or a third party (where involved). Allowing information obtained from such persons, to be admissible in

evidence in “payment for visas” civil penalty proceedings will enable the Department to effectively enforce this sanction.

This approach is a departure from standard practice in relation to handling of self-incrimination, however is similar to provisions already in place for work-related civil penalty proceedings. The privilege against self-incrimination is only being removed in relation to proceedings for the criminal and civil penalties for an alleged contravention of a ‘payment for visas’ matter and the protection will still remain in relation to all other civil penalty and criminal proceedings. To the extent that the relevant provisions in the proposed Bill do not permit documents or information collected under sections 487C to be used in other civil penalty and criminal proceedings (ie those that do not involve a sponsorship-related offence or sponsorship-related provision), this is consistent with Australia’s obligations under Article 14(3)(g) of the ICCPR.

The committee is of the view that even where use and derivative use immunities are included, provisions abrogating the privilege should be limited to serious offences and to situations in which a comprehensive justification for the approach is provided. In light of this general approach it appears that the above justification is insufficiently compelling. In general, the need for effective enforcement is insufficiently focused to justify the abrogation of the privilege. Although it may be accepted that evidence obtained from persons directly involved in ‘payment for visas’ conduct will be relevant, it is not clear that the relevant information may not also be obtained by other lawful means. It appears that this argument could usefully be further explained. In addition, the fact that the privilege against self-incrimination is only being removed in relation to proceedings for the criminal and civil penalties for an alleged contravention of a ‘payment for visas’ matter and the protection will still remain in relation to all other civil penalty and criminal proceedings does not seem sufficiently persuasive. Given the focus of the investigation, it may be expected that any realistic threat of prosecution will relate to precisely those matters in relation to which the immunities do not apply. **The committee therefore seeks the Minister’s further advice as to the perceived need to take the significant step of abrogating the privilege against self-incrimination in these circumstances and whether it can effectively be obtained by other lawful means.**

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

**Trespass on personal rights and liberties—evidential onus**  
**Item 6, proposed subsections 245AR(3), 245AR(6) and 245AS(4)**

The material supporting the bill contains explanations for these subclauses placing an evidential burden on a defendant which are consistent with the principles in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011). (See the explanatory memorandum at pp 10–12 and statement of compatibility at p. 32.) **In light of the explanations provided, 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.*

**Trespass on personal rights and liberties—evidential onus**  
**Item 6, proposed subsection 245AW(5)**

Proposed section 245AW seeks to provide extended geographical jurisdiction to specified new offences (the sponsorship-related civil penalty provisions). Defences to these are made available in subsections 245AW(3) and (4), and subsection (5) specifies that a defendant bears an evidential onus in relation to these defences.

The elements of the proposed defences broadly relate to the conduct (1) occurring in a foreign country, (2) by a person who is not an Australian citizen (or a body corporate) and (3) there is no similar offence in the foreign country (i.e. the person could not be prosecuted for that conduct under the domestic law of the other country). The explanatory memorandum (at p. 19) states that:

It is considered appropriate for the defendant to bear the evidential burden if the defendant seeks to rely on a defence in subsections 245AW(3) or 245AW(4) because the citizenship of the person and the place of incorporation of a body are matters peculiarly within the knowledge of the defendant.

It is not clear to the committee how this information could be peculiarly within the knowledge of the defendant, and the explanation also does not address why it is appropriate to require a defendant to establish the legal position in the other country. **The committee therefore seeks the Minister's**

**further advice as to why it is appropriate for a defendant to bear an evidential burden in relation to these matters.**

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

**Trespass on personal rights and liberties—strict liability  
Item 6, proposed subsections 245AR(5) and 245AS(1)**

These subsections create civil penalties which will be strict liability penalties due to the operation of section 486ZF of the Migration Act. The justification for this approach is provided in the statement of compatibility (see pp 31–32):

The imposition of these strict liability penalties does limit the presumption of innocence, however these penalties are reasonable, necessary and proportionate to the legitimate objective of preventing and deterring the practice of “payment for visas” which has a number of detrimental outcomes including undermining the integrity and distorting the function and operation of Australia’s migration programme, and the exploitation vulnerable people. It is necessary to introduce these penalties as there is currently no clear or direct avenue for addressing “payment for visas” through the legal system and these provisions create in the direct legal consequences for engaging in this behaviour. Given the serious, detrimental effects that can occur from the practice of “payment for visas”, including:

- making vulnerable non-citizens liable to exploitation;
- reducing employment opportunities in Australia for permanent residents;
- negative repercussions for Australian wages and conditions;
- the potential for persons who receive payment in return for sponsorship to inappropriately make significant financial gains; and
- adversely affecting the integrity of Australia’s migration programme, a strong response is required to ensure that this practice does not continue. Additionally, the Department’s investigations into this practice often reveal elaborate fraud which would more appropriately merit criminal prosecution. As such to the extent that the proposed Bill creates strict liability penalties, these can be considered consistent with the protection set out in Article 14(2) of the ICCPR.

Although these are civil penalty provisions, the penalty is imposed is significant: 240 penalty units. For an individual this translates to a maximum pecuniary penalty of \$43,200 and \$216,000 for a body corporate. Given the

severity of the penalties it is of concern that the right to be presumed innocent until proven guilty according to law is limited by the application of strict liability.

In general, the committee takes the view that strict liability should not be applied to offences where the fine exceeds 60 penalty units. These provisions impose penalties four times that level. The committee is also concerned that the principles on strict liability in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) do not appear to have been considered. Finally, it may be noted that the argument in favour of the application of strict liability to these civil penalty provisions appears to merely point to the adverse consequences of the prohibited behaviour which is not, of itself, a compelling argument for the imposition of strict liability penalties. **The committee therefore seeks the Minister's more detailed justification for the proposed approach.**

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

## Migration and Maritime Powers Amendment Bill (No. 1) 2015

Introduced into the House of Representatives on 16 September 2015

Portfolio: Immigration and Border Protection

### Background

This bill amends the *Migration Act 1958* and the *Maritime Powers Act 2013*, including to:

- ensure that when an unlawful non-citizen is in the process of being removed to another country under section 198 and the removal is aborted, or the removal is completed but the person does not enter the other country, and as a direct result the person is returned to Australia, then that person has a lawful basis to return to Australia without a visa;
- ensure that when such a person does return to Australia without a visa, the person will be taken to have been continuously in the migration zone for the purposes of sections 48 and 48A of the Migration Act which bar the person from making a valid application for certain visas;
- amends the definition of *character concern* to be consistent with the character test following the amendments made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*;
- provide that the events described in sections 82, 173 and 174 of the Migration Act that cause a visa that is in effect to cease will, as a general rule, cause a visa that is held, but not in effect, to be taken to cease; and
- clarify that a person who has previously been refused a protection visa application that was made on their behalf cannot make a further protection visa application.

### Retrospective application

#### Schedule 2, item 22

This item provides, in a number of subitems, for the retrospective application of various amendments. In each case the justification is brief and does not expressly address the question of whether it is possible that the approach may create unfairness for affected persons (for example, by defeating a reasonable expectation based on the current provisions). **The committee therefore seeks**

**the Minister's more detailed explanation for the justification of the retrospective application of each provision.**

*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.*

### **Retrospective commencement Schedule 3, Part 1**

Table item 3 of clause 2 provides that Part 1 of Schedule 3 of the bill retrospectively commences on 25 September 2014.

The substantive amendment in Part 1 of Schedule 3 (see item 1) is to insert a reference to subsection 48A(1AA) into subsection 48A(1C). The effect of this insertion is to clarify that subsection 48A(1AA) applies, regardless of any of the factors listed in subsection 48A(1C). Those factors were inserted in into the Migration Act to restore the intended operation of the statutory bar in section 48A of the Migration Act to making a further protection visa application by persons who had a previous application refused or a protection visa cancelled. The effect of these factors is to indicate that the bar on an application in section 48A applies regardless of the grounds on which the previous application was refused or on which a protection visa had been cancelled.

Subsection 48A(1AA) commenced on 25 September 2014 and the bill seeks to apply these amendments retrospectively from the same date. The purpose of subsection 48A(1AA) was to clarify that the application bar in section 48A applies to all people regardless of whether they made the application for a protection visa or had the application made on their behalf (because they were a minor at the time of the application or had a mental impairment). The explanatory memorandum states that at that time the need to add a reference to subsection 48A(1AA) in subsection 48A(1C) was overlooked, but that the 'policy intention was always that subsection 48A(1C) would apply, in addition to persons covered by subsections 48A(1) and (1B), to persons covered by subsection 48A(1AA)' (at p. 25).

The overall effect of this provision is that the coverage of the bar on making an application for a further protection visa (on what are, in effect, new

grounds) is given a broader coverage. Affected persons will thus have very significant interests and rights removed. (It is also noted that the application provision for the substantive amendment described above (item 2 of Part 1 of Schedule 3) appears to exacerbate the problem as the amendment applies even in relation to cases where a previous application was refused or a protection visa cancelled prior to the commencement date.)

The justification for giving these changes retrospective effect is as follows (at p. 5 of the explanatory memorandum):

This item has been given retrospective effect to avoid any suggestion that in the period between 25 September 2014 (when subsection 48(1AA) was inserted) and the commencement of this item, a person who was previously refused a protection visa that was made on their behalf and covered by subsection 48A(1AA) was not barred from making a valid protection visa application relying on a different ground or satisfaction of a different criterion, because subsection 48A(1C) did not apply to them.

If the amendment were made prospective in effect, there would be an implication that the amendment does not clarify section 48A, but instead alters the effect of section 48A. By making the amendment retrospective to the time when subsection 48A(1AA) was inserted, that implication is avoided and it is clear that a person who is otherwise covered by subsection 48A(1AA) could not have validly made a protection visa application relying on a different ground or criterion in between the commencement of subsection 48A(1AA) and the commencement of this amendment.

It appears that the rationale for retrospective commencement amounts to a claim about the intended operation of the amendments introduced on 25 September 2014. While a particular outcome was being sought through the 2014 amendments, the actual content of those provisions as enacted did not (properly interpreted) reflect the intended operation of the amendments. Nonetheless, even in this circumstance retrospectively aligning the law with those intentions significantly undermines the rule of law, particularly when the consequences for affected individuals are significant. In general, individuals should be entitled to rely on the current law to determine their rights, including rights to apply for important benefits such as a protection visa. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law. **The committee therefore seeks the Minister's further justification for the proposed approach, including addressing the fairness of the proposed approach to affected persons and the importance of**

**limiting retrospective commencement to cases where this can be seen to further rather than diminish the rule of law.**

*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.*

## **Social Services Legislation Amendment (Cost of Living Concession) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Social Services

### **Background**

This bill excludes the Cost of Living Concession Payment made by the South Australian Government from being assessed as income under the social security and veterans' affairs income tests.

*The committee has no comment on this bill.*

## **Social Services Legislation Amendment (Low Income Supplement) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Social Services

This bill reintroduces a measure previously introduced in the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015, which was negated in the Senate on 9 September 2015.

The committee commented on the bill in *Alert Digest No. 6 of 2015*, but made no comment on the measures contained in this bill.

### **Background**

The bill ceases the low income supplement paid to independent adults in low-income households from 1 July 2017.

*The committee has no comment on this bill.*

## **Social Services Legislation Amendment (No Jab, No Pay) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Social Services

### **Background**

This bill amends immunisation requirements for child care benefit, child care rebate and the family tax benefit Part A supplement from 1 January 2016.

*The committee has no comment on this bill.*

## **Social Services Legislation Amendment (Youth Employment) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Social Services

This bill reintroduces measures previously introduced in the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015, which was negated in the Senate on 9 September 2015.

The committee commented on the bill in *Alert Digest No. 6 of 2015* and repeats those comments as they are applicable to the current bill.

### **Background**

This bill amends the *Social Security Act 1991* and the *Farm Household Support Act 2014*.

Schedule 1 extends and simplifies the ordinary waiting period for working age payments.

Schedule 2 delays the start date for the measure increasing the age of eligibility for newstart allowance and sickness allowance.

Schedule 3 introduces a revised four-week waiting period for youth income support.

Schedule 4 implements the Rapid Activation for ready job seekers aged under 25 years.

### **Delegation of legislative power**

#### **Schedule 1, item 5, proposed subsection 19DA(5)**

This subsection empowers the Secretary to prescribe, by legislative instrument, circumstances for the purpose of determining whether a person is experiencing a personal financial crisis and for the purpose of waiving the ordinary waiting period. The statement of compatibility suggests that the use of a legislative instrument provides the Secretary 'with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences'. As such, the provision is said to allow the

Secretary to ‘consider other unforeseeable or extreme circumstances...where it would be appropriate for a person to have immediate access to income support’ (at p. 1).

While the committee remains concerned as a matter of general principle about the delegation of legislative power in such circumstances, in light of the explanation provided the committee draws the provision to the attention of Senators, but leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

**The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.**

*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.*

## **Student Loans (Overseas Debtors Repayment Levy) Bill 2015**

Introduced into the House of Representatives on 17 September 2015

Portfolio: Education

### **Background**

This bill seeks to impose a requirement to repay Higher Education Loan Programme and Trade Support Loan debts while overseas as a levy.

*The committee has no comment on this bill.*

## **Superannuation Legislation Amendment (Trustee Governance) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Treasury

### **Background**

This bill amends the *Superannuation Industry (Supervision) Act 1993* and the *Governance of Australian Government Superannuation Schemes Act 2011* to:

- requires trustees of registrable superannuation entities to have a minimum of one-third independent directors and an independent Chair on their boards; and
- restructure the Commonwealth Superannuation Corporation Board to comply with new governance requirements and reduce the Board's size from eleven to nine directors.

### **Trespass on personal rights and liberties—strict liability**

#### **Schedule 1, item 1 proposed subsection 92(5)**

Section 92 seeks to allow APRA to direct an RSE licensee of a registrable superannuation entity to comply with the requirements of Part 9 of the *Superannuation Industry (Supervision) Act 1993*, which relates to governance arrangements for the entity. Subclause 92(4) will create an offence for a failure to comply and subclause 94(5) make the offence one of strict liability. The explanatory memorandum contains a detailed explanation, which comprehensively outlines the justification for the approach, including addressing relevant principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (pp 23 and 24).

**In light of the detailed information provided the committee leaves 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.*

## **Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015**

Introduced into the House of Representatives on 16 September 2015

Portfolio: Treasury

### **Background**

This bill amends various taxation Acts.

Schedule 1 amends the *Income Tax Assessment Act 1997* to include a standard and centralised set of concepts that can be used to determine whether an entity is a ‘significant global entity’.

Schedule 2 amends anti-avoidance provisions in the *Income Tax Assessment Act 1936* to introduce the multinational anti-avoidance law.

Schedule 3 amends the *Taxation Administration Act 1953* to increase penalties imposed on significant global entities that enter into tax avoidance or profit shifting schemes.

Schedule 4 implements Country-by-Country reporting from 1 January 2016, a key recommendation of the G20 and Organisation for Economic Co-operation and Development Action Plan.

### **Trespass on personal rights and liberties—legislation by press release**

#### **Schedule 3**

Schedule 3 seeks to double the penalties imposed on ‘significant global entities that enter into tax avoidance or profit shifting schemes’ (explanatory memorandum p. 9). The measures were announced by the Treasurer as part of the 2015-2016 Budget and the bill provides for them to commence retrospectively on 1 July 2015. Beyond noting that the action was announced in the Budget, the explanatory memorandum does not address the retrospective commencement of the schedule or provide a justification for it.

In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine

the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.

However, in outlining scrutiny issues around this matter previously, the committee has been prepared to accept that some amendments may have some retrospective effect when the legislation is introduced if this has been limited to the introduction of a bill within six calendar months after the date of that announcement. In fact, where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 44).

**In the circumstances, the committee draws this retrospective commencement to the attention of the Senators and makes no further comment.**

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

## **Trade Marks Amendment (Iconic Symbols of National Identity) Bill 2015**

Introduced into the House of Representatives on 14 September 2015

By: Mr Katter

### **Background**

This bill amends the *Trade Marks Act 1995* relating to the registration of trade marks which consist of a sign of ‘national significance or iconic value to the people of Australia’.

*The committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

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

*[Digest 7/15 – no comment]*

On 14 September 2015 the Senate agreed to four Australian Greens and one Liberal Democratic Party amendments and the bill was read a third time.

**The committee has no comment on these amendments.**

## 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 44<sup>th</sup> Parliament since the previous Alert Digest was tabled:**

Nil

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

Nil