

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.

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**

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

Aged Care Amendment (Red Tape Reduction in Places Management) Bill 2015

Introduced into the House of Representatives on 25 November 2015

Portfolio: Health

Background

This bill amends the *Aged Care Act 1997* to amend the transfer process of aged care places between approved providers.

The committee has no comment on this bill.

Credit Repayment (Protecting Vulnerable Borrowers) Bill 2015

Introduced into the House of Representatives on 23 November 2015

By: Mr Katter

Background

This bill seeks to provide protection of certain borrowers who default on the repayment of credit by:

- requiring financial institutions to provide the borrower who is in default of their credit agreement with a notification setting out their claim of default;
- preventing financial institutions from imposing on the borrower any default or penalty rate of interest, additional charges, penalties or impositions on the borrower; and
- preventing confidentiality clauses in settlement agreements.

The committee has no comment on this bill.

Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

Introduced into the House of Representatives on 26 November 2015

Portfolio: Justice

Background

This bill amends the *Proceeds of Crime Act 2002* (POC Act), *Criminal Code Act 1995* (Criminal Code), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), and the *AusCheck Act 2007* (AusCheck Act).

Schedule 1 amends the POC Act to clarify the operation of the non-conviction based confiscation regime provided under that Act.

Schedule 2 amends the *Criminal Code* to create two new offences of false dealing with accounting documents.

Schedule 3 amends the *Criminal Code* to clarify the definitions of the terms ‘drug analogue’ and ‘manufacture’ and ensure that they capture all relevant substances and processes.

Schedule 4 amends the AML/CTF Act to clarify and address operational constraints identified by law enforcement agencies including:

- listing the Independent Commissioner Against Corruption of South Australia as a ‘designated agency’ under the Act;
- amending the definition of ‘foreign law enforcement agency’ in the Act to specifically include Interpol and Europol, and provide a new regulation-making power to enable additional international bodies to be prescribed in future; and
- clarifying the circumstances in which entrusted investigating officials may disclose information obtained under section 49 of the Act.

Schedule 5 amends the AusCheck Act to enable AusCheck to directly share AusCheck scheme personal information with State and Territory authorities and with a broader range of Commonwealth authorities.

Trespass on personal rights and liberties—penalties

Schedule 2, item 1, proposed subsections 490.1 and 490.2 of the *Criminal Code*

Schedule 2 will amend the *Criminal Code* to insert two new offences of false dealing with accounting documents, which are intended to implement Australia's obligations in relation to Article 8 of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (see the statement of compatibility, paragraphs 55 and 56).

While the ratio between imprisonment and penalty units is inconsistent with other provisions in the *Criminal Code*, the proposed approach is justified in detail at pp 36–38 of the explanatory memorandum (see especially paragraph 220).

In light of the explanation 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.

Delegation of legislative power

Schedule 4, item 2

This item repeals the existing definition of 'foreign law enforcement agency' in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and inserts a new definition that includes Europol and Interpol. The explanatory memorandum contains a detailed general justification for this aspect of the bill, which emphasises the importance of enabling information to be shared with international law enforcement organisations as they often play an important role in the facilitation of transnational investigations.

However, the new definition also provides for a regulation-making power to prescribe additional international bodies, including (but not limited to) those with multijurisdictional law enforcement coordination and cooperation functions. The explanatory memorandum notes that regulations prescribing these bodies will be disallowable and, as such, the prescription of any

additional bodies will remain subject to a level of Parliamentary scrutiny (see p. 45).

Nevertheless, the implications for individual privacy of sharing AUSTRAC information are significant, and the committee expects that important matters will usually be included in primary legislation unless a comprehensive and compelling justification is provided. **The committee therefore requests the Minister’s more detailed justification for seeking to prescribe additional international bodies by regulation rather than including any such amendment in future primary legislation.**

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.

Trespass on personal rights and liberties—privacy Schedule 5, item 3

The amendment will enable AusCheck to disclose personal information to a broader range of Commonwealth agencies and also to State and Territory agencies. In each case the disclosure must be for the performance of functions relating to law enforcement or national security.

The statement of compatibility and explanatory memorandum justify this measure in part on the basis that appropriate safeguards will remain in place to protect disclosure of AusCheck personal information under the AusCheck legislation (see pp 6–7 and 15–16).

One of the safeguards discussed relates to AusCheck’s ‘robust administrative procedures and practices’ for ensuring that its information is managed in an open and transparent way. Further, it is emphasised AusCheck has developed *Guidelines for Accessing Information on the AusCheck Database* under regulation 15 of the AusCheck regulations which ‘establish a compulsory framework for providing access to AusCheck information’. Although these practices and the Guidelines do constitute practical safeguards, it is a matter of concern that the existence of safeguards such as these is not required by law. **As such, the committee seeks the Minister’s advice as to whether consideration has been given to enshrining practices and policy in law to provide assurance that the safeguards are robust and permanent. Alternatively, the committee seeks the Minister’s advice as to whether**

consideration has been given to establishing at least a general legislative requirement that safeguards, such as those currently used, are required to be in place.

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.

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

Introduced into the Senate on 25 November 2015

Portfolio: Attorney-General

Background

This bill amends the *Family Law Act 1975* (the Act) to:

- remove existing uncertainties around requirements for entering, interpreting and enforcing financial agreements;
- amend the coverage of spousal maintenance matters in agreements;
- introduce new offences relating to the wrongful retention of a child overseas;
- amend the arrest powers under the Act; and
- make minor and technical amendments, including clarifying definitions and removing redundant provisions.

Retrospective application

Schedule 1, item 5, application of amendments of section 90E

Schedule 1, item 22, application of amendments of section 90UH

Existing section 90E of the *Family Law Act 1975* sets out the requirements for provisions in financial agreements relating to the maintenance of a spouse or child. Specifically, a provision in a financial agreement that relates to the maintenance of a spouse or a child is void unless it specifies the party for whose maintenance provision is made and the amount of, or value of the portion of property attributable to, the maintenance for the spouse or child.

The bill proposes amendments which would mean that there is no longer a requirement for an agreement to nominate a specific value for a maintenance provision when maintenance is being made by way of entitlement to property. This explanatory memorandum (at p. 11) states that this would give parties the option either to nominate a specific value for the relevant property attributable to maintenance or to nominate a proportion of the relevant property attributable to maintenance.

In addition, the bill proposes to insert a new subsection 90E(2) to clarify that any amount, or proportion of the value of the relevant property attributable to the maintenance of a party or a child, may be nil. The explanatory memorandum (at p. 11) states that this would enable parties to waive spousal maintenance rights where parties are not dependent upon Government assistance, enabling parties to opt out of spousal maintenance entitlements and obligations without adverse impact on the community.

Item 5 of the bill relates to the application of these amendments. The explanatory memorandum (at pp 11–12) explains the effect of item 5 as follows:

Subitem 5(1) would provide that the amendments to section 90E apply to all financial agreements made before, on, or after the commencement of the amendments. This means that the amendments would apply to provisions in existing financial agreements that:

- waive spousal maintenance, or
- specify an unvalued amount, or proportion of the relevant property, attributable to the maintenance of a party or child, instead of the value of the portion of the relevant property.

Many parties have made consensual agreements on the understanding that this was possible, and it would be contrary to public policy to cast uncertainty on the validity of those agreements.

Subitem 5(2) would clarify that the amendments would not validate a provision in a financial agreement if a court, prior to the commencement of the amendments, has made an order under the Act on the basis that the provision was void because of existing section 90E.

The explanatory memorandum appears to suggest that because some (perhaps many) parties have made agreements based on a misunderstanding of the current law that the amendments made by items 3 and 4 to section 90E should apply to those agreements on the basis that the proposed law would be consistent with those misunderstandings. Given that it is possible this retrospective operation of the law may cause detriment to some parties, **the committee seeks the Attorney-General’s detailed advice in relation to the appropriateness of the retrospective application of these amendments, particularly the extent to which the retrospective application may cause detriment to a party to an existing financial agreement.**

The committee notes that a similar issue arises in relation to the application of amendments of section 90UH (relating to Part VIIIAB

financial agreements, i.e. those relating to de facto relationships) and therefore seeks similar advice in relation to item 22 of schedule 1.

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

Retrospective effect or application

Schedule 1, item 6, replacement section 90G and new sections 90GA and 90GB

Schedule 1, item 23, replacement section 90UJ and new sections 90UJA and 90UJB

Existing section 90G of the *Family Law Act 1975* specifies when a financial agreement is binding on the parties to the agreement. The explanatory memorandum (at p. 12) states that:

The wording of existing section 90G is confusing and has led to differing judicial interpretations, and has been further complicated by two sets of amendments following its initial introduction. Item 6 of the Bill would repeal existing section 90G and substitute new sections 90G, 90GA, and 90GB to improve the clarity of the rules relating to when financial agreements are binding.

In relation to the effect of the amendments to section 90G, the explanatory memorandum (at p. 12) explains that:

... there are effectively three forms of section 90G that apply to financial agreements depending on when the agreement was made. These are:

- the first section 90G—applying to financial agreements made from 27 December 2000 to 13 January 2004
- the second section 90G—applying to financial agreements made from 14 January 2004 to 3 January 2010, and
- the current section 90G—applying to financial agreements made from 4 January 2010 to present.

Replacement section 90G will set out the general rule for when financial agreements made after 26 December 2000 are binding.

New section 90GA would outline the conditions relating to legal advice for a financial agreement or termination agreement to be binding and is also intended to make it as clear as possible what conditions apply to which agreements, depending on the time they were entered into. New subsection 90GA(5) would provide that, in determining whether an agreement is binding, the court is not to consider whether the legal advice described in new subsection 90GA(2) has actually been provided. The explanatory memorandum (at pp 15–16) states that:

This means that the court should not go behind the statement provided by a legal practitioner to examine the content of advice. This would increase certainty for parties and for legal practitioners, by making it clear that if the conditions relating to statements about legal advice, as well as the extra conditions for agreements made after 3 January 2010 if applicable, are met, then that legal advice is taken to have been provided.

New section 90GB would provide that, on application by a spouse party, a court must make an order declaring that a financial agreement or a termination agreement is binding on the parties to the agreement, even if all of the relevant conditions in section 90GA for the agreement to be binding have not been met, if it is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made). The explanatory memorandum (at p. 16) states that this reflects the policy of existing subsection 90G(1A) of the Act.

The committee notes the intention of this provision to improve the clarity of the rules relating to when financial agreements are binding. However, also noting the complexity of the provisions, **the committee seeks the Attorney-General’s advice as to whether any of the proposed amendments may be considered to make changes that have retrospective effect or application. For example, the committee is interested in whether new subsection 90GA(5) which provides that a court is not to consider whether legal advice has actually been provided would apply to existing agreements and therefore raise the possibility that the amendment may cause detriment to a party to an existing financial agreement.**

The committee notes that a similar issue arises in relation to proposed replacement section 90UJ and proposed new sections 90UJA and 90UJB (relating to Part VIIIAB financial agreements, i.e. those relating to de facto relationships) and therefore seeks similar advice in relation to item 23 of schedule 1.

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

Retrospective application

Schedule 2, item 9, application of amendments relating to offers of settlement

Division 4 of Part 1 of Schedule 2 makes amendments concerning whether the fact an offer of settlement has been made can be disclosed to the family law courts. The amendments would allow parties to disclose to the courts the fact that an offer to settle has been made, but disclosing the terms of the offer would remain prohibited.

Item 9 applies these changes, not only to offers made on or after commencement but also to offers made before commencement. The explanatory memorandum (at p. 35) states that this is appropriate 'to allow the court to consider whether an offer to settle has been made for case management and similar purposes'. **The committee seeks the Attorney-General's advice as to whether it is possible that a party may suffer detriment due to the application of the amendments to offers which have been made prior to the new law commencing.**

Pending the Attorney-General'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.

Coercive powers—powers of arrest

Schedule 2, Division 11

The purpose of this Division is to amend existing arrest provisions in the *Family Law Act 1975*. The statement of compatibility (at p. 6) indicates that the new powers are 'in line with the similar powers of the Federal Court and the Federal Circuit Court to provide for when force may be used by an arrestee when exercising his or her powers of arrest'. The powers are also said to be consistent with the requirements of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* in relation to powers

to enter and search premises for the purposes of arresting a person (explanatory memorandum p. 40).

In light of the explanation of the powers in the explanatory material accompanying the bill, the committee makes no further comment in relation to these provisions.

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

Interactive Gambling Amendment (Sports Betting Reform) Bill 2015

Introduced into the Senate on 24 November 2015

By: Senator Xenophon

Background

This bill amends the *Interactive Gambling Act 2001* (the Act) to:

- insert a new definition into the Act which encompasses websites through which individuals can place bets on sporting events; and
- establish an Interactive Gambling Regulator who will monitor and enforce restricted wagering services' compliance with the Act.

Trespass on personal rights and liberties—offences

Item 6, proposed sections 61GA–61GO

The explanatory memorandum provides no discussion of the level of penalty imposed in relation to these proposed new offences, nor a justification for setting the civil penalty at the same level set for the relevant fault-based offence. **The committee therefore seeks the Senator's advice as to the rationale for these matters, and in particular whether the principles in the Attorney-General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* were taken into account.**

Pending the Senator'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
Delegation of legislative power
Item 6, proposed section 61HF

Under the provisions of the bill, individuals may ask that they be placed on the National Self-exclusion Register as a way to exclude themselves from restricted wagering services. This section relates to the process for a person to have their name removed from the Register.

Proposed subsection 61HF(1) provides that the Regulator must ‘make a legislative instrument that makes provision for a person to apply for his or her name to be removed from the register.’ Without limiting subsection (1), proposed subsection 61HF(2) states that the legislative instrument (in the form of a ministerial determination) must include (a) the form of application, (b) the information that must accompany the application and (c) the documentation required in support of the application.

While the scope of this provision clearly includes some procedural matters suitable for determination by the executive, it is not clear from the bill whether other requirements that must be met prior to a person having their name removed from the register could impose more significant matters, such as substantive tests. For example, the explanatory memorandum indicates (at p. 11) that the legislative instrument may require the production of a report from a psychologist or counsellor to accompany an application for removal and that such report must conclude that the professional is satisfied that the person applying for removal from the register no longer exhibits signs of having a gambling problem.

The breadth of the power, including the scope for the inclusion of significant requirements before removal from the register, indicates the potential for the legislative instrument to include matters more suitable for parliamentary enactment. The scrutiny problem is heightened because requirements for seeking removal of a person’s name could change between the time a person joins the register and the time at which they seek to be removed from it.

The committee therefore seeks the Senator’s advice as to:

- **why requirements to be imposed prior to the application for removal being acceded to are appropriately contained in a legislative instrument (rather than being included in primary**

legislation) given that they may impose requirements that limit rights and liberties of a person;

- whether a person can insist on removal without meeting substantive requirements;
- whether a determination made under this section will be disallowable; and
- whether consideration has been given to alternative ways in which to achieve the desired outcome without inappropriate delegation of legislative power.

Pending the Senator'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 to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Labor 2013-14 Budget Savings (Measures No. 2) Bill 2015

Introduced into the House of Representatives on 26 November 2015

Portfolio: Treasury

Background

This bill amends several Acts relating to social security, student assistance and higher education support.

Schedule 1 replaces the current Student Start-up Scholarship with an income-contingent loan, the Student Start-up Loan which commences on 1 January 2017.

Schedule 2 amends the *Higher Education Support Act 2003* (HESA) and the Commonwealth Grant Scheme Guidelines 2012 to apply an efficiency dividend to Commonwealth contribution amounts in the Act and loadings under the Guidelines.

Schedule 3 amends HESA to remove the HECS-HELP up-front payment discount.

Schedule 4 amends HESA to remove the HELP voluntary repayment bonus.

Schedule 5 allows for an interest charge to be applied to certain debt incurred by recipients of Austudy Payment, Fares Allowance, Youth Allowance for full-time students and apprentices, and ABSTUDY Living Allowance.

This bill reintroduces, with certain modifications, the following measures which have not passed the Senate:

- two measures which were reintroduced in the *Social Services and Other Legislation Amendment (Student Measures Bill 2014)*; and
- two measures which were introduced in the *Higher Education Support Amendment (Savings and Other Measures) Bill 2013*.

Retrospective effect

Schedule 5, subitem 13(1), proposed new section 1229D

This application provision provides that the new interest charge regime will apply in relation to a debt that arises on or after commencement and to a debt that arose before commencement to the extent that the debt was outstanding immediately before commencement.

The explanatory memorandum does not provide a justification for applying the new interest charge regime to pre-existing debts.

The committee is aware that schedule 5 was removed from the bill as a result of government amendments agreed to in the House of Representatives on 1 December 2015. In the event this measure is introduced again in the future, the committee requests that advice as to the rationale for this approach (including addressing the issue of fairness and the extent of likely detriment to any person) be provided to the committee to enable it to finalise its consideration of this measure and that the relevant information also be included in the explanatory memorandum.

Noting that this provision has been removed from the bill the committee makes no further comment on this measure at this stage.

Privacy Amendment (Protecting Children from Paparazzi) Bill 2015

Introduced into the House of Representatives on 23 November 2015

By: Mr Katter

Background

This bill amends the *Privacy Act 1988* to insert a new criminal offence provision for those who harass the children of celebrities or any other person due to that person's vocation or occupation, through their attempt to photograph or record the child's image or voice, whether by following or lying in wait for the child.

Trespass on personal rights and liberties—breadth of offence Item 1, proposed section 18A

The proposed offence relating to conduct of making, or attempting to make, a record of a child's image or voice or following or lying in wait for the child, depends on whether the conduct causes the child to be 'annoyed, alarmed, tormented, or terrorised' or 'emotional distress', or is likely to cause those responses to be felt by a reasonable person in the position of the child (see proposed paragraph 18A(1)(d)).

These responses relate to subjective reactions and will depend very much on the individuals concerned. As such it appears to be very difficult for a person to know in advance of a particular act whether their conduct will constitute an offence because the outcome is based on the broad and uncertain emotional responses of the child(ren) involved. Arguably this indicates that the scope of the offence is overly broad.

As the explanatory materials do no more than repeat the terms of the offence, the committee seeks the Member's detailed justification for the scope of the offence and whether it can be framed in a way that ensures a person can know in advance whether or not particular conduct will constitute an offence.

Pending the Member'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.

COMMENTARY ON AMENDMENTS TO BILLS

Aboriginal Land Rights (Northern Territory) Amendment Bill 2015

[Digest 7/15 – no comment]

On 24 November 2015 the House of Representatives agreed to 11 Government amendments and the Assistant Minister for Health (Mr Wyatt) 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.

Corporations Amendment (Financial Advice Measures) Bill 2015

Previously: Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

[Digest 5/14 – Report 7, 9 and 12/14]

On 24 November 2015 the Senate agreed to 29 Government amendments, the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum, and the bill was read a third time.

Government amendments—general comment

The supplementary explanatory memorandum (at p. 3) explains the background to these government amendments as follows:

On 19 March 2014, the Government introduced the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Bill) as part of the Government's Autumn Repeal Day. The purpose of the Bill is to reduce compliance costs imposed on the financial services industry by amending Part 7.7A of the *Corporations Act 2001*. Part 7.7A is also referred to as Future of Financial Advice (FOFA).

Following refinements to better target a number of FOFA provisions, the Bill passed the House of Representatives on 28 August 2014.

The Government's amendments to FOFA were initially implemented through the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (the Regulation). The Regulation commenced on 1 July 2014. On 19 November 2014, the Senate voted to disallow the Regulation, reversing the law to the original legislation.

Following the disallowance of the Regulation, a number of measures from the Regulation were remade through the *Corporations Amendment (Revising Future of Financial Advice) Regulation 2014*, which commenced in December 2014. Further measures were remade through the *Corporations Amendment (Financial Advice) Regulation 2015*, which commenced on 1 July 2015. The Bill is being amended to remove a number of the proposed amendments to FOFA and to implement minor and technical changes.

In the committee's *Ninth Report of 2014* (at p. 348) the committee commented on the issue of whether the content of the Corporations Amendments (Streamlining Future of Financial Advice) Regulation 2014 (the Regulation) is an appropriate delegation of legislative power or would be more appropriate for Parliamentary enactment. At that time, the committee noted the Acting Assistant Treasurer's response in relation to this issue which stated that 'implementing these changes through the Regulation provides clarity and certainty for the financial advice industry and for investors seeking financial advice while the changes are considered in detail by the Parliament'. In relation to this the committee noted two matters:

- the extent to which the approach promotes clarity and certainty is contingent both on the regulations not being disallowed and on the FOFA amendments being passed in their current form by the Parliament; and
- the committee has strong reservations about using regulations to initially enact changes ultimately intended for primary legislation.

The committee takes this opportunity to reiterate the above comments and its view that enabling a regulated industry to benefit from legislative change 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.

**Government amendments (14), (16) and (18) on sheet GU108—
Inappropriate delegation of legislative power (Henry VIII clause)**

These amendments will allow regulations to prescribe circumstances in which, despite another provision of the relevant section, 'all or part of a benefit is to be treated as conflicted remuneration'. This means that the regulations will be able to override the effect of the primary legislation.

The committee previously sought advice from the Acting Assistant Treasurer in relation to this general matter as outlined in the committee's *Twelfth Report of 2014* (at pp 573–575). At that time, the Acting Assistant Treasurer stated that:

...there is always the possibility – given the complexity of arrangements in the financial services sector – that unintended consequences may arise. As such, the enhanced regulation-making powers would permit the Government to address any unintended consequences should they arise.

The Government has endeavoured to ensure that there is adequate flexibility in the new amendments to address the concerns of industry and consumers at a time of legislative change. I believe that the Bill achieves the appropriate regulatory balance. Any regulations would be subject to consultation with stakeholders, as well as subject to the disallowance procedure under the *Legislative Instruments Act 2003*, providing Parliament with the opportunity to scrutinise the application of new regulations.

The committee again notes these comments, although it reiterates its view that while unintended consequences may arise in complex regulatory environments, it may be doubted whether this risk is, in itself, a sufficient justification for broad delegations of legislative power which enable regulations to override the effect of the primary legislation. **The committee reiterates its concerns about the breadth of the power to override the effect of the primary legislation and draws this issue to the attention of Senators.**

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.

Furthermore, the supplementary explanatory memorandum (at p. 12) states that:

The Bill currently makes amendments to introduce regulation-making powers that would clarify the operation of existing exemptions to conflicted remuneration.

Amendments 14, 16 and 18 remove the regulation-making power.

While these amendments do remove certain regulation-making powers, **the committee considers that this description of the amendments has the**

potential to be misleading because the significant regulation-making powers outlined above (relating to circumstances in which, despite another provision of the relevant section, all or part of a benefit is to be treated as conflicted remuneration) are still provided for in the amendments.

The committee therefore seeks the Assistant Treasurer's advice as to whether the supplementary explanatory memorandum can be amended to more clearly outline the effect of the amendments. The committee also seeks the Assistant Treasurer's advice in relation to possible examples of circumstances in which these regulation-making powers may be utilised.

Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015

[Digest 9/15 – Report 11 and 14/15]

On 23 November 2015 the Senate agreed to two Australian Greens amendments and the bill was read a third time.

On 24 November 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

The committee has no comment on these amendments.

Health Insurance Amendment (Safety Net) Bill 2015

[Digest 12/15 – no comment]

On 25 November 2015 the Minister for Health (Ms Ley) presented a replacement explanatory memorandum and the bill was read a third time.

The committee has no comment on this replacement explanatory memorandum.

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

[Digest 11/15 – Report 12/15]

On 23 November the Senate agreed to four Australian Greens amendments and the bill was read a third time.

The committee has no comment on these amendments.

Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015

[Digest 12/15 – no comment]

On 26 November 2015 the House of Representatives agreed to ten Government amendments, the Minister for Social Services (Mr Porter) 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.

Superannuation Legislation Amendment (Trustee Governance) Bill 2015

[Digest 11/15 – no response required]

On 25 November 2015 the Minister for Finance (Senator Cormann) tabled an addendum to the explanatory memorandum relating to the bill.

The committee has no comment on this 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:

Labor 2013-14 Budget Savings (Measures No. 2) Bill 2015 —
Schedule 1, Part 1, Division 6, item 78

Other relevant appropriation clauses in bills

Nil