

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

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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.



## **Australian Broadcasting Corporation Amendment (Rural and Regional Advocacy) Bill 2015**

Introduced into the Senate on 1 December 2015

By: Senator McKenzie

### **Background**

This bill amends the *Australian Broadcasting Corporation Act 1983* to:

- amend the Australian Broadcasting Corporation's (ABC) Charter in relation to the delivery of services to rural and regional Australia in each state and territory;
- impose certain requirements on the ABC and the ABC Board; and
- provide for the establishment, functions and membership of the Rural and Regional Advisory Council.

*The committee has no comment on this bill.*

## **Australian Crime Commission (National Policing Information Charges) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Justice

### **Background**

This bill enables the Australian Crime Commission to impose charges for applications for, and the provision of, national policing information services.

*The committee has no comment on this bill.*

## **Australian Crime Commission Amendment (National Policing Information) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Justice

### **Background**

This bill merges the functions of the CrimTrac Agency into the Australian Crime Commission (ACC) by amending the *Australian Crime Commission Act 2002* to enable the ACC to perform CrimTrac's functions, including providing national coordinated criminal history checks.

The bill also amends the *Crimes Act 1914*, the *Law Enforcement Integrity Commissioner Act 2006* and *Privacy Act 1988* to make consequential amendments.

### **Trespass on personal rights and liberties—privacy Schedule 1, items 17 and 30**

The purpose of this bill is to merge the CrimTrac Agency into the Australian Crime Commission (ACC). As a consequence the merged agency will be empowered to continue to carry out all of CrimTrac's functions. The explanatory materials note that it is necessary to modify the information disclosure regime in the ACC Act in two broad ways, seemingly with the intention to continue similar arrangements for the disclosure of national policing information that currently are in place for CrimTrac.

First, the ACC Act is to be amended so that the Board of the merged body has a role in the disclosure of 'national policing information' (which may include personal information). Secondly, a new disclosure regime will be inserted to enable the merged body (i.e. ACC) to disclose national criminal history check information to accredited bodies and individuals that are subject to the check.

Item 17 inserts new subsections 46A(5), (6), and (7) which confer on the ACC CEO the function of approving bodies that may access nationally coordinated criminal history checks through the ACC. As explained in the explanatory memorandum (at p. 20) these 'provisions are intended to enable the ACC Board to set limits or conditions on the types of bodies that can access a nationally coordinated criminal history check through the ACC, which the

ACC CEO must comply with'. By this mechanism, the Board 'may control or limit the release of this specific type of national policing information, if it so wishes'.

Given that the accreditation means that particular bodies may apply for and receive what may be sensitive personal information, questions arise as to:

- whether it would be preferable for the legislation to contain more guidance in relation to the types of bodies that may access nationally coordinated criminal history checks (proposed subsection 46A(5) is very broad and provides that the CEO may approve a body of the Commonwealth, a State or a Territory or any other body or organisation however described, including bodies or organisations outside Australia); and
- whether the policy and directions issued by the ACC Board in relation to accreditation should be subject to Parliamentary oversight and disallowance.

**The committee therefore seeks the Minister's further advice in relation to these issues.**

Item 30 inserts a new section 59AAA to enable the merged agency to disclose nationally coordinated criminal history checks to accredited bodies and/or to the person to whom the check relates. Again, the intention is give the ACC Board control over disclosures. More particularly, the amendments will 'enable the ACC Board to set limits or conditions on the level of access an accredited body and/or an individual can have to nationally coordinated criminal history checks' (explanatory memorandum, p. 25). **The committee therefore seeks the Minister's advice as to whether guidance concerning the setting of such limits and conditions could be contained in the primary legislation and, if not, whether it is appropriate for the setting of such limits and controls to at least be subject to disallowance.**

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

## **Broadcasting Legislation Amendment (Digital Radio) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Justice

### **Background**

This bill amends the *Broadcasting Services Act 1992* and *Radiocommunications Act 1992* to:

- remove the:
  - restricted datacasting licence category;
  - requirement for the digital radio moratorium period;
  - spent provisions; and
  - minister's role in the setting of the digital radio start-up day in regional licence areas;
- make consequential amendments; and
- amend the definition of 'non-foundation digital radio multiplex transmitter licence' to exclude category 3 multiplex licences.

*The committee has no comment on this bill.*

## **Communications            Legislation            Amendment (Deregulation and Other Measures) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Communications

### **Background**

This bill amends various Acts in relation to communications to:

- amend account keeping and licence fee administration arrangements for commercial broadcasters and datacasting transmitter licensees;
- remove duplicative requirements for licensees, publishers and controllers to notify the Australian Communications and Media Authority (ACMA) of certain changes in control of regulated media assets;
- provide a consistent classification arrangement for all television programs, including films;
- clarify the complaints handling and information gathering functions of the ACMA;
- removes the ability of the Australian Competition and Consumer Commission (ACCC) to issue tariff filing directions to certain carriers and carriage service providers; and
- amends the statutory information collection powers of the ACMA and the ACCC.

The bill also repeals 53 Acts and removes redundant provisions in four Acts.

### **Inappropriate delegation of legislative power—consultation requirements**

#### **Schedule 5, item 2**

Section 152ELB of the *Competition and Consumer Act 2010* will be repealed by this item. Currently, section 152ELB requires the ACCC to publish a draft of its procedural rules and invite interested persons to make submissions during a period of at least 30 days and to consider submissions received. The explanatory memorandum asserts that this provision is considered unnecessary in light of the standard consultation requirements in section 17 of the *Legislative Instruments Act 2003* (the LI Act). It should be noted, however, that the consultation requirements under the LI Act are (a) less



prescriptive and therefore leave more discretion to the rule-maker about what level of consultation is required, and (b) subject to exceptions specified in section 18. Furthermore, section 19 of the LI Act expressly provides that non-compliance with these requirements does not affect ‘the validity or enforceability of a legislative instrument’.

**In light of these differences between the section 152ELB of the *Competition and Consumer Act 2010* and the LI Act consultation requirements the committee seeks the Minister's further advice for the conclusion that section 152ELB is unnecessary.**

*Pending the Minister's advice, 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.*

### **Adequacy of review rights**

#### **Schedule 6**

The purpose of this schedule is to move to an industry-based management structure for the administration of numbering arrangements for carriage services. Central to these arrangements is the appointment of a numbering scheme manager. The scheme involves a number of mechanisms for the Minister, ACMA and ACCC to ensure that public policy objectives are maintained under the new industry based management scheme. **As it is unclear what, if any, review rights are provided for in relation to the administration of the numbering scheme the committee seeks the Minister's advice about this matter.**

*Pending the Minister's advice, 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.*

## **Competition and Consumer Amendment (Payment Surcharges) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill amends the *Competition and Consumer Act 2010* to:

- establish a framework to ban surcharges imposed in respect of particular payment methods that exceed the cost of acceptance for those payment methods; and
- provide the Australian Competition and Consumer Commission with additional powers to gather information and issue infringement notices in enforcing the ban on excess surcharges.

*The committee has no comment on this bill.*

## **Corporations Amendment (Crowd-sourced Funding) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill amends the *Corporations Act 2001* to:

- establish a framework to facilitate crowd-sourced funding offers by small unlisted public companies;
- provide new public companies that are eligible to crowd fund with temporary relief from reporting and corporate governance requirements that would usually apply; and
- enable the Minister to provide that certain financial market and clearing and settlement facility operators are exempt from specified parts of the Australian Market Licence and clearing and settlement facility licencing regimes.

The bill also makes consequential amendments to the *Australian Securities and Investments Commission Act 2001*.

### **Delegation of legislative power**

#### **Schedule 1, item 14, proposed subsection 738F(3)**

Henry VIII clauses enable delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. The concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government.

This delegation of legislative power appears to enable the regulations to modify the operation of the primary legislation in relation to Chapter 7 (see the explanatory memorandum at p. 41) and therefore operates as a Henry VIII clause.

It is the practice of the committee to comment on so-called Henry VIII clauses when the rationale for their use is not provided or is insufficient. **In this instance, no explanation is provided for the necessity of proposed**

**subsection 738F(3) and the committee therefore seeks the Assistant Treasurer's advice as to the rationale for the proposed approach.**

*Pending the Assistant Treasurer's advice, 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**

#### **Schedule 1, item 14, proposed subsection 738G(1)(c)**

The securities that are to be the subject of the crowd-sourced funding (CSF) offer are those prescribed by a class specified in the regulations. The explanatory memorandum (at p. 16) justifies this approach as follows:

Allowing CSF eligible securities to be specified in the regulations will enable the CSF regime to be restricted to a limited range of securities, which is appropriate given crowd-funding is a relatively new development in Australia, but will provide flexibility to permit the expansion of crowd-funding to a broader range of securities in the future.

**As the regulations will be subject to disallowance, and in light of the explanation provided, the committee leaves the question of whether the proposed delegation of legislative power is appropriate to the Senate as a whole.**

*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.*

### **Reversal of burden of proof**

#### **Schedule 1, item 14, proposed subsection 738Z**

This section provides for a number of defences against liability to an offence relating to a defective offer document under section 738Y. In relation to these defences a defendant bears an evidential burden (see the notes to subsections 738Y(1), (3) and (6)).

The explanatory memorandum notes that the defences are similar to those available in relation to certain existing disclosure documents. In relation to the first defence the explanatory memorandum states that the company is best

placed to raise evidence that ‘they did not know the offer document was defective’. The reversal of onus is not explicitly addressed in relation to the second two defences.

**While some material justifying the approach has been provided, in light of the significance of any reversal of the burden of proof, the committee seeks the Assistant Treasurer’s more detailed justification, which addresses each of the items against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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

#### **Reversal of burden of proof**

##### **Schedule 1, item 14, proposed subsection 738ZG(4)**

The bill sets out a number of defences to the restriction on advertising offences (see subsections 738ZG(6)–(9)). The note to proposed subsection 738ZG(4) states that a defendant bears an evidential burden in relation to matters relevant to establishing these defences. Although the explanatory memorandum (at p. 76) justifies the reversal of the burden of proof in relation to the exception stated in subsection 738ZG(8), the other instances are not addressed. **The committee therefore seeks the Assistant Treasurer’s more detailed justification, which covers all instances where an evidential burden is placed on a defendant, including addressing each of the items against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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

## **Courts Administration Legislation Amendment Bill 2015**

Introduced into the Senate on 2 December 2015

Portfolio: Attorney-General

### **Background**

This bill amends the *Federal Court of Australia Act 1976*, *Family Law Act 1975* and *Federal Circuit Court of Australia Act 1999* to:

- designate the Federal Court of Australia (including the National Native Title Tribunal), the Family Court of Australia and the Federal Circuit Court of Australia as a single administrative entity under the *Public Governance, Performance and Accountability Act 2013* and a single statutory agency under the *Public Service Act 1999*;
- establish shared corporate services functions for the courts;
- maintain heads of jurisdiction's responsibility in relation to the business and administrative affairs of their respective courts;
- provide for a chief executive officer (CEO) for each head of jurisdiction to assist with the management of administrative affairs and provide that the CEOs also hold the position of Principal Registrar;
- provide for the Federal Court CEO to have responsibility for managing the shared corporate services, with a requirement for consultation; and
- provide that the Federal Court CEO is the accountable authority for the administrative entity and the agency head for the statutory agency.

The bill also makes consequential amendments to 16 Acts.

### **Delegation of legislative power**

**Schedule 1, items 5 and 8, proposed paragraph 18A(1B)(j) and subsection 18A(5) of the *Federal Court of Australia Act 1976***

**Schedule 2, items 53 and 57, proposed paragraph 38A(1B)(j) and subsection 38A(5) of the *Family Law Act 1975***

**Schedule 3, items 5 and 7, proposed paragraph 89(2A)(j) and subsection 89(5) of the *Federal Circuit Court of Australia Act 1999***

Item 5 would insert a new definition of 'corporate services' into the *Federal Court of Australia Act 1976* and provide that they are excluded from the

administrative affairs of the courts. A major purpose of the bill is to enable the corporate services for the Federal Court, Family Court and Federal Circuit Court to be provided under an amalgamated corporate structure. New paragraph 18A(1B)(j) provides that in addition to the matters listed in subsection 18A(1B), further matters may be prescribed so as to come within the definition of corporate services (see also proposed subsection 18A(5)).

This approach to the definition of corporate services is replicated in the amendments relating to the Family Court and the Federal Circuit Court (see Schedule 2, items 53 and 57 and Schedule 3, items 5 and 7).

The explanatory memorandum justifies this delegation of legislative power to the Attorney-General by pointing to the flexibility that it would provide ‘to determine the inclusion of further matters in the definition of corporate services in the future, should further matters be identified’ (at p. 15).

Given the importance of federal courts maintaining an appropriate level of control over their own administrative affairs and the central role the definition of corporate services plays in the overall objectives of the legislation, the committee seeks the Attorney-General’s more detailed justification for enabling the Attorney-General to modify the definition by legislative instrument rather than requiring such modifications to be achieved through amendment to the primary legislation.

*Pending the Attorney-General’s advice, 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.*

## **Criminal Code Amendment (Firearms Trafficking) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Justice

### **Background**

This bill amends the *Criminal Code Act 1995* to provide for a mandatory minimum sentence and increased maximum penalties for the offences of trafficking firearms or firearms parts within Australia, and into and out of Australia.

### **Offences—penalties**

This bill raises the maximum penalties and sets new mandatory minimum penalties for the offences of:

- trafficking firearms and firearm parts within Australia (in Division 360 of the *Criminal Code*); and
- trafficking firearms and firearm parts into and out of Australia (in Division 361 of the *Criminal Code*),

The **maximum penalties** for these offences will be raised from 10 years imprisonment or a fine of 2500 penalty units or both to 20 years imprisonment or a fine of 5000 penalty units or both. The doubling of the applicable maximum penalty is justified in the explanatory memorandum (at p. 6):

The increased maximum penalty is necessary to ensure that the serious offences of trafficking firearms within Australia, and into and out of Australia, are matched by commensurate punishments.

Consistent with the principles set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, the increased maximum penalty will be adequate to deter and punish the worst case offence. This ensures that sentences imposed by courts can continue to take into account the particular circumstances of the offence and the offender.

The new maximum penalty reflects the seriousness of the conduct covered by the offences, to address the clear and serious social and systemic harms associated with this trade.



The statement of compatibility elaborates the seriousness of the offences by reference to the ‘serious social and systemic harms associated with firearms trafficking’ and ‘the gravity of supplying firearms and firearm parts to the illicit market’. The gravity of the offences is illustrated by noting that the ‘entry of even a small number of illegal firearms into Australia can have a significant impact on the community’ on account of the fact that ‘firearms can remain within that market for many years and be accessed by individuals and groups who would use them to commit serious and violent crimes, such as murder’. For example, in 2012 firearms were identified as being the type of weapon used in 25% of homicides in Australia (at p. 4).

Although the explanatory materials make a case for increasing the maximum penalty, doubling the penalties represents a very significant increase. The committee therefore seeks the Minister’s advice as to examples of other offences that carry this level of penalty and a more detailed justification demonstrating that these trafficking offences are of a similar level of seriousness.

The justification provided for the imposition of a **new mandatory minimum sentence** of five years imprisonment is also addressed in the explanatory materials. The explanatory memorandum (at p. 7) states:

The Commonwealth has adopted a range of measures in response to the threat posed by illicit firearms, one of which is sentencing people convicted of firearms trafficking offences to mandatory minimum prison terms. Mandatory minimum sentences, when applied to individuals convicted of serious offences, are an effective way to deter potential offenders from firearms trafficking. The severe mandatory penalties associated with the firearms trafficking sentencing regime accord with the criminality of firearms smuggling, but must be carefully directed towards those whose individual culpability also justifies mandatory terms of imprisonment.

The mandatory minimum penalty will not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed (subsection 360.3A(2)). This preserves judicial discretion when sentencing to take into account the particular circumstances of minors.

The amendment does not prescribe a minimum non-parole period. This will preserve a court’s discretion in sentencing, and will help ensure that custodial sentences imposed by courts are able to take into account the particular circumstances of the offence and the offender. The mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence.

The statement of compatibility suggests that the mandatory minimum penalty is proportionate given the seriousness of the offences, the fact it does not apply to children and because there is no minimum non-parole period.

Nevertheless, mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. Such discretions are exercised judicially and in light of sentencing principles and it remains unclear why the discretion should be removed in this particular instance. For this reason the committee seeks the Minister's more detailed justification for the proposed approach, including whether there are examples of analogous offences that carry a mandatory minimum penalty.

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

## **Fair Work Amendment (Remaining 2014 Measures) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Employment

### **Background**

This bill amends the *Fair Work Act 2009* in relation to:

- the payment of annual leave upon termination of employment;
- taking or accruing leave while receiving workers' compensation;
- the requirements for flexibility terms in modern awards and enterprise agreements and individual flexibility arrangements made under those terms;
- the transfer of business rules;
- the right of entry framework; and
- the Fair Work Commission not having to hold a conference or hearing to dismiss an unfair dismissal application.

### **Trespass on personal rights and liberties—fair hearing Schedule 1, Part 6**

The effect of the amendments proposed by Part 6 of Schedule 1 will be to enable the Fair Work Commission (FWC) to dismiss an unfair dismissal claim without holding a hearing or conducting a conference where:

- the applicant has unreasonably failed to attend a conference or hearing, comply with an FWC direction or order, or discontinue an application after a settlement agreement has been concluded; or
- the application is frivolous or vexatious or has no reasonable prospects of success.

Prior to exercising the power the FWC must provide an opportunity to the parties to provide further information which must then be considered before an application is dismissed. Appeal rights are not affected by the amendments.

**In light of the detailed explanation and justification for the amendments in the statement of compatibility (at pp x and xii) the committee leaves**

**the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

## **Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Education and Training

### **Background**

This bill amends various Acts in relation to family assistance.

Schedule 1 amends the *A New Tax System (Family Assistance) Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to:

- cease the child care benefit and child care rebate;
- introduce a child care subsidy (CCS) which is subject to both an income and activity test;
- introduce various rates of additional child care subsidy (ACCS) that are available in certain circumstances; and
- make amendments in relation to CCS and ACCS claims, reviews of decisions, provider approvals, and compliance obligations of approved providers of child care services.

Schedule 2 provides for amendments contingent on the passage of other bills currently before the Parliament and also makes consequential amendments.

Schedule 3 enables the Secretary to reassess service approvals at any time from 1 July 2016 and also closes enrolment advances and allows for their recovery.

Schedule 4 provides for provisions relating to:

- the cessation date of eligibility to child care benefit (CCB) and child care rebate (CCR) and the commencement of CCS and ACCS;
- the saving of certain laws in relation to CCB and CCR (to ensure, for example, that debts and reviews can continue to be dealt with); and
- transitional provisions to enable existing claimants and recipients to be eligible for CCS and for services to transition to the CCS system from 3 July 2017.

**Review rights—notice of a deemed refusal**  
**Schedule 1, item 1, subsections 85CE(5) and 85CH(5)**

Subsection 27A(1) of the AAT Act will not apply to a deemed refusal under these proposed provisions. **As the explanatory memorandum does not include a justification, the committee seeks the Minister’s advice as to the rationale for the proposed approach.**

*Pending the Minister’s advice, 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.*

**Delegation of legislative power—Henry VIII clause**  
**Schedule 1, item 202, proposed section 199G**  
**Schedule 4, item 12 (transitional rules)**

The explanatory memorandum (at pp 54–55) states that proposed section 199G may be characterised as a Henry VIII clause because it appears to ‘provide a broad modification power of principal legislation’. Although the explanatory memorandum states that it is ‘intended to operate in a purely beneficial way to deal with any anomalies that may arise where an approval is taken to be backdated in time’. Nevertheless, the proposed section itself does not appear to include a limitation which ensures that it is only used beneficially.

A similar issue arises in relation to item 12 of Schedule 4 for the power to make transitional rules. The explanatory memorandum (at p. 65) indicates that power is intended to only be exercised beneficially, but again there is no legislative provision requiring this approach.

**The committee seeks the Minister’s advice as to whether these clauses can be drafted to ensure that the provisions are only used beneficially (i.e. in the manner described in the explanatory materials).**

*Pending the Minister’s advice, 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—strict liability**  
**Schedule 1, Item 202, new part 8A, various provisions**

This part contains a number of strict liability offences. The statement of compatibility (at p. 8) provides the following global justification for all of these offences:

These offences are proportionate to the value of maintaining adequate safeguards in relation to public money. It is considered reasonable in these cases to impose strict liability offences to ensure the integrity of payments. It is intended that prosecution action will only be taken in relation to strict liability offences in serious or repeated cases.

The explanatory memorandum provides little further justification except that in relation to each of the offences it is stated that an offence would not be prosecuted in respect of honest or reasonable mistakes (see, e.g., at p. 56). However, advice as to expectations about how prosecutorial discretion will be exercised is not a sufficient justification for the imposition of strict liability offences. The committee expects a detailed justification of each instance of the application of strict liability and that justification should include reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. **The committee therefore seeks the Minister's advice addressing these points for each proposed strict liability offence.**

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

## Foreign Acquisitions and Takeovers Amendment (Strategic Assets) Bill 2015

Introduced into the House of Representatives on 30 November 2015

By: Mr Katter

### Background

This bill amends the *Foreign Acquisitions and Takeovers Act 1975* to prevent foreign persons or entities from acquiring a 10 per cent or greater interest in Australian land, water or other assets that are of strategic economic or strategic defensive importance to Australia.

### Delegation of legislative power

#### General

The key scrutiny concern in relation to this private member's bill is that the details of the regulatory scheme envisioned by the bill are almost entirely to be established by regulations. The explanatory memorandum does not explain why this is appropriate.

The committee's view is that important matters be included in primary legislation unless a sound justification for the use of delegated legislation is provided. **In the absence of information outlining the rationale for the proposed approach, the committee seeks the Member's advice as to the justification for the use of delegated legislation rather than including the details of the regulatory scheme in the bill itself.**

*Pending the Member's advice, 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.*



## **Income Tax (Attribution Managed Investment Trusts—Offsets) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill is part of a package of four bills to establish a new tax system for certain managed investment trusts.

The bill imposes tax on trustees of an attribution management investment trust in relation to amounts of a character relating to tax offsets in certain circumstances

*The committee has no comment on this bill.*

## **Income Tax Rates Amendment (Managed Investment Trusts) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill is part of a package of four bills to establish a new tax system for certain managed investment trusts.

The bill amends the *Income Tax Rates Act 1986* to specify the rate of tax payable by trustees of attribution management investment trusts in certain circumstances.

*The committee has no comment on this bill.*

## **Insolvency Law Reform Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill amends *Bankruptcy Act 1966*, the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* to:

- make changes in relation to insolvency administrations;
- align the registration and disciplinary frameworks that apply to registered liquidators and registered trustees;
- align a range of specific rules relating to the handling of personal bankruptcies and corporate external administrations; and
- provide the Australian Securities and Investments Commission with increased powers to assist in the oversight of the regulation of registered liquidators.

The bill also makes consequential amendment to 25 Acts.

### **Delegation of legislative power**

**Schedule 1, Insolvency Practice Schedule (Bankruptcy), section 5-30**  
**Schedule 2, Insolvency Practice Schedule (Corporations), section 5-30**

The Insolvency Practice Schedule (Bankruptcy) refers to people with a financial interest in the administration of a regulated debtor's estate and provides for a power of such persons to apply to the Court in relation to that administration. Section 5-30 states a person has a 'financial interest' if the person is the regulated debtor, a creditor, the trustee or 'in any other circumstances prescribed'.

The explanatory memorandum states it may be necessary to expand the category of persons who have a financial interest in the future, but does not explain why that may be so or why it is appropriate to do so through the rules rather than the primary legislation. The same issue arises in the Insolvency Practice Schedule (Corporations), section 5-30.

The committee's view is that important matters, such as the scope of those affected by a particular law, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. **In the absence of information outlining the rationale for the approach proposed in these provisions, the committee seeks the Assistant Treasurer's advice as to the justification for the use of delegated legislation rather than addressing these significant matters in primary legislation as the need arises.**

*Pending the Assistant Treasurer'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.*

## **Privacy**

### **Delegation of legislative power**

#### **Schedule 1, Insolvency Practice Schedule (Bankruptcy), section 15-1 Schedule 2, Insolvency Practice Schedule (Corporations), section 15-1**

Under the proposed subsection 15-1(1) of Insolvency Practice Schedule (Bankruptcy), the Inspector-General must establish and maintain a Register of Trustees. The Insolvency Practice Rules may provide for and in relation to the Register (subsection 15-1(3)) and in particular may provide for and in relation to the details to be entered on the Register and the parts of the Register that are to be made available to the public. Proposed subsection 15-1(5) makes it clear that the details that may be included on the Register may include details of disciplinary action decided by a committee under section 40-55 and details of persons who have had their registration as a trustee under this Act suspended or cancelled.

This means that the Insolvency Practice Rules may include provisions which affect individual privacy interests. The same issue also arises in the Insolvency Practice Schedule (Corporations), section 15-1. The statement of compatibility notes that privacy is affected by the provision of such information to the public, but does not attempt to justify the approach (see p. 233).

As outlined above, the committee's view is that important matters, such as the matters which may affect a person's privacy interests, be included in primary legislation unless a sound justification for the use of delegated legislation is provided. **The committee therefore seeks the Assistant Treasurer's justification for the potential impact on privacy interests and an explanation for providing for these important matters in a legislative instrument, including for authorising such an instrument to allow for the publication of disciplinary action taken against individuals.**

*Pending the Assistant Treasurer'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.*

### **Reversal of onus of proof**

**Schedule 1, Part 1, Division 2, subsection 50-35(2), 60-20(6), 60-26(3), 65-5(3), 65-15(3), 65-40(3) and others**

A defendant bears an evidential burden in relation to the matter in subsection 50-35(2), but no explanation is provided in the accompanying material. The same issue also arises for subsection 60-20(6), 60-26(3), 65-5(3), 65-15(3), 65-40(3) and others. **In light of the importance of any reversal of the burden of proof, the committee seeks the Assistant Treasurer's detailed justification for the proposed approach that addresses each of the instances in the bill against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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

### **Delegation of legislative power**

**Schedule 1, Part 1, Division 2, section 105-1**

This section provides for the making of the Insolvency Practice Rules.

The explanatory memorandum provides a general justification for a broad power to make Insolvency Practice Rules (at p. 105).

3.204 The Minister may, by legislative instrument, make rules providing for matters:

- required or permitted by the Bankruptcy Act to be provided; or
- necessary or convenient to be provided in order to carry out or give effect to the Bankruptcy Act.

3.205 The Minister requires this rule-making power to ensure the detail under and operational aspects of the Bankruptcy Act can be clearly outlined and, where necessary and appropriate, can be modified. Given the limitations on this rule-making power, as discussed below, it is appropriate to empower the Minister to make such rules. *[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsection 105-1(1)]*

3.206 Rules made under subsection 105-1(1) may include offences but the penalties for such offences must not be more than 50 penalty units for an individual or 250 penalty units for a body corporate. It is appropriate for offences that incur lesser penalties to be created by the Minister under the Insolvency Practice Rules. This will allow greater flexibility where creating offences of a more minor and technical nature while ensuring that more serious offences undergo scrutiny by Parliament. *[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsections 105-1(2) and (3)]*

3.207 For further clarification, subsections 105-1(4) and (5) outline limitations to the scope of the Insolvency Practice Rules. The rationale for these limitations is to ensure that rules cannot be created in relation to subject matter that should be limited to laws made by Parliament. *[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsections 105-1(4) and (5)]*

3.208 The Minister's power to make rules under this section cannot be delegated to any other person to ensure that this rule-making power is exercised personally by the Minister, as is appropriate. *[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsection 105-1(6)]*

3.209 References in section 105-1 to 'this Act' do not include the regulations or rules made under section 105-1. *[Schedule 1, Insolvency Practice Schedule (Bankruptcy), Part 4, Division 105, subsection 105-1(7)]*

However, in light of the committee's view that important matters should be included in primary legislation unless a compelling justification is provided it is regrettable that the explanatory materials do not include a more detailed justification for why particular aspects of the new regulatory framework and the content of the rules are to be provided for in the Rules rather than the primary legislation.

For example, subsection 40-40(4) allows for the Rules to prescribe standards applicable to the exercise of power or the carrying out of duties of registered

trustees. The explanatory memorandum does not explain why these rules cannot be included in the primary legislation (see p. 44).

Another example is found in subsection 65-50, which provides that significant rules in relation to the consequences for failure to comply with Division 65 of the Schedule may be provided for by the Insolvency Practice Rules. Other examples may also be given, such as section 70-50 (reporting to creditors).

The same issue also arises in the Insolvency Practice Schedule (Corporations).

Although flexibility is a relevant consideration in making such determinations, its relevance is not explained in particular instances. The committee therefore seeks the Assistant Treasurer's detailed explanation of the general division between the Rules and primary legislation, which addresses the justification for including matters in the Rules (delegated legislation) in each instance.

*Pending the Assistant Treasurer'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, Part 3, section 178 Schedule 2, Part 3, proposed section 1634**

Henry VIII clauses enable delegated or subordinate legislation to override the operation of legislation which has been passed by the Parliament. In this regard, the concern is that such clauses may subvert the appropriate relationship between the Parliament and the Executive branch of government.

This delegation of legislative power appears to enable the rules to modify the operation of the primary legislation and therefore operates as a Henry VIII clause. The explanatory memorandum explains section 178 as follows:

The Governor-General may make regulations prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments and repeals made by the Schedule. This will allow for the creation of any transitional provisions that may have been overlooked by Part 3 of the Schedule. The regulations may provide that certain provisions of the Schedule are taken to be modified as set out in the

regulations. Those provisions then have effect as if they were so modified. The provisions of the Schedule that provide for regulations to deal with matters do not limit each other [*Schedule 1, Part 3, Division 6, section 178*]

It is the practice of the committee to comment on so-called Henry VIII clauses when the rationale for their use is not provided or is insufficient.

The same issue arises in relation to the Insolvency Practice Schedule (Corporations), Schedule 2, Part 3, proposed section 1634.

**In this instance, no explanation is given and the committee therefore seeks the Assistant Treasurer's advice as to the rationale for the proposed approach.**

*Pending the Assistant Treasurer's advice, 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.*

## **Strict liability**

### **Various**

The bill includes a number of strict liability offences and these are addressed in the explanatory material in detail:

1.12 Both Schedules create new strict liability offences and retain strict liability offences existing in the Bankruptcy Act and the Corporations Act. It is worth noting from the outset that the application of strict liability, as opposed to absolute liability, preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities. This defence maintains adequate checks and balances for individuals who may be accused of breaching such offences.

1.13 Strict liability offences are appropriate in this area of commercial regulation, as it is necessary to strongly deter misconduct that can have serious consequences for affected parties. Strict liability offences also reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by ASIC and AFSA. Strict liability is particularly beneficial to these regulatory bodies as they need to deal with offences expeditiously to maintain public confidence in their regulatory regimes.

1.14 With the exception of section 60-21 discussed in detail below, the strict liability offences in the Bill meet all the conditions listed in the Guide to



Framing Commonwealth Offences (pages 23 and 24). For example, the fines for the offences do not exceed 60 penalty units for an individual.

1.15 The majority of strict liability offences relate to conduct by an insolvency practitioner. For example, Division 65 of the Schedule provides strict liability offences around payments into and out of an administration account. By providing a strict liability enforcement regime for duties of insolvency practitioners, the Bill significantly enhances the likelihood of compliance by practitioners.

1.16 Insolvency practitioners possess statutory powers they may use with a high level of discretion in the exercise of these powers. Further, given the financial responsibilities associated with their duties, the consequences of an abuse of power can have far-reaching and significant consequences. (For example, if a practitioner were to sell off a debtor's family home to benefit themselves). As such, practitioners should be subject to a higher level of scrutiny in the performance of their duties as registered trustees and liquidators. Insolvency practitioners should, therefore, not only refrain from consciously doing wrong but actively take steps to fulfil their obligations and uphold the professional standards imposed upon them. Any changes to practitioner rules and standards do not take effect until 2017. Practitioners will, therefore, have sufficient time to familiarise themselves with any new requirements and guard against the possibility of any contravention.

1.17 Further, many of the strict liability offences relate to conduct where a requirement for proof of intention would be difficult to establish and would render the offence unenforceable. For example, where the prosecution has to prove the accused intended to refrain from paying money into the appropriate administration account when he or she failed to do so. Further, a requirement to establish intent will draw a level of resources for investigation and prosecution from the regulators that cannot always be justified, especially for offences with such a low maximum penalty.

1.18 Some strict liability offences relate to creditor conduct (such as sections 80-55 and 80-60). For example, section 80-60 makes it an offence for a creditor to directly or indirectly become the purchaser of any part of the regulated debtor's estate, subject to certain exceptions. Strict liability is only imposed on non-practitioners for more serious misconduct that may have significant consequences for innocent third parties. Such as, people who purchase the property in good faith only to have the transaction set aside by the Court.

1.19 Section 60-21 creates an offence (in personal insolvency) for a person to offer an inducement to securing the appointment or nomination of their preferred trustee. It provides that a person commits an offence of strict liability with a penalty of 50 penalty units, or 3 months imprisonment, or both. This provision, and its corresponding penalty, is modelled on section 595 of the Corporations Act. The severity of the penalty recognises the

importance of appointing an impartial trustee who would have significant power to determine the outcome of an estate for creditors and for the regulated debtor. The conduct described in this offence amounts to an abuse of the insolvency process that could see favourable treatment for the creditors involved in the breach at the expense of innocent creditors. Such conduct would significantly undermine the integrity of the insolvency regime and have far-reaching consequences for insolvency practitioners, debtors, creditors and financial institutions.

(See the explanatory memorandum at pp 9–10, 25–26, and pp 71–72. See also the statement of compatibility at pp 230–232.)

**In light of the detailed information provided, the committee draws this matter to the attention of Senators, but leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

## **Medicare Levy Amendment (Attribution Managed Investment Trusts) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill is part of a package of four bills to establish a new tax system for certain managed investment trusts.

The bill amends the *Medicare Levy Act 1986* to impose the two per cent Medicare levy on trustees of attribution management investment trusts in certain circumstances.

*The committee has no comment on this bill.*

## **Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015**

Introduced into the Senate on 2 December 2015

By: Senator Leyonhjelm

### **Background**

This bill amends the *Northern Territory (Self-Government) Act 1978* and *Australian Capital Territory (Self-Government) Act 1988* to:

- remove the prohibition on legalising voluntary euthanasia; and
- repeal the *Euthanasia Laws Act 1997*.

*The committee has no comment on this bill.*

## **Social Services Legislation Amendment (Budget Repair) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Social Services

### **Background**

This bill reintroduces the following:

- three measures removed from the Social Services Legislation Amendment (Fair and Sustainable Pensions) Bill 2015 during its passage through the Senate; and
- two measures previously introduced in the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015, which was negatived in the Senate on 9 September 2015.

The committee considered the bills in *Alert Digest No. 6 of 2015*. The committee did not comment on the Social Services Legislation Amendment (Fair and Sustainable Pensions) Bill 2015, and made no comment on measures contained in the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015.

The bill amends various Acts relating to social security and veterans' entitlements to:

- reduce from 26 to six weeks the period during which age pension and other payments with unlimited portability can be paid outside Australia at the means-tested rate from 1 January 2017; and
- pause for three years the indexation of various income thresholds that apply to certain social security benefits and allowances and the income test free area for parenting payment single;
- abolish the pensioner education supplement from 1 January 2016; and
- abolish the education entry payment from 1 January 2016.

The bill also makes consequential amendments to seven Acts.

*The committee has no comment on this bill.*

## **Social Security Legislation Amendment (Community Development Program) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Indigenous Affairs

### **Background**

This bill amends the: *Social Security Act 1991* and *Social Security (Administration) Act 1999* to:

- create new income support payment and compliance arrangements for individuals living in remote Australia who are eligible for activity tested income support payments including Newstart, youth allowance, parenting payment, disability support pension and special benefit; and
- remove spent provisions in relation to the Northern Territory Community CDEP Transition Payment and the Community Development Employment Project Scheme.

The bill also to makes consequential amendments to the *Social Security (Administration) Act 1999* and *Social Services Legislation Amendment (Youth Employment) Act 2015*.

### **Delegation of legislative power**

#### **Insufficient Parliamentary scrutiny**

##### **General**

The purpose of this bill is to introduce a distinctive community development program in remote areas. The objective is to better achieve positive outcomes in encouraging job seekers in remote Australia to understand the link between fulfilling requirements under the CDP program and income support payments. The bill establishes a structure which will enable simpler payment and compliance arrangements to be introduced.

To achieve this outcome the Minister will be authorised to exercise legislative power in two ways. First, the Minister will be empowered to determine, in a legislative instrument, the scheme for the imposition of obligations and to ensure compliance in relation to remote income support recipients. Second, the Minister may specify, by legislative instrument, remote income support regions in which these measures will operate (see proposed section

1061ZAAZ). The Minister may also determine by legislative instrument that the operation of the social security law be modified in relation to remote income recipients.

It therefore appears that the central elements of the scheme are to be determined by legislative instrument and that these matters will be of great practical importance to those affected by them. The explanatory materials contain a detailed justification of the need for differentiated CDP arrangements in remote communities. It is argued that the generally applicable framework is failing in remote regions and that an approach targeted specifically to the unique circumstances in remote communities in relation to strengthening incentives for job seekers is necessary. The key rationale for providing for central elements of the scheme in legislative instruments rather than the primary legislation is that this ‘will allow the Minister to consult with communities and the Parliament to determine participation requirements and compliance arrangements and to make amendments to meet the changing needs of communities’ (at p. 3). The intention in enabling the Minister to determine which specific regions will be covered by the scheme is to enable the targeted consideration of relevant matters (such as the level of social and economic disadvantage). The explanatory memorandum indicates that it is expected that ‘these arrangements will be phased in and will initially apply in no more than four regions’. The explanatory memorandum also provides the assurance that there ‘will be extensive community consultation with communities to be included...and participating providers will be assessed and supported to ensure they have sufficient capability and capacity to deliver the new arrangements’ (see pp ii-iii).

**While these matters are very significant and may be considered more suitable for Parliamentary enactment, in light of the detailed explanation provided the committee draws this matter to the attention of Senators, but leaves the general question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

**However, in light of the importance of the issues involved, the committee seeks the Minister’s advice as to whether consideration can be given to including a reporting requirement to evaluate: (a) the operation of the scheme and (b) the appropriateness of the use of delegated legislation (to be tabled in Parliament to facilitate parliamentary scrutiny).**

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



## **Social Services Legislation Amendment (Family Measures) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Social Services

### **Background**

This bill amends the *A New Tax System (Family Assistance) Act 1999* and *A New Tax (Family Assistance) (Administration) Act 1999* to:

- reduce to six weeks the period during which family tax benefit Part A, and additional payments that rely on family tax benefit eligibility, will be paid to recipients who are outside Australia from 1 January 2016; and
- cease the large family supplement from 1 January 2016.

*The committee has no comment on this bill.*

## **Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill (No. 2) 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Social Services

### **Background**

This bill amends the *A New Tax System (Family Assistance) Act 1999* and *Social Security Act 1991* to:

- increase family tax benefit (FTB) Part A fortnightly rates by \$10.08 for each FTB child in the family up to 19 years of age; restructure family tax benefit Part B by increasing the standard rate by \$1000.10 per year for families with a youngest child aged under one;
- maintaining certain standard rates for families, single parents who are at least 60 years of age, grandparents and great-grandparents; and introducing a reduced rate of \$1000.10 per year for individuals with a youngest child aged 13 to 16 years of age who are not single parents aged 60 or more or grandparents or great-grandparents; and
- phase out the family tax benefit Part A and Part B supplements; and
- increase certain youth allowance and disability support pension fortnightly rates by approximately \$10.44 for recipients under 18 years of age.

The bill also amends the *A New Tax System (Family Assistance) (Administration) Act 1999* to make consequential amendments

*The committee has no comment on this bill.*

## **Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Social Services

### **Background**

This bill amends the *Social Security Act 1991* in relation to:

- special benefit payments;
- assessment of full-time study load for youth allowance and Austudy payments;
- the definition of new apprentices;
- exemptions from the assets test for Austudy payments;
- indexation of the pharmaceutical allowance;
- calculating allowable income for the purposes of step 2 of the health care card income test calculator; and
- make technical corrections.

The bill also amends the *A New Tax (Family Assistance)(Administration) Act 1999* to re-align the time period for income reconciliation for certain family tax benefit recipients and remove a delegation provision.

*The committee has no comment on this bill.*

## **Tax and Superannuation Laws Amendment (2015 Measures No. 6) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill amends the *Income Tax Assessment Act 1997* and *Taxation Administration Act 1953* to:

- change the capital gains tax treatment of the sale and purchase of businesses involving certain earnout rights (rights to future payments linked to the performance of an asset or assets after sale); and
- impose withholding obligations on the purchasers of certain Australian assets.

The bill also makes consequential amendments to five Acts.

### **Retrospective application Schedule 1, items 38 and 39**

The amendments in Schedule 1 of this bill modify the capital gains tax treatment of the sale and purchase of businesses involving rights to future payments linked to the performance of an asset or assets after sale.

The amendments will apply from 24 April 2015 (item 38), which was the date draft legislation to give effect to these measures was made publicly available. The proposal to introduce these measures was first announced as part of the 2010-11 Budget and, on 14 December 2013, the government announced that it would proceed with proposed amendments.

Item 39 provides for transitional rules that will protect taxpayers who ‘have reasonably and in good faith anticipated changes to the tax law in this area as a result of the announcement by the former Government’ (explanatory memorandum, p. 39). This protection will operate by reference to section 170B of the *Income Tax Assessment Act 1936*. The effect is to place ‘a statutory bar on the Commissioner amending an income tax assessment in relation to a particular contained in a statement, to the extent that the particular represents the taxpayer’s reasonable anticipation of the announced changes to the law and satisfies the timing conditions’ (p. 39).

In light of the assurance that ‘no taxpayer will be disadvantaged as a result of the retrospective application of these provisions’ (statement of compatibility p. 41), the committee makes no further comment on these provisions.

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

## **Tax Laws Amendment (Implementation of the Common Reporting Standard) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill amends the *Taxation Administration Act 1953* to:

- require financial institutions to carry out Common Reporting Standard due diligence procedures to identify reportable accounts held by foreign tax residents and provide statements about those accounts;
- require financial institutions to provide a statement in relation to certain accounts if they receive a notice requiring them to do so; and
- provide for administrative penalties when financial institutions fail to collect account holder self-certifications about the jurisdiction of residence for tax purposes; and require financial institutions to keep records for at least five years that explain the procedures used for identifying these accounts.

The bill also makes consequential amendments to the *Income Tax Assessment Act 1997*, *Tax and Superannuation Laws Amendment (2015 Measures No. 5) Act 2015* and *Taxation Administration Act 1953*.

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

#### **General**

The bill engages the right to privacy as it involves the sharing of personal information with other jurisdictions if a relevant information-sharing agreement is in place. The scheme is part of an effort to develop a global, standardised model for information reporting and exchange between jurisdictions as a response to tax evasion.

**In light of the comprehensive discussion of individual privacy interests in the statement of compatibility, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*The committee draws Senators' attention to this matter 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 (New Tax System for Managed Investment Trusts) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Treasury

### **Background**

This bill is part of a package of four bills to establish a new tax system for certain managed investment trusts.

The bill amends various Acts relating to taxation to:

- establish the new class of attribution managed investment trusts (AMIT);
- enable the Commissioner of Taxation to determine an amount of non-arm's length income in relation to a managed investment trust (MIT);
- provide that a member of an AMIT will make a capital gain or capital loss when a capital gains tax event happens to their membership interests;
- provide that fund payment withholding provisions apply when a withholding MIT makes a fund payment to another entity that has a place of payment or address outside Australia;
- exclude certain superannuation funds and exempt entities from the application of the 20 per cent tracing rule for public trading trusts;
- repeal the corporate unit trust rules; and
- extend the list of entities qualifying as eligible investors for the purpose of the *widely held* requirements.

The bill also amends thirteen Acts to make consequential amendments.

*The committee has no comment on this bill.*

## **Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Communications

### **Background**

This bill amends the *Telecommunications Act 1997* (Tel Act), the *Competition and Consumer Act 2010* (CCA) and the *National Broadband Network Companies Act 2011* (NBN Companies Act) to:

- clarify that the facilities access regime processes in the CCA have precedence over those in this Tel Act;
- provide that certain access providers are to give access to in-building cabling that they own or control when the cabling is necessary for the supply of an active declared service;
- introduce an exemption to NBN corporations' (such as NBN Co) and other relevant carriers' non-discrimination obligations for the purpose of conducting pilots or trials of new eligible services;
- require the Australian Competition and Consumer Commission (ACCC), in finalising an access determination, to take into account the method it uses to determine terms and conditions for NBN Co and others;
- require the ACCC to consult before making an interim access determination or a binding rule of conduct;
- amend the process for submission and approval of new or varied special access undertakings;
- provide the person submitting a special access undertaking with flexibility as to how they respond to changes required by the ACCC;
- amend the provisions in the CCA dealing with the ACCC's consideration of fixed principles provisions in new or varied special access undertakings;
- require the ACCC to have regard to relevant fixed principles terms and conditions included in previous access determinations or special access undertakings when considering new access determinations or special access undertakings; and



- enable NBN Co's line of business restrictions to be changed through regulation.

*The committee has no comment on this bill.*

## **Telecommunications (Numbering Charges) Amendment Bill 2015**

Introduced into the House of Representatives on 2 December 2015

Portfolio: Communications

### **Background**

This bill amends the *Telecommunications (Numbering Charges) Act 1997* to make consequential amendments to reflect that the allocation to, and holding of, numbers by carriage service providers (for which charges arise under the Act) could in future be managed in accordance with an industry-based scheme.

*The committee has no comment on this bill.*

## **Water Amendment (Review Implementation and Other Measures) Bill 2015**

Introduced into the House of Representatives on 3 December 2015

Portfolio: Agriculture and Water Resources

### **Background**

This bill amends the *Water Act 2007* to:

- provide for five-yearly reviews of the social and economic impacts of the Basin Plan 2012 (the Basin Plan) and postpone some Basin Plan reviews;
- clarify arrangements for accreditation of first generation state water resource plans and provide for future accreditation to be linked to Basin Plan review outcomes;
- provide increased flexibility for the Commonwealth Environmental Water Holder to trade by allowing investment in other non-water environmental activities;
- provide for greater incorporation of Indigenous expertise and knowledge in the governance of the Basin's water resources;
- repeal Part 5 of the Water Act;
- clarify definitions relating to irrigation operators;
- allow the water charge rules to provide that the Australian Competition and Consumer Commission can extend the period of effect of a determination or approval of regulated water charges; and
- make minor administrative and technical amendments.

*The committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

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

*[Digest 11/15 – no comment]*

On 30 November 2015 the Senate agreed to five Opposition amendments and the bill was read a third time.

On 1 December 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

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

### **Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015**

*[Digest 12/15 – no comment]*

On 2 December 2015 the Senate agreed to:

- 24 Government amendments (two amended by Independent (Lazarus) and Australian Motoring Enthusiast Party); and
- a request for an amendment to be made by the House of Representatives.

The Minister for Education and Training (Senator Birmingham) tabled a supplementary memorandum and the House of Representatives made the Senate's requested amendment to the bill.

On 3 December 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

#### **Merits review**

#### **Government amendment (16) on sheet GZ155 (as amended by Lazarus-AMEP (2) on sheet 7835)**

This amendment (as amended) adds six new items to the table in clause 91 of Schedule 1A to the *Higher Education Support Act 2003* (the HESA). Clause 91 sets out the decisions that are made under Schedule 1A that are 'reviewable VET decisions' and are therefore subject to reconsideration and

then review by the Administrative Appeals Tribunal. **The committee takes this opportunity to seek the Minister’s advice as to what decisions made under Schedule 1A are not ‘reviewable VET decisions’ and the rationale for excluding these decisions from this review mechanism.**

**Delegation of power to ‘a person’  
Government amendment (25) on sheet GZ155**

This amendment relates to subclause 39GA(1) of Schedule 1A to the HESA. The amendment will enable the Secretary to appoint any person (rather than being confined to an APS employee in the Department) as an investigator. The supplementary explanatory memorandum (at p. 18) states that:

There are times when the Department does not have the internal expertise to carry out particular types of investigation and may want to appoint another person or body with relevant expertise, including persons or bodies outside the public service. Equally, there are times when there are competing compliance priorities and additional capacity is required for investigations. This amendment gives the Department the flexibility to appoint other persons or bodies as required. The proposed subclause 39GA(3) of Schedule 1A to the Act will apply to ensure that any person so appointed must have the knowledge or experience necessary to properly exercise the powers of such an investigator.

**The committee notes this explanation, but seeks further advice from the Minister as to:**

- **examples of the types of persons or bodies outside the public service that may be appointed as an investigator under this provision; and**
- **whether it would be possible to provide any further limits or safeguards on the power to appoint investigators outside the public service (beyond the requirement in subclause 39GA(3) that the person must be considered to have appropriate knowledge and experience). In this regard the committee notes that if an investigator is appointed from outside the public service that person would not automatically be subject to the APS Values and Code of Conduct.**

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

*[Digest 14/15 – no response required]*

On 1 December 2015 the House of Representatives agreed to 23 Government amendments and the Assistant Minister to the Treasurer (Mr Hawke) presented a supplementary explanatory memorandum.

**The committee notes that government amendment (23) removed schedule 5 from the bill. This schedule would allow for an interest charge to be applied to certain debts incurred by recipients of Austudy payment, fares allowance, youth allowance for full-time students and apprentices, and ABSTUDY Living Allowance.**

**The committee draws Senators' attention to the comments it made in relation to the retrospective effect of this schedule on page 17 of the committee's Alert Digest No. 14 of 2015.**

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

*[Digest 11/15 – no response required]*

On 3 December 2015 the Senate resolved not to insist on three amendments to which the House of Representatives had disagreed, but agreed to four Australian Greens amendments in place of those amendments.

On the same day the House of Representatives agreed to the new Senate amendments and the bill was passed.

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

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

*[Digest 7/15 – no comment]*

On 30 November 2015 the Senate agreed to three Government amendments and the Minister for Defence (Senator Payne) tabled a supplementary explanatory memorandum. On 1 December 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

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

## SCRUTINY OF STANDING APPROPRIATIONS

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

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

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

### **Bills introduced with standing appropriation clauses in the 44<sup>th</sup> Parliament since the previous Alert Digest was tabled:**

Nil

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

Nil