

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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Senate Standing Legislation Committee Inquiries

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.

Broadcasting Legislation Amendment (Media Reform) Bill 2016

Purpose	This bill amends the <i>Broadcasting Services Act 1992</i> to: <ul style="list-style-type: none">• repeal two media ownership and control rules; and• introduce new local programming obligations for regional commercial television broadcasting licensees where a change in control, known as a trigger event, results in a licence forming part of a group of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the Australian population
Portfolio	Communications and the Arts
Introduced	House of Representatives on 1 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee has no comment on this bill.

Budget Savings (Omnibus) Bill 2016

Purpose	This bill contains 24 measures which, if implemented, would result in \$6 billion in savings
Portfolio	Treasury
Introduced	House of Representatives on 31 August 2016

This bill is an omnibus bill which proposes amendments across a large number of portfolios. It includes some measures introduced in the previous Parliament, as well as new measures.

Given the short timeframe for the committee to consider this bill, the comments below relate to matters it has identified as being reintroduced from the previous Parliament. The committee will finalise its consideration and, if necessary, comment on other measures in this bill in a future report.

Parliamentary scrutiny—distinguishing new and previously introduced measures

General comment

Consistent with its previous comments in relation to omnibus bills, the committee considers that it would assist Parliamentary scrutiny if the explanatory memorandum to the bill identified whether measures are new or whether they reflect items previously introduced. This would enable Senators and others with an interest in the matters covered in the bill to quickly identify which measures are completely new and have not yet been considered by the Parliament. **The committee therefore seeks the Treasurer’s advice as to whether the explanatory memorandum to the bill can be amended:**

- **to specify whether each item in the bill is a new or previously introduced measure; and**
- **in the case of previously introduced measures, to identify:**
 - **the previous bill containing those measures; and**
 - **whether there have been any significant changes to the measure in this latest bill.**

For an example of a similar approach which clearly identified replicated measures in a bill see the addendum to the explanatory memorandum for the Omnibus Repeal Day (Spring 2015) Bill 2015 tabled in the Senate on 2 February 2016.

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

**Parliamentary scrutiny—section 96 grants to the States
Schedule 9 (Dental services), item 5, proposed section 7F of the
*Dental Benefits Act 2008***

Proposed section 7E empowers the Commonwealth executive to enter into agreements with the States relating to financial assistance for the provision of dental services. Proposed paragraph 7F(2)(a) provides that the terms and conditions applying to the grants are those set out in the relevant agreement between the Commonwealth and the State. In addition, other terms and conditions may be determined by the Minister by legislative instrument (proposed paragraph 7F(2)(b) and proposed subsection 7F(3)).

In relation to other terms and conditions determined by the Minister under proposed subsection 7F(3), the explanatory memorandum (at p. 74) states that:

The ability for the Minister to set additional terms and conditions is intended as a reserve power to cover unforeseen circumstances. As any such terms and conditions will be in a legislative instrument they will be subject to Parliamentary scrutiny and potential disallowance.

The committee notes this explanation and the fact that any terms and conditions determined under this provision will be subject to Parliamentary scrutiny and disallowance and therefore makes no further comment in relation to this aspect of the setting of terms and conditions applying to these dental services grants.

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

However, in relation to the terms and conditions set out in agreements between the Commonwealth and State executive governments (proposed

paragraph 7F(2)(a)), the committee notes that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution. If this provision is agreed to and the Parliament is therefore delegating this power to the Executive in this instance, the committee considers that it is appropriate that the exercise of this power be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their State or Territory.

Noting this, the committee welcomes the fact that the government ‘intends that agreements made under this section will be published on the COAG website’ (explanatory memorandum, p. 74). However, the committee notes that there is no legislative requirement for this to occur, nor is there any requirement to table the agreements in the Senate within a specified period after they are made (which would ensure that the Senate would be proactively made aware of any agreements made under proposed section 7E).

The committee therefore seeks the Treasurer’s advice as to whether the bill can be amended to include a requirement that agreements with the States about grants of financial assistance relating to dental services made under proposed section 7E are:

- **tabled in the Parliament within 15 sitting days after being made; and**
- **published on the internet within 30 days after being made.**

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

Delegation of legislative power

Schedule 9 (Dental services), item 5, proposed paragraph 7G(2)(b) and subsection 7G(3) of the *Dental Benefits Act 2008*

Proposed section 7G provides that the level of financial assistance payable under the dental services scheme is subject to a statutory funding cap of \$175 million in 2016-17. However, proposed paragraph 7G(2)(b) and subsection 7G(3) provide the Minister for Health with the ability to reduce the cap in 2016-17 by disallowable instrument. The explanatory memorandum (at p. 74) states that this power is necessary because:

...the Government has decided that it wishes to spend a total of \$415.6 million on dental services in 2016-17 under this part of the Act, the Child Dental Benefits Schedule and the National Partnership Agreement on Adult Public Dental Services. At this stage the amount that will be spent under the Child Dental Benefits Schedule for the period July to December 2016 is unknown. The cap in 2016-17 of \$175,000,000 has been included in the Act as the maximum amount that could be available for spending under this part of the Act. The Minister will make an instrument setting a lower amount if required once actual expenditure under the Child Dental Benefits Schedule for the period July to December 2016 is available.

The committee notes this explanation, and the fact that any instrument made under this provision would be subject to Parliamentary scrutiny and disallowance, and therefore makes no further comment.

In the circumstances, the committee makes no further comment in relation to this provision.

General comment

Schedule 13 (Debt recovery)

The committee commented on the measures in schedule 13 when it considered the Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016 in the previous Parliament (see pages 385–390 of the committee's *Fifth Report of 2016*). **The committee takes this opportunity to re-state these comments (in relation to merits review, the privilege against self-incrimination and reversal of the evidential burden of proof) below.**

Freedom of movement

Merits review

Schedule 13 (Debt recovery), item 3, proposed section 102A of the *A New Tax System (Family Assistance) (Administration) Act 1999*

Section 102B makes it an offence to depart from Australia if a departure order in respect of the person is in force and the person has not been granted a departure authorisation certificate. Proposed section 102A empowers the Secretary to make a departure prohibition order if a person owes a debt to the Commonwealth under Part 4, there are no satisfactory arrangements for its recovery in place and the Secretary believes on reasonable grounds that it is desirable to make the order for the purpose of ensuring that the person does

not travel to a foreign country without paying the debt or there being satisfactory arrangements in place for it to be paid.

Proposed section 102H provides for circumstances where the Secretary must issue a departure authorisation certificate. Subsection 102H(3) provides that a departure authorisation certificate must be issued if the person has given security under section 102J for the person's return to Australia or if the Secretary is satisfied that the certificate should be issued on humanitarian grounds or that refusing to issue the certificate will be detrimental to Australia's interests.

Although the statement of compatibility (at p. 3) states that a person's rights to freedom of movement are 'enshrined in the capacity of the person to travel under a departure authorisation certificate on humanitarian grounds' it should be noted that the question of whether such grounds are established may be contestable and establishing these questions depends on the Secretary's 'satisfaction'. On the other hand, section 102R provides that an application for review of a decision of the Secretary under section 102H may be made to the Administrative Appeals Tribunal.

Although section 102N provides that an appeal from a decision to make a departure prohibition order may be made to the Federal Court of Australia or Federal Circuit Court of Australia, this is expressly made subject to Chapter III of the Constitution (and would, in any event, necessarily be read as subject to the Constitution). The result is that the appeal would be limited to questions about the legality of the decision rather than enabling the court to question the merits of the original decision. This means that the court would not be in a position to substitute its judgment for the Secretary's even if it thought the decision was not the correct or preferable decision on the established facts.

Especially given the significant impact on the right to freedom of movement constituted by the offence in section 102B (the operation of which depends on decisions made under sections 102A and 102H) and the potential breadth of operation of the provision it is unclear why merits review of the decision to make a departure prohibition order should not be available. The committee therefore sought the Minister's advice as to whether consideration had been given to providing for merits review of decisions made pursuant to section 102A.

The Minister responded to the committee in a letter received on 14 April 2016:

The Committee notes that appeals regarding the Secretary's power to make a departure prohibition order to the Federal Court of Australia or the Federal Circuit Court of Australia would be limited to questions about the legality of the decision, rather than enabling the court to question the merits of the original decision.

The Committee specifically questions why merits review of the decision to make a departure prohibition order should not be available.

Powers of review by the Administrative Appeals Tribunal (AAT) and the Federal Court were considered when drafting the Bill. The departure prohibition order provisions of the Bill were modelled upon similar arrangements applying in child support and taxation legislation. This was done in order to align administrative practices and to treat social welfare debtors in the same manner as those with child support and taxation debts.

The Secretary's power to make a departure prohibition order is onerous and discretionary. The conditions required to be satisfied for the Secretary to come to the position to make a departure prohibition order are prescribed at proposed subsection 102A(1) of the A New Tax System (Family Assistance) (Administration) Act 1999 in the Bill. The Secretary must take into consideration matters specified at subsection 102A(2), which are prescriptive at paragraphs (a), (b) and (c). Paragraph 102A(2)(d) provides that the Secretary also must have regard to 'such other matters as the Secretary considers appropriate'.

These provisions are mirrored in proposed amendments to the Paid Parental Leave Act 2010, Social Security Act 1991 and Student Assistance Act 1973.

The Committee should note that the use of the Secretary's power to make a departure prohibition order is a 'last resort' position following lengthy, unsuccessful efforts to engage with the debtor to enter into satisfactory arrangements for repayment of the debt. My Department will ensure that the Guide to Social Security Law, which will be used to assist the Secretary's decision-making process to determine whether to make a departure prohibition order, reflects this intent.

Under the current provisions of the Bill, a person against whom a departure prohibition order has been made can seek merits review of a refusal by the Secretary to issue a Departure Authorisation Certificate (certificate) to allow a temporary absence from Australia, or of a refusal to revoke or vary a departure prohibition order.

The Administrative Appeals Tribunal (AAT), standing in the shoes of the Secretary, can affirm the Secretary's decision to refuse to issue a certificate, or can set the decision aside. The AAT can also affirm the Secretary's decision that the departure prohibition order not be revoked or varied, or can set aside that decision. A request for review, by a person against whom a departure prohibition order has been made, of the decision to refuse to revoke or vary the order will be quicker and simpler at the AAT than an appeal to the Federal Court.

In my view, the Federal Court of Australia or the Federal Circuit Court of Australia is best placed to conduct judicial reviews of the Secretary's discretionary legislative power to ensure that the decision was properly made at that point in time and met the required legislative threshold.

I base this position on jurisprudence developed by the Federal Court in the context of taxation departure prohibition orders which indicates that a court has greater capacity under similar review provisions to inquire into the reasonableness of the grounds for the order, and thus into factual matters, than a court undertaking a purely judicial review.

Since 2001, departure prohibition orders have been available to restrict the movement of child support debtors from departing Australia where they have unpaid child support debts. In that time, of the several thousand decisions to make a departure prohibition order, only 17 matters have been appealed to the Federal Court of Australia or the Federal Circuit Court of Australia (or equivalent). This would suggest that the overwhelming majority of debtors subject to departure prohibition orders are accepting of the circumstances, with few seeking judicial review. Further, the provisions that allow temporary travel under certificates, ensures sufficient means for people to travel when required.

I anticipate that the existing review regime, provided in the Bill, will continue to provide satisfactory review mechanisms for persons subject to departure prohibition orders.

The committee thanked the Minister for this detailed response.

The committee noted that the proposed departure prohibition regime is modelled upon similar arrangements applying in child support and taxation legislation. The committee also welcomed the Minister's undertaking that the *Guide to Social Security Law* will specify that the use of the Secretary's power to make a departure prohibition order will be a position of 'last resort' following 'lengthy, unsuccessful efforts to engage with the debtor to enter into satisfactory arrangements for repayment of the debt'.

However, the committee remained concerned about the absence of merits review of a decision to make a departure prohibition order under proposed section 102A. In the committee's view, a Chapter III court will necessarily have more limited capacity (as it can only exercise judicial power) to inquire into the reasonableness of the order and factual matters (which are questions which directly concern the merits of an order) than would the AAT.

The committee drew these concerns to the attention of Senators and left the question of whether the proposed approach to the provision of merits review is appropriate to the consideration of the Senate as a whole, and does so again in this instance.

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

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

Schedule 13 (Debt recovery), item 3, proposed section 102T of the *A New Tax System (Family Assistance) (Administration) Act 1999*

Schedule 13 (Debt recovery), item 8, proposed section 200T of the *Paid Parental Leave Act 2010*

Schedule 13 (Debt recovery), item 13, proposed section 1257 of the *Social Security Act 1991*

Schedule 13 (Debt recovery), item 16, proposed section 43Z of the *Student Assistance Act 1973*

In the context of an officer of Customs or the Australian Federal Police seeking to enforce a departure prohibition order the officer may require a person seeking to depart Australia to answer questions or produce documents relevant to the order. A person is not excused from responding on the basis that the information might tend to incriminate them, which abrogates the usual privilege against self-incrimination.

The bill provides use and derivative use immunities (see proposed subsection 102T(2)) and the explanatory memorandum (at p. 168) provides the following justification for abrogating the privilege:

New section 102T provides that an individual is not excused from the requirement to answer questions or produce documents on the basis that to do so might tend to incriminate them or expose them to a penalty, as this information is essential for ensuring the effectiveness of the scheme. It is crucial that an officer can obtain information from an individual, through answers to questions and production of documents such as a departure authorisation certificate, to determine whether a person should be prevented from leaving the country under a departure prohibition order.

The same issue arises in relation to:

- Schedule 13 (Debt recovery), item 8, proposed section 200T of the *Paid Parental Leave Act 2010*;
- Schedule 13 (Debt recovery), item 13, proposed section 1257 of the *Social Security Act 1991*; and
- Schedule 13 (Debt recovery), item 16, proposed section 43Z of the *Student Assistance Act 1973*.

Noting the above explanation and the inclusion of use and derivative use immunities, the committee leaves to the Senate as a whole the question of whether the proposed abrogation of the privilege against self-incrimination is appropriate in this instance.

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

Trespass on personal rights and liberties—reversal of the evidential burden of proof

Schedule 13 (Debt recovery), item 3, proposed section 102S(4) of the *A New Tax System (Family Assistance) (Administration) Act 1999*

Schedule 13 (Debt recovery), item 8, proposed section 200S(4) of the *Paid Parental Leave Act 2010*

Schedule 13 (Debt recovery), item 13, proposed section 1256(4) of the *Social Security Act 1991*

Schedule 13 (Debt recovery), item 16, proposed section 43Y(4) of the *Student Assistance Act 1973*

The effect of these items is that the defendant bears an evidential burden in relation to certain matters.

Proposed subsection 102S(4) provides that an offence (relating to refusal or failure to comply with a requirement to answer questions or produce documents) does not apply if the person answers the question or produces the document to the extent that the person is capable. Subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on such an exception bears an evidential burden in relation to that matter.

The same issue arises in relation to:

- Schedule 13 (Debt recovery), item 8, proposed section 200S(4) of the *Paid Parental Leave Act 2010*;
- Schedule 13 (Debt recovery), item 13, proposed section 1256(4) of the *Social Security Act 1991*; and
- Schedule 13 (Debt recovery), item 16, proposed section 43Y(4) of the *Student Assistance Act 1973*.

The committee looks to the explanatory memorandum for a detailed justification for provisions that reverse the evidential burden of proof. The committee is particularly interested in whether:

- the matter is peculiarly within the knowledge of the defendant; or
- it would be significantly more difficult or costly for the prosecution to disprove the matter than for the defendant to establish it.

Explanatory material should directly address these matters and others outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. **As the explanatory memorandum does not appear to directly address these points, the committee seeks the Treasurer's advice as to the rationale for the proposed approach, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pages 50–51).**

Pending the 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.

**Explanatory memorandum
Schedule 13 (Debt recovery)**

In its *Fifth Report of 2016*, the committee requested that certain key information be included in the explanatory memorandum accompanying this measure, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

The committee takes this opportunity to thank the Minister for including further information in the new version of the explanatory memorandum as requested by the committee in its *Fifth Report of 2016*.

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

Purpose	This bill provides for the following amendments in relation to the re-establishment of the Australian Building and Construction Commission: <ul style="list-style-type: none">• repeal of the <i>Fair Work (Building Industry) Act 2012</i>;• minor consequential amendments to Commonwealth legislation that are relevant to the operation of the Building and Construction Industry (Improving Productivity) Bill 2013; and• several transitional provisions
Portfolio	Employment
Introduced	House of Representatives on 31 August 2016

General comment

As this bill is identical to a bill introduced in the previous Parliament the committee restates its views as outlined in *Alert Digest No. 9 of 2013* and its *Fourth Report of 2014*, both of which can be found on the committee's website at http://www.aph.gov.au/senate_scrutiny.

Building and Construction Industry (Improving Productivity) Bill 2013

Purpose	<p>This bill seeks to:</p> <ul style="list-style-type: none"> • replace the Office of the Fair Work Building Industry Inspectorate by re-establishing the Australian Building and Construction Commission; • enable the minister to issue a Building Code; • provide for the appointment and functions of the Federal Safety Commissioner; • prohibit certain actions; • provide the ABC Commissioner with powers to obtain information; • provide for orders for contraventions of civil remedy provisions and other enforcement powers; and • makes several miscellaneous amendments
Portfolio	Employment
Introduced	House of Representatives on 31 August 2016

General comment

As this bill is identical to a bill introduced in the previous Parliament the committee restates its views as outlined in *Alert Digest No. 9 of 2013* and its *Fourth* and *Sixth Reports of 2014*, all of which can be found on the committee's website at http://www.apf.gov.au/senate_scrutiny.

Competition and Consumer Amendment (Country of Origin) Bill 2016

Purpose	This bill clarifies the country of origin labelling requirements by amending the definition of substantial transformation as it applies to the safety harbour provisions and removing the 50 per cent production cost test
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives on 1 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee has no comment on this bill.

Corporations Amendment (Auditor Registration) Bill 2016

Purpose	This bill amends the <i>Corporations Act 2001</i> to ensure that auditors registered from 1 December 2005 on the basis of the CPA/ICAA competency standard, as approved by the Australian Securities and Investments Commission on 24 November 2004, are validly registered with effect from the date of their purported registration
Portfolio	Treasury
Introduced	House of Representatives on 1 September 2016 <i>This bill is identical to a bill introduced in the previous Parliament</i>

Retrospective validation

General comment

This bill proposes to retrospectively validate a legislative instrument that may otherwise be invalid as it was not lodged and registered as required by section 32 of the *Legislation Act 2003*. The legislative instrument is an auditing competency standard, approved by ASIC under section 1280A of the *Corporations Act 2001* in 2004, which had been produced by CPA Australia and the Institute of Chartered Accountants in Australia. The result is that the validity of the registration of an auditor on the basis of this standard since 1 December 2005 is uncertain.

The explanatory memorandum (at p. 3) acknowledges the retrospective operation of this amendment and states:

The retrospective effect of the amendments will not add any new regulatory requirements. Rather, the retrospective effect of the amendments is necessary to ensure that decisions and actions taken by auditors, the regulator and business which relied upon the enforceability and integrity of the Legislative Instrument are valid, and the retrospective effect of the Bill is necessary to provide certainty for those decisions and actions.

Given the nature of this instrument and the explanation provided the committee makes no further comment.

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

Customs Tariff Amendment (Tobacco) Bill 2016

Purpose	This bill amends the <i>Customs Tariff Act 1995</i> to increase the rate of excise equivalent customs duty on tobacco by four annual increases of 12.5 per cent a year, commencing on 1 September 2017
Portfolio	Treasury
Introduced	House of Representatives on 31 August 2016

The committee has no comment on this bill.

Excise Tariff Amendment (Tobacco) Bill 2016

Purpose	This bill amends the <i>Excise Tariff Act 1921</i> to increase the rate of excise duty on tobacco by four annual increases of 12.5 per cent a year, commencing on 1 September 2017
Portfolio	Treasury
Introduced	House of Representatives on 31 August 2016

The committee has no comment on this bill.

Fair Work (Registered Organisations) Amendment Bill 2014

Purpose	<p>This bill amends the <i>Fair Work (Registered Organisations) Act 2009</i> to:</p> <ul style="list-style-type: none">• establish the Registered Organisations Commission;• amend the requirements for officers' disclosure of material personal interests and change grounds for disqualification and ineligibility for office;• amend existing financial accounting, disclosure and transparency obligations; and• increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations
Portfolio	Employment
Introduced	House of Representatives on 31 August 2016

General comment

As this bill is identical to a bill introduced in the previous Parliament the committee restates its views as outlined in *Alert Digest No. 4 of 2015* and its *Fifth Report of 2015*, both of which can be found on the committee's website at http://www.aph.gov.au/senate_scrutiny.

International Tax Agreements Amendment Bill 2016

Purpose	This bill amends the <i>International Tax Agreements Act 1953</i> to give legislative effect to the Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance and its Protocol, signed at Berlin on 12 November 2015
Portfolio	Treasury
Introduced	House of Representatives on 1 September 2016

The committee has no comment on this bill.

Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016

Purpose	This bill amends the <i>Migration Act 1958</i> in relation to mandatory visa cancellation-related powers and the lawful disclosure of non-citizens' identifying information where a non-citizen is suspected of being of character concern
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 1 September 2016

General comment

As this bill is substantively similar to a bill introduced in the previous Parliament the committee restates its views outlined in the committee's *Fourth Report of 2016* (see pp 306–314). This report can be found on the committee's website at http://www.aph.gov.au/senate_scrutiny.

Migration Amendment (Family Violence and Other Measures) Bill 2016

Purpose	This bill amends the <i>Migration Act 1958</i> to introduce a sponsorship framework for the sponsored family visa program
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 1 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee has no comment on this bill.

National Cancer Screening Register Bill 2016

Purpose	This bill creates the legislative framework for the establishment and ongoing management of the National Cancer Screening Register
Portfolio	Health
Introduced	House of Representatives on 31 August 2016 <i>This bill is similar to a bill introduced in the previous Parliament</i>

Trespass on personal rights and liberties—privacy

General comment

Clause 11 of the bill provides for the proposed National Cancer Screening Register to include certain key information about individuals, including personal identifying information, and information about individuals' screening tests, diagnosis with a designated cancer or precursor to a designated cancer, and nominated healthcare provider. The statement of compatibility (at p. 4) states that these authorised collections, recordings, uses and disclosures are designed 'to ensure that the National Cervical Screening Program and the National Bowel Cancer Screening Program function effectively by allowing the appropriate sharing of information'. The consequences of the bill for privacy interests are set out in the statement of compatibility at pages 4–5.

Clause 14 of the bill allows individuals to opt out of participation in the screening programs. The explanatory memorandum (at p. 19) states that:

Individuals may elect to opt off from, or defer, receiving invitations to screen, test kits, or reminders to rescreen or undergo follow-up tests or procedures. Individuals may also elect not to have information relating to their screening test or diagnosis recorded in the Register.

An individual may opt-off from or defer screening for a designated cancer by using the Register self-service facility, contacting the register operator, or during a consultation with their healthcare provider. Individuals have the option to opt-off screening for a designated cancer at any point and opt back in whenever they choose.

Paragraph 14(1)(c) of the bill allows an individual to elect not to have information notifiable under clause 13 included in the Register. In relation to this paragraph, the explanatory memorandum (at p. 19) notes that:

This provision operates prospectively, that is, any information related to the individual that has already been collected by the Register prior to receiving the request from the individual will remain in the Register. This will allow consistent, complete and accurate data for reporting and statistical purposes to ensure Register data is not compromised by retrospective removal of information.

The committee notes the options available to opt out of participation, but in light of the potential impact of this bill on the privacy interests of individuals the committee seeks the Minister’s advice as to:

- **whether consideration was given to framing the register as an opt-in initiative (for example, by allowing doctors and other health care professionals to include their patients on the register after receiving their consent), rather than requiring individuals to actively opt-out; and**
- **the rationale for not allowing individuals to elect to have all their information removed from the Register under paragraph 14(1)(c) of the bill (for example, the committee seeks further information as to how retrospective removal of information would compromise Register data).**

Pending the Minister’s reply, the committee draws Senators’ attention to this bill 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—privacy Inappropriate delegation of legislative power Subclause 11(g)

Subclause 11(g) provides that the register may include further information relevant to the purposes of the register and prescribed by the rules. The explanatory memorandum suggests that providing this level of flexibility is necessary as ‘rapidly advancing technology or changes in screening tests’ may mean that ‘the range of information that needs to be collected may also change and is difficult to predict’ (at p. 14).

Although the need for some flexibility in light of changing technology may be accepted, **the committee seeks the Minister’s advice as to whether consideration has been given to including in the bill a specific requirement to consult the Privacy Commissioner prior to the making of rules under subclause 11(g).**

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

**Trespass on personal rights and liberties—privacy
Inappropriate delegation of legislative power
Subparagraph 17(3)(a)(iv)**

Subparagraph 17(3)(a)(iv) authorises a person to collect, make a record of, disclose or otherwise use protected information for the purposes of the Register if that person is a ‘prescribed body’.

As there is no explanation for the inclusion of this provision in the explanatory materials accompanying the bill, the committee seeks the Minister’s advice as to:

- **the rationale for, and necessity of, this provision; and**
- **how adequate control over personal information is to be maintained in relation to these (yet to be determined) prescribed bodies.**

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

National Cancer Screening Register (Consequential and Transitional Provisions) Bill 2016

Purpose	<p>This bill amends various Acts to:</p> <ul style="list-style-type: none">• authorise the disclosure of specified information kept on the Australian Immunisation Register to the National Cancer Screening Register;• exempt register information from disclosure in response to a freedom of information request; and• enable the ongoing provision of Medicare enrolment and claims data to the register
Portfolio	Health
Introduced	<p>House of Representatives on 31 August 2016</p> <p><i>This bill is similar to a bill introduced in the previous Parliament</i></p>

The committee has no comment on this bill.

National Disability Insurance Scheme Savings Fund Special Account Bill 2016

Purpose	This bill establishes the National Disability Insurance Scheme Savings Fund Special Account to assist the Commonwealth to meet its funding obligations in relation to the National Disability Insurance Scheme
Portfolio	Social Services
Introduced	House of Representatives on 31 August 2016 <i>This bill is identical to a bill introduced in the previous Parliament</i>

The committee has no comment on this bill.

Primary Industries Levies and Charges Collection Amendment Bill 2016

Purpose	This bill amends the <i>Primary Industries Levies and Charges Collection Act 1991</i> to enable levy and charge payer information to be provided to rural research and development corporations for the purpose of developing levy payer registers. The bill also makes consequential amendments to various Acts
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 31 August 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>
Status	Passed both Houses on 12 September 2016

The committee has no comment on this bill.

Racial Discrimination Amendment Bill 2016

Purpose	This bill amends the <i>Racial Discrimination Act 1975</i> to amend section 18C to remove the words ‘offend’ and ‘insult’
Sponsors	Senators Bernardi, the Hon Eric Abetz, Back, Burston, Bushby, Culleton, Day, Duniam, Fawcett, Hanson, Hinch, Leyonhjelm, the Hon Ian Macdonald, McKenzie, O’Sullivan, Paterson, Reynolds, Roberts, Smith, Williams
Introduced	Senate on 31 August 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee has no comment on this bill.

Registration of Deaths Abroad Amendment Bill 2016

Purpose	<p>This bill amends the <i>Registration of Deaths Abroad Act 1984</i> to:</p> <ul style="list-style-type: none"> • enable the minister to appoint any state or territory registrar as the Registrar of Deaths Abroad; • validate the prior appointment of the ACT Registrar-General as the registrar and validate any previous registrations of deaths; • enable the registrar to register deaths that could have been registered under the law of a state or territory, where the state or territory concerned has provided notice that it will not register a death; and • ensure that only the registrar can register deaths
Portfolio	Foreign Affairs and Trade
Introduced	<p>House of Representatives on 31 August 2016</p> <p><i>This bill is identical to a bill introduced in the previous Parliament</i></p>
Status	Passed both Houses on 12 September 2016

The committee has no comment on this bill.

Social Services Legislation Amendment (Budget Repair) Bill 2016

Purpose	<p>This bill amends the <i>Social Security Act 1991</i> to:</p> <ul style="list-style-type: none">• 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; 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 <p>The bill also amends various Acts relating to social security and veterans' entitlements to abolish the pensioner education supplement and education entry payment</p>
Portfolio	Social Services
Introduced	House of Representatives on 1 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee has no comment on this bill.

Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2016

Purpose	<p>This bill amends Acts relating to family assistance and social security to:</p> <ul style="list-style-type: none"> • 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; • 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
Portfolio	Social Services
Introduced	<p>House of Representatives on 1 September 2016</p> <p><i>This bill is substantively similar to a bill introduced in the previous Parliament</i></p>

The committee has no comment on this bill.

Social Services Legislation Amendment (Youth Employment) Bill 2016

Purpose	<p>This bill amends the <i>Social Security Act 1991</i> to:</p> <ul style="list-style-type: none">• make changes to the ordinary waiting period for working age payments;• delay the start date for the measure increasing the age of eligibility for newstart allowance and sickness allowance;• introduce a revised four-week waiting period for youth income support; and• implement the ‘Rapid Activation’ for ready job seekers aged under 25 years <p>The bill also makes consequential amendments to the <i>Farm Household Support Act 2014</i></p>
Portfolio	Social Services
Introduced	House of Representatives on 1 September 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

Delegation of legislative power

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

This subsection empowers the Secretary to prescribe, by legislative instrument, circumstances for the purpose of determining whether a person is experiencing a personal financial crisis and for the purpose of waiving the ordinary waiting period. The statement of compatibility suggests that the use of a legislative instrument provides the Secretary ‘with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences’. As such, the provision is said to allow the Secretary to ‘consider other unforeseeable or extreme circumstances...where it would be appropriate for a person to have immediate access to income support’ (at p. 1).

While the committee remains concerned as a matter of general principle about the delegation of legislative power in such circumstances, in light of the

explanation provided the committee draws the provision to the attention of Senators, but leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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

Statute Law Revision Bill 2016

Purpose	This bill amends 15 Acts to correct technical errors
Portfolio	Prime Minister
Introduced	House of Representatives on 30 August 2016

The committee has no comment on this bill.

Statute Law Revision (Spring 2016) Bill 2016

Purpose	<p>This bill:</p> <ul style="list-style-type: none"> • amends 19 Acts to correct technical errors; • inserts generic references in an Act; • removes obsolete provisions in two Acts; and • repeals the <i>Forestry Marketing and Research and Development Services (Transitional and Consequential Provisions) Act 2007</i>
Portfolio	Attorney-General
Introduced	<p>House of Representatives on 1 September 2016</p> <p><i>This bill is substantively similar to a bill introduced in the previous Parliament.</i></p>

The committee has no comment on this bill.

Statute Update Bill 2016

Purpose	<p>This bill amends various Acts to:</p> <ul style="list-style-type: none">• replace references to penalties expressed as a number of dollars with penalties expressed as a number of penalty units;• replace references to ‘maximum penalty’ with ‘penalty’;• provide that provisions relating to evidentiary status of a certificate (or other instrument or register) clearly provide that it is prima facie evidence of the matters stated in it; and• update references to aircraft registered in accordance with the Civil Aviation Regulations 1988
Portfolio	Attorney-General
Introduced	<p>House of Representatives on 1 September 2016</p> <p><i>This bill is substantively similar to a bill introduced in the previous Parliament</i></p>

General comment Schedule 1

Schedule 1 to the bill relates to references to dollar penalties in Commonwealth legislation. The committee considered a substantively similar version of this bill in its *Alert Digest No. 5 of 2016* (at pp 17–20). At that time the committee sought the Attorney-General’s advice as to whether the formula for converting dollar penalties under section 4AB of the *Crimes Act 1914* applies to existing regulation-making powers that authorise regulations to prescribe offences with penalties not exceeding an amount expressed in dollars. The explanatory memorandum to this version of the bill clarifies this matter (by confirming that section 4AB already applies to these provisions). **The committee thanks the Attorney-General for including this information and makes no comment in relation to the bill.**

The committee has no further comment on this bill.

Transport Security Amendment (Serious or Organised Crime) Bill 2016

Purpose	<p>This bill amends various Acts in relation to transport security to:</p> <ul style="list-style-type: none"> • seek to prevent the use of aviation and maritime transport or offshore facilities in connection with serious or organised crime; • establish a regulatory framework to implement harmonised eligibility criteria for the aviation security identification card (ASIC) and maritime security identification card (MSIC) schemes; • clarify and align the legislative basis for undertaking security checking of ASIC and MSIC applicants and holders; • provide for regulations to prescribe penalties for offences; and • insert an additional severability provision to provide guidance to a court as to Parliament's intention
Portfolio	Infrastructure and Regional Development
Introduced	<p>House of Representatives on 30 August 2016</p> <p><i>This bill is substantively similar to a bill introduced in the previous Parliament</i></p>

Delegation of legislative power

Schedule 1, item 4, proposed subsection 38AB(3) of the *Aviation Transport Security Act 2004* (the *Aviation Act*)

Schedule 1, item 12, proposed subsection 113F(2) of the *Maritime Transport and Offshore Facilities Security Act 2003* (the *Maritime Act*)

Proposed subsection 38AB(1) of the *Aviation Act* provides that the regulations may, for the purposes of preventing the use of aviation in connection with serious or organised crime, prescribe requirements in relation to areas and zones established under Part 3 of the Act. Subsection 38AB(3) provides that the regulations made under this section may prescribe penalties

for offences against those regulations. The subsection provides that for an offence committed by an operator the maximum penalty is 200 penalty units; for an industry participant, 100 penalty units; and for an accredited air cargo agent or any other person, 50 penalty units. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* suggests that penalties that exceed 50 penalty units should not normally be imposed by regulations.

The explanatory memorandum, however, states that these offence provisions 'are consistent with existing penalties in relation to access to secure aviation areas and zones in Part 3 of the Aviation Act'. Further, it is noted that prescribing maximum penalties in proposed subsection 38AB(3) 'provides for discretion to be applied in making regulations imposing penalties' and the approach 'also takes into consideration the need to provide an appropriate level of deterrence for the relevant classes of offenders' (see p. 6).

The same issue arises in relation to item 12, proposed subsection 113F(2) of the Maritime Act, which is discussed at p. 7 of the explanatory memorandum.

The committee considered a substantively similar version of this bill in the previous Parliament and at that time the minister with responsibility for the bill provided the following response to the concerns outlined above:

Proposed subsection 38AB(3) of the Bill, which amends the *Aviation Transport Security Act 2004* (Aviation Act), provides for regulations to be made prescribing maximum penalties of 200 penalty units for airport and aircraft operators, and 100 penalty units for aviation industry participants other than airport or aircraft operators or accredited air cargo agents. Similarly, proposed subsection 113F(2), which amends the *Maritime Transport and Offshore Facilities Security Act 2003* (Maritime Act), provides for regulations to be made prescribing maximum penalties of 200 penalty units for operators of ports, ships, port facilities and offshore facilities, with 100 penalty units for other maritime industry participants.

The Guide recommends that penalties exceeding 50 penalty units should not normally be imposed by regulations.

The primary object of the Bill is to introduce an additional purpose in the Aviation and Maritime Acts to prevent the use of security-relevant areas and zones at aviation and maritime facilities in connection with serious or organised crime. Currently, the Aviation and Maritime Acts are focused on securing such areas and zones solely for the purpose of preventing unlawful interference with aviation and maritime transport.

As explained in the explanatory memorandum to the Bill, any new penalties to be prescribed in the Aviation Transport Security Regulations 2005 (Aviation Regulations) and Maritime Transport and Offshore Facilities Security Regulations 2003 (Maritime Regulations) for the purpose of the new serious or organised crime provisions, will be consistent with existing penalties prescribed for similar offences within the Aviation and Maritime Regulations. This will ensure uniform implementation and enforcement of similar offences, which reflects the Guide's requirements that any penalties imposed should be consistent with penalties for existing offences of a similar kind, or of a similar seriousness.

I also note that the penalties specified in the Bill, and in the existing Aviation and Maritime Acts, take into the account body corporate multiplier rule identified in the Guide. This rule provides that penalties can be set five times higher for body corporates than for natural persons, which also applies to offences in subordinate legislation. The maximum penalty imposed in the Bill for natural persons (identified as 'any other persons' in the Bill) is 50 penalty units, which is consistent with the requirements under the Guide. However, in accordance with the Guide, higher maximum penalties are prescribed for industry roles undertaken by corporate entities. 'Aviation industry participants' and 'maritime industry participants' are corporate entities such as port operators or airlines.

Finally, by prescribing maximum penalties, the Bill provides for discretion to be applied in making regulations imposing any such penalties. The provisions of the Bill itself do not establish any offences or impose any penalties. (*Fifth Report of 2016*, pp 391–393)

In light of the explanation provided, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

In the circumstances, the committee makes no further comment on this issue

Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016

Purpose	<p>This bill amends various taxation Acts to:</p> <ul style="list-style-type: none">• reduce the corporate tax rate for small businesses with an aggregated turnover of less than \$10 million to 27.5 per cent for the 2016-17 financial year and progressively extend that lower rate to all corporate tax entities by the 2023-24 financial year;• further reduce the corporate tax rate in stages so that by the 2026-27 financial year, the corporate tax rate for all entities will be 25 per cent;• increase the small business income tax offset to 16 per cent of an eligible individual's basic income tax liability that relates to their total net small business income from the 2026-27 financial year;• enable small businesses with an aggregated turnover of less than \$10 million to access most small business tax concessions, and small businesses with an aggregated turnover of less than \$5 million to access the small business income tax offset; and• make consequential amendments
Portfolio	Treasury
Introduced	House of Representatives on 1 September 2016

The committee has no comment on this bill.

Treasury Laws Amendment (Income Tax Relief) Bill 2016

Purpose	This bill amends the <i>Income Tax Rates Act 1986</i> to increase the third personal income tax threshold so that the rate of tax payable on taxable incomes from \$80 001 to \$87 000 for individuals is 32.5 per cent
Portfolio	Treasury
Introduced	House of Representatives on 1 September 2016

The committee has no comment on this bill.

Commentary on amendments and additional explanatory materials

Budget Savings (Omnibus) Bill 2016

[Digest 6/16]

On 31 August 2016 the Treasurer (Mr Morrison) tabled a correction to the explanatory memorandum in the House of Representatives.

The committee has no comment on this correction to the explanatory memorandum.

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:

Budget Savings (Omnibus) Bill 2016 — Schedule 9, item 5, Part 1A, section 7K

Building and Construction Industry (Improving Productivity) Bill 2013 — Chapter 8, Part 2, Division 1, subclause 81(7)

Other relevant appropriation clauses in bills

Fair Work (Registered Organisations) Amendment Bill 2014 — Schedule 1, Part 1, item 88, section 329EA (**SPECIAL ACCOUNT**: CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*)

National Disability Insurance Scheme Savings Fund Special Account Bill 2016 — Clause 5 (**SPECIAL ACCOUNT**: CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*)