

Senate Standing Committee
for the
Scrutiny of Bills

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Members of the Committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Jonathon Duniam	LP, Tasmania
Senator Jane Hume	LP, Victoria
Senator Janet Rice	AG, Victoria
Senator Murray Watt	ALP, Queensland

Secretariat

Ms Anita Coles, Acting Secretary
Mr Glenn Ryall, Principal Research Officer
Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

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

Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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Senate Standing Legislation Committee Inquiries

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

Commonwealth Electoral Amendment (Protect the Eureka Flag) Bill 2016

Purpose	This bill seeks to allow the Australian Electoral Commission to consider the historical and cultural context of flags and other symbols when assessing their use in political party logos
Sponsor	Ms King MP
Introduced	House of Representatives on 21 November 2016

The committee has no comment on this bill.

Corporations Amendment (Crowd-sourced Funding) Bill 2016

Purpose	This bill seeks to establish the regulatory framework to facilitate crowd-sourced funding offers by small unlisted public companies, provides new public companies that are eligible to crowd fund with temporary relief from reporting and corporate governance requirements that would normally apply and creates new exemption powers to provide emerging financial markets with a more tailored regulatory and licencing framework
Portfolio	Treasury
Introduced	House of Representatives on 24 November 2016 <i>This bill is a similar to a bill introduced in the previous Parliament</i>

Delegation of legislative power

Schedule 1, item 14, paragraphs 738G(1)(c) and 738G(1)(f)

This bill seeks to amend the *Corporations Act 2001* to facilitate crowd-sourced funding (CSF) by small, unlisted public companies. The bill will establish eligibility requirements for a company to fundraise via CSF, including disclosure requirements for CSF offers.

Proposed new subsection 738G(1) provides that CSF offers may be made if, among other things:

- ‘the securities are of a class specified in the regulations’ (proposed new paragraph 738G(1)(c)); and
- ‘any other requirements specified in the regulations are satisfied in relation to the securities or the offer’ (proposed new paragraph 738G(1)(f)).

In relation to proposed new paragraph 738G(1)(c), the explanatory memorandum (at p. 16) states that it is necessary to allow the class of securities eligible for crowd-funding to be specified in the regulations because ‘the CSF regime is new and is expected to evolve quickly’ and therefore ‘there is a need to have flexibility to quickly adjust the type of securities that

are eligible for crowd-funding’. Furthermore, it is suggested that the power is necessary so that ‘the Government can quickly amend the types of securities available on crowd-funding platforms to prevent a systematic issue from arising and maintain investor confidence’. The committee thanks the Minister for including this additional information in the explanatory memorandum which was provided in response to the committee’s comments on a similar version of this bill introduced in the previous Parliament (see *Second Report of 2016* at pp 64–72). **In light of this explanation, the committee makes no further comment in relation to the delegation of legislative power in proposed new paragraph 738G(1)(c).**

However, the committee takes this opportunity to note that there appears to be no information in the explanatory memorandum in relation to the broad power in proposed new paragraph 738G(1)(f) which, as noted above, allows the regulations to prescribe other requirements in relation to the securities or the CSF offer. The committee consistently expects that where important matters are left to be specified in regulations (rather than being included on the face of the primary legislation) the explanatory materials should clearly explain the rationale for the delegation of legislative power. **The committee therefore seeks the Treasurer’s advice as to the rationale for allowing the regulations to prescribe other requirements in relation to the securities or the CSF offer, including examples of circumstances in which it is envisaged that this power may be used.**

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

Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016

Purpose	This bill seeks to amend the <i>Corporations Act 2001</i> (Corporations Act) to raise the education, training and ethical standards of financial advisers by: <ul style="list-style-type: none"> • requiring relevant providers to hold a degree; • undertake a professional year; • pass an exam; and • undertake continuous professional development and comply with a Code of Ethics
Portfolio	Treasury
Introduced	House of Representatives on 23 November 2016

Judicial review of decisions of the standards body

General comment

The bill provides for the establishment of a new standards body to develop education standards and a Code of Ethics for financial advisers. There is no explanation in the explanatory materials as to whether decisions of the standards body will be subject to judicial review. The committee notes that the *Administrative Decisions (Judicial Review) Act 1977* does not apply to decisions of a legislative nature and the corporate status of the standards body (see proposed new section 921X) may mean that it does not qualify as an ‘officer of the Commonwealth’ and therefore it may not be susceptible to review under section 39B of the *Judiciary Act 1903* or section 75(v) of the Constitution.

Noting the significance of decisions to be made by the standards body (discussed below), the committee seeks the Minister’s advice as to whether, and under what jurisdiction, the standards body’s decisions, including legislative instruments, will be subject to judicial review.

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

**Delegation of legislative power—provisions allowing delegated legislation to modify the operation of primary legislation
Schedule 1, item 12, proposed new section 921U**

Proposed new section 921U sets out the functions of the standards body. Among other things, the functions of the standards body include making legislative instruments in relation to:

- education standards and a Code of Ethics for financial advisers (proposed new subsection 921U(2));
- modifying the operation of the Corporations Act in relation to requirements for financial advisers whose Continuing Professional Development year changes (proposed new subsections 921U(3) and (4)); and
- the requirements for supervision of provisional providers (proposed new subsection 921U(5)).

The committee notes that proposed section 921U may be characterised as a framework provision, in that it allows the proposed standards body to provide for many important details of the new regulatory scheme for financial advisers to be set out in a legislative instrument, rather than on the face of the bill. In relation to proposed new subsection 921U(5) the explanatory memorandum (at p. 20) states that ‘this approach ensures that specific technical requirements are set by the body with specialist knowledge and the requirements can be more easily updated when practices change’.

In light of this explanation and the fact that that legislative instruments made by the standards body will be subject to parliamentary disallowance, the committee leaves the general question of whether the delegation of legislative power in subsection 921U(5) is appropriate to the Senate as a whole.

However, proposed new subsections 921U(3) and (4) may be characterised as Henry VIII clauses as together they allow the operation of the Corporations Act to be modified by delegated legislation. The committee has consistently commented on such provisions as they may subvert the appropriate relationship between the Parliament and the Executive branch of government. There does not appear to be an explanation for this approach in the explanatory materials.

The committee seeks the Minister’s advice as to the rationale for allowing legislative instruments to modify the operation of the Corporations Act, including examples of the circumstances in which it is envisaged that this power may be used.

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

Judicial review—consultation

Schedule 1, item 12, proposed new subsection 921U(8)

Proposed new subsection 921U(6) provides that prior to making or reviewing a legislative instrument the standards body must consult financial services licensees and providers, associations representing consumers of financial services, professional associations, the Australian Security and Investment Commission (ASIC) and the Treasury, and any other person or body that the standards body considers it appropriate to consult. Proposed new subsection 921U(7) and the explanatory memorandum (at p. 66) confirm that the standards body will satisfy this consultation requirement by making the proposed legislative instrument available on its website and inviting persons to comment on it. However, proposed new subsection 921U(8) provides that if the standards body fails to comply with the consultation requirement, the legislative instrument nonetheless remains valid and enforceable.

The effect of proposed new subsection 921U(8) is that judicial review for a failure by the standards body to comply with the consultation obligations in proposed new subsection 921U(6) will lack utility. **Noting this, and the significance of the matters to be determined by the standards body by legislative instrument, the committee seeks the Minister’s advice as to the rationale for including proposed new subsection 921U(8) and whether there is an alternative mechanism (other than judicial review) through which the consultation requirements will be enforced.**

Pending the Minister’s reply, the committee draws Senators’ attention to the provision, as it 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.

Parliamentary scrutiny—fees

Schedule 1, item 12, proposed new subsection 921U(9)

Proposed new subsection 921U(9) provides that ‘the standards body may charge fees for things done in performing its functions’. The explanatory memorandum (at p. 66) suggests that the standards body may, for example, choose to charge a fee for individuals to sit the proposed exam. Furthermore, the explanatory memorandum states that ‘the body is not required, or expected, to recover all of its costs by charging a fee for service’. However, the legislation sets no limits on the amount of fee that could be charged by the standards body.

The committee notes that the power provided to the standards body to charge fees is broad and unconstrained and therefore seeks the Minister’s advice as to whether guidance or limitations in relation to charging of fees by the standards body can be included on the face of the bill.

Pending the Minister’s reply, the committee draws Senators’ attention to the provisions, as they 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.

Reversal of evidential burden of proof

Schedule 1, items 16 and 17, subsections 922M(2) and 923C(3)–(6)

Proposed subsection 922M(2) introduces an exception to an existing offence of failing to comply with an obligation to notify ASIC, and proposed subsections 923C(3)–(6) introduce exceptions to the new restrictions on the use of the terms ‘financial adviser’ and ‘financial planner’. Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The committee’s consideration of the appropriateness of a provision which reverses the burden

of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (see in particular pp 50–52).

As neither the statement of compatibility nor the explanatory memorandum address this issue the committee seeks a justification from the Minister as to why the items propose to reverse the evidential burden of proof which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50–52).

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

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Purpose	<p>This bill seeks to amend a number of Acts relating to the criminal law, law enforcement and background checking to:</p> <ul style="list-style-type: none">• ensure Australia can respond to requests from the International Criminal Court and international war crimes tribunals;• amend the provisions on proceeds of crime search warrants, clarify which foreign proceeds of crime orders can be registered in Australia and clarify the roles of judicial officers in domestic proceedings to produce documents or articles for a foreign country, and others of a minor or technical nature;• ensure magistrates, judges and relevant courts have sufficient powers to make orders necessary for the conduct of extradition proceedings;• ensure foreign evidence can be appropriately certified and extend the application of foreign evidence rules to proceedings in the external territories and the Jervis Bay Territory;• amend the vulnerable witness protections in the <i>Crimes Act 1914</i>;• clarify the operation of the human trafficking, slavery and slavery-like offences in the <i>Criminal Code Act 1995</i>;• amend the reporting arrangements under the <i>War Crimes Act 1945</i>;• ensure the Australian Federal Police’s alcohol and drug testing program and integrity framework is applied to the entire workforce and clarify processes for resignation in cases of serious misconduct or corruption;• provide additional flexibility regarding the method and timing of reports about outgoing movements of physical currency, allowing travellers departing Australia to report cross-border movements of physical currency electronically;
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<p>Portfolio</p> <p>Introduced</p>	<ul style="list-style-type: none"> • include the Australian Charities and Not-for-profits Commission in the existing list of designated agencies which have direct access to financial intelligence collected and analysed by AUSTRAC enabling it to access AUSTRAC information; • clarify use of the Australian Crime Commission’s prescribed alternative name; and • permit the AusCheck scheme to provide for the conduct and coordination of background checks in relation to major national events <p>Justice</p> <p>House of Representatives on 23 November 2016</p>
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Reversal of evidential burden of proof Schedule 1, items 6 and 95

Items 6 and 95 of Schedule 1 introduce new exceptions to existing offences. Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The committee’s consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (see in particular pp 50–52).

As neither the statement of compatibility nor the explanatory memorandum address this issue the committee seeks a justification from the Minister as to why the items propose to reverse the evidential burden of proof which addresses the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 50–52).

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

**Right to liberty
Schedule 3, items 1 and 2**

Items 1 and 2 of Schedule 3 provide that where a person has been released on bail and a surrender or temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant.

The explanatory materials state that the provision gives courts the power to remand the person into custody (pp 23 and 162–163). However, the provision is more than an enabling provision; it is phrased as an obligation to commit the person to prison, without any discretion as to whether this is appropriate in all the circumstances.

The explanatory memorandum states that it is appropriate that the person be committed to prison to await surrender as an extradition country has a period of two months in which to effect surrender and '[c]orrectional facilities are the only viable option for periods of custody of this duration' (p. 162). The statement of compatibility states that without this provision the police may need to place the person in a remand centre, for a period of up to two months, yet remand centres 'do not have adequate facilities to hold a person for longer than a few days' (p. 24). The statement of compatibility also states that the power to remand a person pending extradition proceedings is necessary as reporting and other bail conditions 'are not always sufficient to prevent individuals who wish to evade extradition by absconding'. It also goes on to provide that the *Extradition Act 1988* makes bail available in special circumstances which ensures that 'where circumstances justifying bail exist, the person will not be kept in prison during the extradition process' (p. 24). However, it is unclear how these existing bail provisions fit with the amendments which require the magistrate, judge or court to commit a person, already on bail, to prison to await surrender under the warrant.

The committee seeks the Minister's advice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail

process under the *Extradition Act 1988* fits with the amendments proposed by this bill.

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

Broad delegation of administrative powers Schedule 4, item 3

Item 3 of Schedule 4 proposes repealing section 26 of the *Foreign Evidence Act 1994* and replacing it with a new, substantially similar, provision. The section as it currently stands provides that the Attorney-General and an authorised officer can certify that a specified document or thing was obtained as a result of a request made to a foreign country by or on behalf of the Attorney-General. This certificate provides prima facie evidence to a court of the matters stated in the certificate. Subsection (3) (as it currently stands) defines an authorised officer for this purpose as a person who is a Senior Executive Service (SES) level employee (or acting SES) in the Attorney-General's Department. The bill proposes to omit subsection (3) (and allow the Attorney-General to issue the evidentiary certificate). The explanatory memorandum (at p. 164) states that the reason for the omission of subsection (3) is that it is now proposed to rely on the delegation of the Attorney-General's power under section 17 of the *Law Officers Act 1964*. The explanatory memorandum states that a delegation under this provision 'would be to a person with an appropriate level of seniority, not below the executive level, who has a close involvement in the matters to be certified'.

However, section 17 of the *Law Officers Act 1964* relevantly provides that the Attorney-General can delegate his or her powers to any person holding the office specified in the instrument of delegation. There does not appear to be any limit on the level or type of employee who may be specified in the instrument of delegation.

The committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The

committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made (either through the bill or through other legislation), the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

In this case, the explanatory memorandum (at p. 164) states the reason for removing the limit on the power of delegation as allowing for 'reliability, flexibility and promptness, with sufficient oversight'. However, it is not clear to the committee why the bill proposes removing any detail regarding the office-holder who may be delegated this important function. The explanatory memorandum states that the delegation will not be to persons below the executive level, yet there is nothing on the face of the bill (or in section 17 of the *Law Officers Act 1964*) which restricts the delegation in this way.

The committee seeks the Minister's detailed justification for the rationale for removing the limit on the delegation of the Attorney-General's power to issue an evidentiary certificate and whether the delegation could be confined on the face of the legislation to Australian Public Service employees not below the executive level.

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Retrospective application Schedule 4, item 6

Items 1 and 2 of Schedule 4 provide that the *Foreign Evidence Act 1994* applies to proceedings conducted in State or Territory courts in relation to the external territories and the Jervis Bay Territory, and ensures that the part of that Act applying to certain proceeds of crime proceedings will apply to prescribed external territories. Item 6 of Schedule 4 provides that these amendments will apply in relation to proceedings that commence before or after commencement of the item.

There is no discussion in the explanatory materials as to whether applying these amendments to proceedings that occur before the item commences (which has a retrospective application) will cause anyone any hardship or detriment.

The committee seeks the Minister's advice as to whether retrospectively applying amendments relating to the application of the *Foreign Evidence Act 1994* to proceedings under a law of the external territories and Jervis Bay causes any person any detriment or hardship.

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

Retrospective application Schedule 5, item 4

Item 2 of Schedule 5 inserts the word 'child complainant' into an existing provision of the *Crimes Act 1914*, which has the effect of extending the existing offence of publishing any matter identifying child witnesses or vulnerable adult complainants without the leave of the court, to also cover the publication of information identifying a child complainant. Item 4 of this Schedule provides that these amendments apply in relation to proceedings instituted after commencement of the item regardless of when the alleged offences were committed. As such, it applies in relation to offences committed before commencement of the item (but to proceedings initiated after commencement). It is not clear to the committee whether, in applying this to offences that occurred before commencement and in circumstances where the existing offence is being extended, this imposes retrospective criminal liability.

The committee seeks the Minister's advice as to whether applying the amendments to proceedings instituted after commencement but relating to offences that may have been committed before commencement, in circumstances where the amendments extend an existing criminal offence, effectively imposes retrospective criminal liability, and if so, what is the justification for doing so.

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

Delegation of legislative power—incorporation of external material into the law

Schedule 8, item 15, new subsection 40P(2)

This item amends a regulation making power in the *Australian Federal Police Act 1979* (the AFP Act). The item adds a new subsection 40P(2) which will allow regulations made for the purposes of sections 40LA, 40M and 40N of the AFP Act (relating to drug and alcohol testing of AFP appointees) to incorporate any matter contained in a standard published by, or on behalf of, Standards Australia as in force at a particular time or as in force from time to time.

At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny;
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

The explanatory memorandum (at p. 179) states that the drug and alcohol testing provisions in sections 40LA, 40M and 40N are applicable only to AFP appointees, and not the general public. Further, the explanatory memorandum notes that the relevant standards as in force from time to time will be available on request to AFP appointees and 'the standards are available to the public for purchase from SAI Global Limited'. Finally, the explanatory memorandum states that allowing the AFP to incorporate the relevant standards for alcohol and drug testing as in force from time to time allows the AFP to keep pace with scientific and technology advances and ensures that it is able to employ the most appropriate procedures for conducting drug testing.

The committee notes this explanation and welcomes the indication that the relevant standards incorporated into the law will be available to AFP appointees on request. However, the committee has scrutiny concerns where material incorporated into the law is not freely and readily available to all those who may be interested in the law. In this case, for example, potential AFP recruits may be interested in the relevant standards. In any event, as a matter of principle, any member of the public should be able to freely and readily access the terms of the law. As noted above, the committee's scrutiny concerns in relation to the incorporation of external material into the law will be particularly acute where incorporated materials are not freely and readily available and therefore persons interested in or affected by the law may have inadequate access to its terms. In this case, the relevant standards will only be available to members of the public if a fee is paid to SAI Global Ltd.

The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue: *Access to Australian Standards Adopted in Delegated Legislation* (June 2016). This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

Noting the above comments, the committee requests the Minister's further advice as to whether material incorporated by reference under proposed subsection 40P(2) can be made freely available to all persons interested in the law.

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

Fair Work Amendment (Protecting Christmas) Bill 2016

Purpose	This bill seeks to amend the National Employment Standards within the <i>Fair Work Act 2009</i> to ensure that people who are entitled to receive Public Holiday penalty rates who work on Christmas Day (25 December) and New Year's Day (1 January) will be paid public holiday penalty rates for working on these days, regardless of whether the State/Territory in which they reside declares these dates as public holidays
Sponsor	Mr Bandt MP
Introduced	House of Representatives on 21 November 2016

The committee has no comment on this bill.

Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2016

Purpose	This bill seeks to: <ul style="list-style-type: none"> • allow for cost recovery for permitting activities under the <i>Hazardous Waste (Regulation of Exports and Imports) Act 1989</i>; and • make a number of administrative amendments
Portfolio	Environment and Energy
Introduced	House of Representatives on 24 November 2016

Parliamentary scrutiny—removing requirement for particulars to be specified in the regulations

Schedule 1, item 4, proposed new subsection 18A(2)

Under current provisions the particulars of an export application must be specified in the regulations before a decision can be made to grant a Basel export permit for final disposal of hazardous waste in exceptional circumstances. This item seeks to remove this requirement. Removing this precondition to the grant of a permit has the potential to reduce parliamentary scrutiny because currently any amendment to the regulations is subject to disallowance by either House of Parliament.

The explanatory memorandum (at p. 6) states that the current provisions have the potential to impose unnecessary delays on business and removing this requirement will therefore reduce potential delays for industry. Furthermore, the explanatory memorandum suggests that the intent of the current provision was largely to ensure that particulars of an application are clearly set out prior to the grant of a permit (to ensure that the public is made aware of the details of an application) and that this intent is achieved by the requirement in section 33 for particulars of applications to be published in the *Commonwealth Gazette* (item 9 of this bill would enable this information to be published on the Department's website rather than in the *Gazette*).

In light of the detailed explanation provided, the committee leaves the question of the appropriateness of removing the requirement to specify

the particulars of an export application in the regulations to the Senate as a whole.

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—setting level of fee by regulation
Schedule 1, item 6, subsection 32(1)**

Item 6 will remove the current \$8000 cap on the fee amount that may be prescribed under the regulations for permit applications for the export, import and transit of hazardous waste.

The explanatory memorandum (at pp 6–7) states that the amendment will allow the permit fees to be adjusted to reflect the costs incurred by the department in assessing permit applications and that removing the cap will allow the fee to be fully cost recovered in the future.

The committee notes this explanation that the intention of the amendment is to allow a level of fee to be set that is linked to cost recovery. However, the committee notes that there is no limit on the amount of fee that may be prescribed on the face of the bill.

As the setting of the amount of fees is a significant matter, the committee seeks the Minister's advice as to whether the bill can be amended to provide greater legislative guidance as to how the fee amount is to be determined and/or to limit the fee that may be imposed.

In this regard, the committee notes that a higher cap could be introduced rather than simply removing the \$8000 cap altogether. For example, the committee notes that there is statutory cap on the amount of levy able to be imposed on permit applications in paragraph 9(1)(b) of the related Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016, and seeks the Minister's advice as to why a similar approach cannot be adopted in relation to placing a limit on the permit fee.

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

**Delegation of legislative power—indexation of fee by regulation
Schedule 1, item 7, proposed new subsection 32(7)**

Item 7 proposes to insert a new subsection 32(7) which will allow the fees referred to above to be indexed by a method prescribed in the regulations.

The explanatory memorandum (at p. 7) states that the annual indexation of the application fees will be based on the Consumer Price Index (CPI) to ensure that fees remain up to date. However, there is no guidance in relation to the method of indexation to be used on the face of the bill.

As different methods of indexation can result in different rates of increase in the level of fees, the committee seeks the Minister's advice as to whether the bill can be amended to specify the method of indexation to be used.

In this regard, the committee notes that subclauses 9(2)–(7) of the related Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016 provide a statutory basis for calculating indexation by CPI in relation to the levy on permit applications and seeks advice as to why a similar approach cannot be adopted in relation to the indexation of the permit fee.

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

**Insufficiently defined administrative power—delegation of administrative powers
Schedule 1, item 14, section 60**

Item 14 of the bill seeks to amend section 60 so that the Minister may delegate any or all of the Minister's functions and powers under the Act to an Australian Public Service employee who holds, or is acting in, an Executive

Level 2 position in the Department. As such, Executive Level 2 officers will be able to exercise all of the Minister's functions and powers under the Act (previously this delegation was limited to the Secretary and Senior Executive Service (SES) employees). In addition, item 14 also seeks to insert a new subsection 60(2) which provides that in performing functions or exercising powers under a delegation the delegate must comply with any directions of the Minister. The explanatory memorandum (at p. 8) states that the purpose of this provision is to allow the Minister to direct an Executive Level 2 employee that they may only exercise decision-making powers in relation to certain types of decisions.

The committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. While this provision does limit the category of people to Executive Level 2 officers in the department, the committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

The committee notes that the explanatory memorandum (at p. 9) states that the rationale for broadening the category of persons to whom the Minister's powers and functions under the Act may be delegated is to 'ensure that permit processing and decisions can be made more efficiently and effectively, and reduce any delay costs to business'.

While the committee notes this explanation, the desire for administrative efficiency may not, of itself, be a sufficient justification for delegating administrative powers to a broad range of people. The committee notes that the rationale for proposed new section 60(2) in the explanatory memorandum seems to indicate that it may be possible to limit the decision-making powers of Executive Level 2 officers to certain types of decisions.

The committee therefore seeks the Minister's advice as to whether a limitation on the categories of powers and functions that may be exercised by Executive Level 2 officials can be included on the face of the bill.

Pending the Minister's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Parliamentary scrutiny—removing Convention text from the Act Schedule 1, item 17

This item repeals the Schedule to the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the HW Act) so that a copy of the full English text of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (the Basel Convention) is no longer scheduled to the Act.

The committee previously commented on a provision in the Omnibus Repeal Day (Spring 2014) Bill 2014 which sought to implement this change (see pages 96–98 of the committee's *First Report of 2015*). At that time the committee noted that under the current provisions, where the text of the Basel Convention changes it is necessary for a regulation, which can be disallowed by either House of the Parliament, to be made under subsection 62(2) of the HW Act. Removing this process may therefore be said to have the potential to impact on parliamentary scrutiny. It may also make the terms of the law less accessible given that readers of the legislation would be directed to another source (the AustLII website—which may not be permanently available) to access the full terms of the Convention.

The committee sought the then Parliamentary Secretary's advice in relation to how often it has been necessary to update the text of the Basel Convention using the mechanism in subsection 62(2). The committee also sought advice as to the original rationale for providing that the text of the Convention be included as a Schedule to the Act (rather than providing a reference to the Convention as is proposed in this bill).

The then Parliamentary Secretary advised the committee that:

Regulations amending the text of the Schedule to the Hazardous Waste Act have been made three times, although this is not as often as amendments have been made to the Basel Convention. This discrepancy is a result of the resources required and process involved to make a legislative instrument to amend the Schedule to the Hazardous Waste Act, which has meant that the Schedule no longer aligns with the current text of the Basel Convention.

The text of the Basel Convention was set out in a Schedule to the Hazardous Waste Act, as part of a suite of amendments made by the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 1995. The explanatory memorandum gives the rationale that inclusion of the Convention text enables convenient reference and transparency by eliminating the need for the reader to refer to another source. It was also considered common practice in legislation implementing international Conventions.

However, as noted the inclusion of the text of the Basel Convention adds unnecessary length to the Hazardous Waste Act. In addition, making regulations to update the text is resource intensive in practice, and as these resources are not always available, the Schedule is currently out of date. As a result, the current arrangement has not provided greater transparency or convenience to the reader, than that which is provided through other sources. The proposed amendment would refer the reader to the Australian Treaties Library on the AustLII website, as an authoritative database of Australia's treaties, and which receives financial funding and provision of content by the Department of Foreign Affairs and Trade.

The proposed amendment would not impact on parliamentary scrutiny, as Australia's consent to any change to the text of the Basel Convention would continue to be considered by the Joint Standing Committee on Treaties.

In light of the detailed explanation previously provided to the committee, the committee leaves the question of the appropriateness of removing the text of the Basel Convention from the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* to the Senate as a whole.

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.

Hazardous Waste (Regulation of Exports and Imports) Levy Bill 2016

Purpose	This bill seeks to introduce a flat rate levy on permit applications
Portfolio	Environment and Energy
Introduced	House of Representatives on 24 November 2016

The committee has no comment on this bill.

High Speed Rail Planning Authority Bill 2016

Purpose	This bill seeks to: <ul style="list-style-type: none">• establish the High Speed Rail Planning Authority and provides for its functions, appointment and terms and conditions of appointment of members, staff and consultants, conduct of meetings, and reporting and information requirements; and• enable the minister to make rules prescribing matters
Sponsor	Mr Albanese MP
Introduced	House of Representatives on 21 November 2016 <i>This bill is identical to a bill introduced in the previous Parliament</i>

Delegation of legislative power—limitations on rule-making powers Clause 29

Clause 29 provides for the making of rules (delegated legislation), which simply states that the Minister may make rules prescribing matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed to carry out or give effect to the Act. It does not contain any of the standard restrictions on what the rules can do, as outlined in Office of Parliamentary Counsel Drafting Direction 3.8:

27 If your Bill will contain a power to make instruments other than regulations, and the instructor's policy is that [a significant provision (as described in paragraph 3 of Drafting Direction 3.8)] is not required to be included in the instrument, you should include the following provision:

- (2) To avoid doubt, the [*name of legislative instrument e.g. rules*] may not do the following:
- (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
 - (e) amend this [*Act/Ordinance*].

- 28 You should include this provision in this form even if not all paragraphs are relevant to your Bill (such as because your Bill does not contain an appropriation).
- 29 Alternatively, if the instructor's policy is that a [a significant provision (as described in paragraph 3 of Drafting Direction 3.8)] should be able to be dealt with by subordinate instrument, then you should include a regulation-making power in addition to the instrument-making power, and specifically allow the regulations to provide for that kind of provision.

As this wording includes important safeguards in relation to the use of subordinate legislation that is not in the form of a regulation, the committee seeks the Member's advice as to whether the provision can be amended so that it aligns with the requirements in Drafting Direction 3.8.

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

National Health Amendment (Pharmaceutical Benefits) Bill 2016

Purpose	This bill seeks to amend the <i>National Health Act 1953</i> to: <ul style="list-style-type: none">• allow computer programs to be used for certain administrative decisions and actions;• reduce administrative requirements for pharmacists needing to operate from alternative premises following disasters or exceptional circumstances; and• amend a definition to ensure that PBS entitlements work as intended for concessional beneficiaries and their dependants on the day a person dies
Portfolio	Health
Introduced	House of Representatives on 24 November 2016

The committee has no comment on this bill.

Renew Australia Bill 2016

Purpose	This bill seeks to establish the Renew Australia authority
Sponsor	Mr Bandt MP
Introduced	House of Representatives on 21 November 2016

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

Purpose	This bill seeks to enable the Secretary of the Department of Veterans' Affairs to authorise the use of computer programmes to: <ul style="list-style-type: none">• make decisions and determinations;• exercise powers or comply with obligations; and• do anything else related to making decisions and determinations or exercising powers or complying with obligations
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 24 November 2016

Broad discretionary power—disclosure of information Schedule 2, items 1, 7 and 10, proposed new sections 409A, 151B and 131A

Items 1, 7 and 10 of Schedule 2 insert a provision into each of the *Military Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and the *Veterans' Entitlement Act 1986*, respectively, that would enable the Secretary to certify that it is necessary in the public interest to 'disclose any information obtained by any person in the performance of that person's duties [under the relevant Act] to such persons and for such purposes as the Secretary determines'.

The explanatory memorandum (at p. 11) provides examples of circumstances in which it might be appropriate for the Secretary to disclose information, such as 'where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices'.

The statement of compatibility (at p. 4) notes that several safeguards have been incorporated into the bill in relation to the disclosure of information under these provisions. These include that:

- the Secretary must act in accordance with rules the Minister makes about how the power is exercised;
- the powers of the Minister and Secretary cannot be delegated to anyone; and
- before disclosing personal information about a person, the Secretary must notify the person, give the person a reasonable opportunity to make written comments on the proposed disclosure and consider any written comments made by the person (if the Secretary fails to comply with these requirements he or she commits an offence).

The committee notes these safeguards, however it remains the case that there is no limitation on the face of the bill in relation to the breadth of the Secretary's power to certify that the disclosure of information is in the public interest (other than the notification requirement in relation to personal information described above). While the Secretary must act in accordance with any rules that the Minister makes about how the power is to be exercised there is no requirement for the Minister to actually make rules for this purpose.

The committee therefore seeks the Minister's advice as to:

- **why (at least high-level) rules or guidance about the exercise of the Secretary's disclosure power cannot be included in the primary legislation; and**
- **why there is no duty on the Minister to make rules regulating the exercise of the Secretary's power (i.e. the committee seeks advice as to why the proposed subsections have been drafted to provide that the Minister *may* make these rules, rather than requiring that the Minister *must* make rules to guide the exercise of this significant power).**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Commentary on amendments and additional explanatory materials

Counter-Terrorism Legislation Amendment Bill (No. 1) 2016

[Digest 7/16 – Reports 8 & 9/16]

On 22 November 2016 the Minister for Justice (Mr Keenan) presented a revised explanatory memorandum in the House of Representatives.

The committee thanks the Attorney-General for including additional key information in the revised explanatory memorandum as previously requested by the committee (see pp 551–567 of the committee’s *Ninth Report of 2016*).

Fair Work Amendment (Protecting Christmas) Bill 2016

[Digest 10/16 – no comment]

On 24 November 2016 Mr Bandt presented a replacement explanatory memorandum in the House of Representatives.

The committee has no comment on this replacement explanatory memorandum.

Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016

[Digest 8/16 – no comment]

On 24 November 2016 the Senate agreed to two Jacqui Lambie Network requests for amendments.

The committee has no comment on these requests for amendments.

Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016

[Digest 8/16 – Report 10/16]

On 21 November 2016 the House of Representatives agreed to two Government amendments, the Minister for Justice (Mr Keenan) presented a supplementary explanatory memorandum and the bill was read a third time.

The committee has no comment on these amendments or the supplementary 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 45th Parliament since the previous Alert Digest was tabled:

Nil

Other relevant appropriation clauses in bills

Nil