



**SENATE STANDING COMMITTEE**  
**FOR THE**  
**SCRUTINY OF BILLS**

**EIGHTH REPORT**  
**OF**  
**2016**

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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.



# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## EIGHTH REPORT OF 2016

The committee presents its *Eighth Report of 2016* to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

<b>Bills</b>	<b>Page No.</b>
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Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016	504





## Responsiveness to requests for further information

The committee has resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process as the committee frequently writes to the minister, senator or member who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the government (requests to ministers) and (2) non-government bills.

### Ministerial responsiveness to 9 November 2016

Bill	Portfolio	Correspondence	
		Due	Received
Appropriation Bill (No. 2) 2016-2017	Finance	27/10/16	25/10/16
Budget Savings (Omnibus) Bill 2016	Treasury	28/10/16	24/10/16
<i>Minister's further response</i>		28/10/16	01/11/16
Counter-Terrorism Legislation Amendment Bill (No. 1) 2016	Attorney-General	27/10/16	07/11/16
Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016	Attorney-General	27/10/16	<i>not yet received</i>
National Cancer Screening Register Bill 2016	Health	29/09/16	05/10/16
Narcotic Drugs Legislation Amendment Bill 2016	Health	27/10/16	27/10/16
Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016	Industry, Innovation and Science	27/10/16	27/10/16
Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016	Treasury	27/10/16	27/10/16



## Appropriation Bill (No. 2) 2016-2017

<b>Purpose</b>	This bill seeks to appropriate money out of the Consolidated Revenue Fund for services that are not the ordinary annual services of the government
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives on 31 August 2016 <i>This bill is substantively similar to a bill introduced in the previous Parliament</i>

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Minister responded to the committee's comments in a letter dated 25 October 2016. A copy of the letter is attached to this report.

### ***Alert Digest No. 7 of 2016 - extract***

#### **Delegation of legislative power**

#### **Parliamentary scrutiny—section 96 grants to the States**

#### **Clause 16 and Schedules 1 and 2**

Clause 16 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the States. Section 96 states that '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

Clause 16 of this bill delegates this power to the relevant Minister, and in particular, provides the Minister with the power to determine:

- conditions under which payments to the States, the Australian Capital Territory, the Northern Territory and local government may be made: clause 16(2)(a); and
- the amounts and timing of those payments: clause 16(2)(b).

Subclause 16(4) provides that determinations made under subclause 16(2) are not legislative instruments. The explanatory memorandum (at p. 14) states that this is:

...because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.

The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills—see the committee’s *Seventh Report of 2015* (at pp 511–516) and *Ninth Report of 2015* (at pp 611–614).

The committee has previously requested that additional explanatory material be included in explanatory memoranda accompanying even-numbered appropriation bills. Relevantly, the committee has requested the inclusion of detailed information about the particular purposes for which money is sought to be appropriated for payments to State, Territory and local governments. To ensure clarity and ease of use the committee has stated that this information should deal only with the proposed appropriations in the relevant bill. The committee considers this would significantly assist Senators in scrutinising payments to State, Territory and local governments by ensuring that clear explanatory information in relation to the appropriations proposed in the particular bill is readily available in one stand-alone location.

Most recently the committee considered this matter in its *Fifth Report of 2016* (at pp 352–357) and in that report the committee considered a response from the Minister for Finance received on 15 March 2016. Relevant extracts of the response are included below:

While the concept of a stand-alone location of explanatory information on appropriations including purposes and specific statutory provisions that authorise programs has some appeal, it would be well outside the scope of an explanatory memorandum. The explanatory memoranda to the Bills address technical aspects of the operative clauses of the Bills, rather than specific details of appropriation amounts for proposed Government expenditure. Any further expansive background in the explanatory memoranda to the appropriation Bills would add considerably to production times for Budget documentation, which would be impractical where some decisions can be settled late in the process and final production work ties down available staff in rigorous processes for reconciling financial data and quality assuring documentation for typesetting and preparation of the legislation.

The suite of Budget documentation has been carefully developed over the years and is continually evolving. The detail of proposed Government expenditure, and the detail for the Budget generally, appears in the Budget Papers, with more specific detail provided in portfolio budget statements prepared for each portfolio and authorised by the relevant Minister. Such information as the Committee seeks is most closely managed by responsible entities and appropriately reported by each in their portfolio statements and other resources such as the Federal Financial Relations website ([www.federalfinancialrelations.gov.au](http://www.federalfinancialrelations.gov.au)). The portfolio statements provide the Senate with additional information and facilitate understanding of the proposed appropriations as a ‘relevant document’ under the *Acts Interpretation Act 1901* for the associated Appropriation Bills.

The committee again thanks the Minister for this response and for his ongoing engagement with the committee on this matter.

The committee takes this opportunity to reiterate the fact 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. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their State or Territory. While, as highlighted by the Minister, some information in relation to grants to the States is publicly available, effective parliamentary scrutiny is difficult because the information is only available in disparate sources. It is appropriate that at least a minimum level of information is readily and easily available as a matter of course in order to enable Senators and others to determine whether further inquiries are warranted.

The committee also notes the Minister's advice that Budget documentation 'has been carefully developed over the years and is continually evolving' and that the:

...detail for the Budget generally appears in the Budget Papers, with more specific detail provided in portfolio budget statements prepared for each portfolio and authorised by the relevant Minister. Such information as the Committee seeks is most closely managed by responsible entities and appropriately reported by each in their portfolio statements and other resources such as the Federal Financial Relations website.

**Noting the above context, the committee seeks the Minister's advice as to:**

- **whether future Budget documentation (such as Budget Paper No. 3 'Federal Financial Relations') could include general information about:**
  - **the statutory provisions across the Commonwealth statute book which delegate to the Executive the power to determine terms and conditions attaching to grants to the States; and**
  - **the general nature of terms and conditions attached to these payments (including payments made from standing and other appropriations); and**
- **whether the Department of Finance is able to issue guidance advising departments and agencies to include the following information in their portfolio budget statements where they are seeking appropriations for payments to the States, Territories and local government in future appropriation bills:**
  - **the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory);**
  - **the specific statutory or other provisions (for example in the *Federal Financial Relations Act 2009*, the *COAG Reform Fund Act 2008*, *Local Government (Financial Assistance) Act 1995* or special legislation or agreements) which detail how the terms and conditions to be attached to the particular payments will be determined; and**
  - **the nature of the terms and conditions attached to these payments.**

### *Minister's response - extract*

The Committee has sought my advice as to whether future Budget documentation (such as Budget Paper No. 3 and the portfolio budget statements) could include additional information on payments to the States, Territories and local government.

I will ask my Department, in consultation with the Treasury, to review the current suite of Budget documentation and give consideration to including additional information on payments to the States, Territories and local government in time for the next Budget.

### *Committee response*

The committee thanks the Minister for this response.

**The committee welcomes the Minister's indication that a review into the current suite of Budget documentation will be undertaken in order to give consideration to including additional information on payments to the States, Territories and local government in these documents in time for the next Budget.**

**Noting the terms of section 96 of the Constitution and the role of Senators in representing the people of their State or Territory, the committee will continue to draw the issue of parliamentary scrutiny of section 96 grants to the States to the attention of Senators where appropriate in the future.**

**In relation to this bill, the committee draws its comments about the delegation of legislative power in clause 16 to the attention of Senators.**

## Budget Savings (Omnibus) Bill 2016

<b>Purpose</b>	This bill contains 24 measures which, if implemented, would result in \$6 billion in savings
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 31 August 2016 <i>The bill received Royal Assent on 16 September 2016</i>

The committee dealt with this bill in *Alert Digest Nos. 6 and 7 of 2016*. The Treasurer responded to the committee's comments in letters dated 24 October and 1 November 2016. Copies of the letters are attached to this report.

### *Alert Digest No. 6 of 2016 - extract*

#### **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.**

### ***Treasurer's response - extract***

I note the matters that the Committee raised regarding details in the explanatory memorandum, in relation to identifying new and previously introduced measures. As the Bill has now been enacted, the explanatory memorandum cannot be amended.

### ***Committee response***

The committee thanks the Treasurer for this response.

**The committee takes this opportunity to reiterate its view that where omnibus bills containing new and previously introduced measures are introduced in the future the explanatory memorandum accompanying such bills should identify whether each proposed measure is new or previously introduced. The committee notes that this approach enables 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.**

**In relation to this particular bill, the committee notes that the bill has already passed both Houses of Parliament and therefore makes no further comment in relation to this matter.**

### ***Alert Digest No. 6 of 2016 - extract***

#### **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.**

### ***Treasurer’s response - extract***

Regarding the former Schedule 9 (Dental Services), this measure was removed from the Bill. However, I have made the Minister for Health (who has carriage of this measure going forward) aware of these issues, for her to take into account when preparing the legislation for reintroduction.

***Committee response***

The committee thanks the Treasurer for this response and for indicating that the Minister for Health has been made aware of the committee's concerns. The committee will scrutinise any proposed legislation when it comes before the Parliament and **as the measure has been removed from this legislation makes no further comment in relation to this matter.**

***Alert Digest No. 6 of 2016 - extract***

**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).**

#### *Committee response*

The committee notes that the Treasurer’s response did not address this aspect of the committee’s concerns.

**The committee takes this opportunity to express its disappointment in this regard; however, noting that the bill has already passed both Houses of Parliament the committee makes no further comment in relation to this matter.**

#### *Alert Digest No. 7 of 2016 - extract*

### **Retrospective validation**

#### **Schedule 8 (Aged care), item 2**

This item provides that classification decisions (in relation to the level of care an aged care recipient requires) made before the commencement of these amendments, that took into account the manner in which care was provided, are valid. However, as the revised explanatory memorandum (at p. 58) indicates, the item does not affect the validity of any such decisions that have been the subject of proceedings heard and finally determined by a court.

The revised explanatory memorandum (at p. 58) notes that the amendment is designed to ensure that:

...classification decisions which considered the manner in which care was provided, including the qualifications of the person providing the care, in determining the amount of Commonwealth subsidy payable to an approved provider will be valid, even if made before commencement of this item.

**As the explanatory memorandum does not address the extent of any detriment which may be suffered by this retrospective validation or why the retrospective validation of past classification decisions is necessary, the committee seeks Treasurer's advice in relation to these matters.**

### ***Treasurer's response - extract***

Regarding Schedule 8 (Aged Care), as stated in the explanatory memorandum, the purpose of retrospective validations is to ensure fair treatment of both providers and recipients, where a prior classification of the level of care has previously taken into account the manner in which the care is provided.

### ***Committee response***

The committee thanks the Treasurer for this response, but notes that the advice does not address the committee's question relating to whether anyone may suffer any detriment by this retrospective validation or why the retrospective validation is necessary.

**The committee takes this opportunity to express its disappointment in this regard; however noting that the bill has already passed both Houses of Parliament the committee makes no further comment in relation to this matter.**

### ***Alert Digest No. 7 of 2016 - extract***

## **Explanatory memorandum Schedule 8 (Aged care)**

In addition to the comments above in relation to item 2, the committee notes that item numbers in the 'notes on clauses' sections of the revised explanatory memorandum for this schedule do not reflect the actual item numbers in the bill.

**In order to assist the committee in finalising its consideration of this bill the committee requests that it be provided with a revised version of the explanatory materials for this schedule which includes the correct item references.**

***Treasurer's response - extract***

I note the matter that the Committee raised regarding details in the explanatory memorandum of the item numbers in Schedule 8 to the Bill. As the Bill has now been enacted, the explanatory memorandum cannot be amended.

***Committee response***

The committee thanks the Treasurer for this response.

**Noting that the bill has already passed both Houses of Parliament the committee makes no further comment in relation to this matter.**

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

<b>Purpose</b>	This bill amends various legislation in relation to: <ul style="list-style-type: none"><li>• extending control orders to children aged 14 or 15 years</li><li>• control orders and tracking devices</li><li>• preventative detention orders</li><li>• telecommunications interception</li><li>• use of surveillance devices</li><li>• a new offence of advocating genocide</li><li>• delayed notification search warrants</li></ul>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	Senate on 15 September 2016 <i>This bill is similar to a bill introduced in the previous Parliament</i>

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Attorney-General responded to the committee's comments in a letter received on 7 November 2016. A copy of the letter is attached to this report.

## ***Alert Digest No. 7 of 2016 - extract***

### **Trespass on personal rights and liberties—use of information obtained where interim control order declared void**

#### **Schedule 8, item 1, proposed section 3ZZTC of the *Crimes Act 1914***

#### **Schedule 9, item 58, proposed section 299 of the *Telecommunications (Interception and Access) Act 1979***

#### **Schedule 10, item 45, proposed section 65B of the *Surveillance Devices Act 2004***

Proposed section 3ZZTC of the *Crimes Act 1914* (as outlined in item 1 of Schedule 8), specifies certain purposes for which things seized, information obtained or a document produced pursuant to a monitoring warrant can be communicated or adduced as evidence where a court has subsequently declared the interim control order to be void. The same amendment is made in relation to information obtained under the provisions of *Telecommunications (Interception and Access) Act 1979* (the TIA Act) (see Schedule 9, item 58, proposed section 299) and to information obtained under the provisions of the

*Surveillance Devices Act 2004* (the SD Act) (see Schedule 10, item 45, proposed section 65B) where the control order is subsequently declared to be void.

The committee previously noted that the use of information obtained in these circumstances may have serious implications for personal rights and liberties. As such, the committee sought the Attorney-General's advice as to whether similar provisions appear in other Commonwealth legislation and requested a more detailed justification for the use of material obtained in circumstances in which the relevant control order has been declared void.

The Attorney-General provided a response to the committee, much of which now forms the reasons given in the statement of compatibility as to why these provisions do not undermine a right to a fair trial and fair hearing (pp 44–45). The statement of compatibility notes that the provision 'enables agencies to further use either lawfully intercepted information or lawfully accessed information obtained under an interception warrant relating to an interim control order which is subsequently declared void' (p. 44):

It is a fundamental principle of the Australian legal system that courts have a discretion as to whether or not to admit information as evidence into proceedings, irrespective of the manner in which the information was obtained. As an example, the *Bunning v Cross*<sup>1</sup> discretion places the onus on the accused to prove misconduct in obtaining certain evidence and to justify the exclusion of the evidence. This principle is expanded on in Commonwealth statute,<sup>2</sup> where there is an onus on the party seeking admission of certain evidence to satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. This fundamental principle reflects the need to balance the public interest in the full availability of relevant information in the administration of justice against competing public interests, and demonstrates the role the court plays in determining admissibility of evidence.

However, the TIA Act departs from these fundamental principles, by imposing strict prohibitions on when material under those Acts may be used, communicated or admitted into evidence.<sup>3</sup> Under the TIA Act, it is a criminal offence for a person to deal in information obtained under these Acts for any purpose, unless the dealing is expressly permitted under one or more of the enumerated and exhaustive exceptions to the general prohibition. This prohibition expressly overrides the discretion of the judiciary, both at common law and under the Evidence Act, to admit information into evidence where the public interest in admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. There is also a risk that the prohibition might be interpreted, either by a court considering the matter after the fact, or by an agency considering the question in extremis, to override the general defence to criminal responsibility under the Criminal Code.

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<sup>1</sup> (1978) 141 CLR 54.

<sup>2</sup> Section 138 of the *Evidence Act 1995* (Cth).

<sup>3</sup> See s 63 of the TIA Act.

The committee welcomes the incorporation of this further information in the explanatory materials. However, the relevant provisions remain unchanged from the previous bill. In relation to the justification provided, the committee makes the following observations.

Although it is said that the information is obtained ‘lawfully’ it remains the case that, if that basis for obtaining the information is subsequently declared to be void, the information was obtained in excess of the powers granted to obtain information. In this context, describing the information as ‘lawfully obtained information’ does not capture the essential point that information was obtained on the bases of a legally invalid exercise of power.

It may be accepted that there is a default judicial discretion about whether or not information may be admitted as evidence into proceedings, irrespective of the manner in which it was obtained. However, describing the imposition of strict prohibitions on when materials may be used, communicated or admitted into evidence under the SD Act and TIA Act as a departure from this ‘fundamental’ principle downplays the reasons why that approach was taken. The strict limits on the use that may be made of information obtained reflects a recognition that the methods of surveillance authorised by these Acts constitutes a significant invasion on an individual’s right to privacy.

The committee notes that the explanatory memorandum states that the current prohibitions in the TIA Act override a fundamental principle of the Australian legal system, that courts have a discretion as to whether or not to admit information as evidence into proceedings, irrespective of the manner in which the information was obtained. However, the provisions as currently drafted, allow a person to adduce the thing, information or document as evidence so long as that person reasonably believes doing so is necessary to assist in preventing or reducing the risk of a number of harms (or for the purposes of a preventative detention order (PDO)). It does not appear to allow the court any discretion as to whether such evidence should be adduced; it appears that it may be enough that the person who wants to adduce the evidence has the belief or is using it for the purpose of the PDO. It also appears that section 138 of the *Evidence Act 1995*, which allows the court the discretion to exclude evidence that was improperly or illegally obtained, may not apply where evidence was obtained pursuant to a control order which is later declared to be void. If this is the case, it is not clear to the committee why this fundamental principle of the court having the discretion to admit evidence has been overridden in this instance.

**For the above reasons the committee reiterates its scrutiny concerns in relation to these provisions and requests the Attorney-General’s advice as whether the provisions override judicial discretion as to whether the evidence should be adduced and, if so, why provisions similar to section 138 of the *Evidence Act 1995* do not apply (which sets out the matters that should be taken into account by the court in deciding to allow certain evidence to be admitted).**



## *Attorney-General's response - extract*

Proposed section 3ZZTC of the *Crimes Act 1914*, section 299 of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) and section 658 of the *Surveillance Devices Act 2004* (the SD Act) expressly permit agencies to rely on things, information or documents obtained under a monitoring warrant where the control order is subsequently declared void in very limited circumstances. Specifically, the things, information or documents can be used to prevent, or lessen the risk of, a terrorist act, serious harm to a person, or serious damage to property. These provisions also permit the use of such information to apply for, and in connection with, a preventative detention order. While agencies are therefore entitled to adduce such evidence under these provisions, the court's discretion as to whether or not that evidence may be admitted as evidence into the proceedings, irrespective of the manner in which the information was obtained, remains unaffected.

The provisions do not affect a court's discretion to refuse to admit evidence in a proceeding before it. In addition, these provisions do not override a court's duty to refuse to admit improperly obtained evidence in particular circumstances, or its determination of the weight to be given to particular evidence. Similarly, these provisions do not impact upon a party's right to adduce or challenge evidence in court.

### *Committee response*

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the provisions do not affect a court's discretion in relation to the admissibility of evidence.

**The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, 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 draws its concerns to the attention of Senators and leaves the appropriateness of enabling the use of information obtained where an interim control order is subsequently declared void to the consideration of the Senate as a whole.**

**Trespass on personal rights and liberties—fair hearing  
Schedule 15, general comment**

The broad purpose of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act) is to prevent the disclosure of information in federal criminal and civil proceedings where disclosure is likely to prejudice national security. Schedule 15 proposes some significant amendments to that Act by enabling a court to make three new types of orders in control order proceedings. The effect of the proposed amendments can generally be described as allowing the court to determine that it can rely, in control order proceedings, on secret evidence in particular circumstances. The three new orders a court may make are:

- that the subject of the control order and their legal representative may only be provided with a redacted or summarised form of national security information. Despite this, however, the court may consider the information in its entirety (proposed new subsection 38J(2));
- that the subject of the control order and their legal representative may not be provided with any information in an original source document. Despite this, however, the court may consider all of that information (proposed new subsection 38J(3)); and
- when a hearing is required under subsection 38H(6) the subject of the control order and their legal representative can be prevented from calling the relevant witness, and if the witness is otherwise called, the information provided by the witness need not be disclosed to the subject of the control order or their legal representative. Despite this, however, the court may consider all of the information provided by the witness (proposed new subsection 38J(4)).

Notably, the provisions provide that a court may determine whether one of the new orders should be made in a closed hearing, that is, a hearing at which the parties to the control order proceeding and their legal representatives are not present.

These proposals clearly undermine the fundamental principle of natural justice which includes a fair hearing. In judicial proceedings a fair hearing traditionally includes the right to contest any charges against them but also to test any evidence upon which any allegations are based. In many instances it may not be possible in practice to contest the case for the imposition of control orders without access to the evidence on which the case is built. Evidence is susceptible to being misleading if it is insulated from challenge. Given that the burden of proof in civil cases is lower than criminal proceedings, that risk is magnified.

The explanatory materials point to the increasing ‘speed of counter-terrorism investigations’ as the reason why these powers are necessary (p. 142). At the general level,

the explanatory memorandum suggests that ‘for control orders to be effective, law enforcement need to be able to act quickly, and be able to present sensitive information...to a court as part of a control order proceeding without risking the integrity, safety or security of the information or its source’ (p. 142).

On the other hand, the explanatory memorandum also recognises that it is important that a court, in the context of control order proceedings, continue to be able to ensure procedural fairness and the administration of justice. However, it is questionable whether the amendments in the bill adequately preserve procedural fairness to the subject of a control order.

The committee reiterates its previous comments in relation to the overall approach of requiring the courts to determine when the disclosure of information will be likely to prejudice national security. Courts are not well placed to second-guess law enforcement evaluations of national security risk which means that it may be particularly challenging to protect an individual’s interest in a fair hearing. The fact that the court has discretion as to how to draw the balance between national security and any adverse effect on the ‘substantive hearing’ (in relation to whether a special order be made, or in the exercise of any general powers to stay or control its proceedings) cannot be said to ‘guarantee’ procedural fairness.

In considering the extent to which judges will be able, in the exercise of their discretionary powers under the proposed regime, to resist the claims of a law enforcement agency that an order should be made, it should be noted that judges routinely accept that the courts are ‘are ill-equipped to evaluate intelligence’ [*Leghaei v Director-General of Security* (2007) 241 ALR 141; (2007) 97 ALD 516] and the possibility that law enforcement agencies may be wrong in their national security assessments. For this reason, the fact that security information is read by judges in the context of the legislative regime proposed in this schedule does not mean that they will be well placed to draw a different balance between security risk and fairness than is drawn by law enforcement agencies.

The committee previously requested, and received, from the Attorney-General, a justification for the proposed approach including whether further safeguards for fairness had been considered. Following that advice, the committee previously concluded that it was not persuaded that the previous bill provided an appropriate balance between the need to protect national security information and the controlee’s right to procedural fairness.

Schedule 15 of this bill has made a number of amendments to the scheme. The committee’s view in relation to these amendments is set out below.

### ***Sufficient information to be provided***

The PJCIS in its Advisory Report recommended (recommendation 4) that the bill be amended to ensure that the subject of the control order proceeding be provided with ‘sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations’.

As a result, item 21, proposed paragraph 38J(1)(c) has been altered so that the court must be satisfied that the relevant person has been given ‘sufficient information about’ the allegations on which the control order was based, to ‘enable effective instructions to be given in relation to those allegations’ Previously the bill had provided that the court must be satisfied that the relevant person has been given ‘notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations)’. This change provides a greater level of detail about the allegations on which the control order request is made to be provided to the potential subject of the order.

The committee welcomes this amendment which will enable the person who may be subject to the control order to be given more information to better enable them to provide instructions and present their defence. However, the committee notes that with the introduction of special advocates (see further below) it is important that the disclosure of this ‘sufficient information’ be made prior to national security information being disclosed to a special advocate, to enable the special advocate to obtain effective instructions from the controlee. This is important as communication between the controlee and their legal representative is heavily restricted after national security information has been disclosed to the advocate.

**The committee welcomes the amendment to ensure sufficient information is provided to a person who may be subject to a control order in order to obtain effective instructions. However, the committee seeks the Attorney-General’s advice as to whether the ‘sufficient information’ will be provided to a person before a special advocate has been provided with national security information (disclosed pursuant to proposed section 38PE) to enable them to adequately communicate with the special advocate.**

### ***Attorney-General's response - extract***

The amendments contained in Part 1 of Schedule 15 enable a court to make three new types of protective orders in control order proceedings. Under revised section 38J of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), each of the new protective orders allows the court to consider sensitive national security information that the controlee and their ordinary legal representative are prevented from hearing or seeing. Part 2 of Schedule 15 provides that a special advocate may be appointed to represent the interests of the controlee in parts of the control order proceedings where the controlee and their ordinary legal representative have been excluded.

In determining whether to make a protective order under revised section 38J, the court must be satisfied that the controlee has been given ‘sufficient information about the allegations on which the control order request was based to enable effective instructions to

be given in relation to those allegations’ (new paragraph 38J(1)(c)). This implements Recommendation 4 of the PJCIS Advisory Report.

Whether the controlee is provided the ‘sufficient information’ prior to the special advocate seeing the sensitive national security information will depend on the circumstances of the control order application.

In the ordinary case, the controlee will be given sufficient information about the allegations on which a control order request is based, such that they can instruct their ordinary legal representative and special advocate in relation to those allegations. This information is provided by the AFP pursuant to the various disclosure obligations under Division 104 (for instance, subparagraph 104.12A(2)(a)(iii)) as well as under other applicable procedural rights in federal civil proceedings (for instance, normal processes of discovery). Given the controlee will have access to this information prior to the special advocate seeing the sensitive national security information under new section 38PE, the controlee and the special advocate will generally be able to communicate freely.

There may be some circumstances where further information is disclosed to the controlee after a special advocate has been appointed and received the sensitive national security information. Following the receipt of the sensitive national security information by the special advocate, any communication from the special advocate to the controlee will require the authorisation of the court, pursuant to new section 38PF. Following the closed hearing, if the court determines that the information should be subject to a new protective order under revised section 38J, the court must ensure the controlee is provided ‘sufficient information’ about the allegations contained in that ‘information’ such that they are able to instruct their ordinary legal representative and special advocate in relation to those allegations.

The communication restrictions in new section 38PF do not prevent the controlee from communicating with the special advocate nor providing information to the special advocate that the controlee considers relevant in relation to the ‘sufficient information’. Pursuant to new subsection 38PF(8), the controlee can continue to communicate with the special advocate in writing through their ordinary legal representative without restriction.

***Committee response***

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General’s advice that there may be circumstances in which a person who may be subject to a control order (the ‘controlee’) will not be given sufficient information prior to a special advocate seeing the sensitive national security information (at which point communication between the two is heavily restricted).

*continued*

The committee accepts that a controlee is able to communicate with the special advocate after the advocate has seen the sensitive national security information. However, such communication can only be in writing through their legal representative, and the advocate can only submit a written communication to the court for the court's approval to forward it to the controlee or their legal representative (see proposed section 38PF). This is a heavily restricted approach to communication between the controlee and the special advocate, who may be the only person able to represent the interests of the controlee at many stages of the proceedings.

**The committee considers that if a controlee is only given 'sufficient information' about the allegations against them *after* restrictions are placed on communication with the special advocate, there will be limited opportunity for proper instructions to be given to the special advocate. The committee considers this would appear to defeat the purpose of the special advocate scheme in instances where the information is not provided to the controlee before the special advocate has received the sensitive national security information.**

The committee reiterates its view that the secret evidence provisions are apt to undermine the fundamental principle of natural justice which includes the right to a fair hearing. The right to a fair hearing traditionally includes the right to contest any charges and test any evidence on which allegations are based. If sufficient information about the allegations against the controlee is not provided to the controlee until after communications with the special advocate are heavily restricted, the committee considers the scheme set out in the bill does not appear to provide an appropriate balance between the need to protect national security information and the controlee's right to procedural fairness.

The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, 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 draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of the timing of when 'sufficient information' is provided to the controlee to the consideration of the Senate as a whole.

## ***Alert Digest No. 7 of 2016 - extract***

### ***Special advocates***

The major change to the schedule and the process by which the court can prevent the disclosure of information to the potential subject of a control order, is the introduction of a special advocates scheme. This was introduced as a result of recommendation 5 of the

PJCIS's report. The PJCIS had recommended that a system of special advocates be introduced to represent the interests of persons subject to control order proceedings where the subject and their legal representative have been excluded. A special advocate is to be a security-cleared lawyer who represents the interests of a person who may be subject to a control order (the controlee) who has been excluded from parts of the control order proceeding. The explanatory memorandum (at pp 156–157) explains that the special advocate may represent the interests of the controlee by:

- making submission to the court at any part of a hearing when the controlee or their legal representative are not entitled to be present;
- adducing evidence and cross-examining witnesses at such a hearing; and
- making written submissions to the court.

While the special advocate scheme may help to ameliorate some of the committee's concerns regarding the fairness of adducing evidence without the controlee knowing the full extent of that evidence, the committee is concerned that the current formulation of the special advocate scheme may not guarantee a controlee's procedural rights. In particular, a controlee is not entitled to insist that a special advocate be appointed. Rather, whether a special advocate is appointed remains in the discretion of the court. The explanatory memorandum (at p. 163) provides the following justification for this approach:

The provisions are designed to provide the court flexibility to conduct the control order proceedings in the manner it considers most appropriate. This will require the court to balance the need to conduct proceedings efficiently and effectively with the need to protect the procedural rights of the controlee.

One instance in which the court may not appoint a special advocate even where the criteria outlined above have been satisfied is where the court considers itself adequately equipped to manage the sensitive national security information. Courts are not unfamiliar with considering sensitive national security information. The courts are well-equipped to make judgments as to the weight that should be given to the risk that disclosing information will prejudice national security.

However, if secret evidence is to be used against a controlee and they are not entitled to insist on the appointment of a special advocate, this significantly diminishes the adequacy of the special advocate scheme in ameliorating the apparent unfairness of the new regime.

**Given this, the committee requests a more detailed justification from the Attorney-General as to the rationale for leaving the appointment of a special advocate to the discretion of the court.**

## ***Attorney-General's response - extract***

Under new subsection 38PA(1), the court may appoint a person to be a special advocate if the proceeding is a control order proceeding and the court makes an order under new subsection 381(3A), or new subsections 38J(2), 38J(3) or 38J(4).

New section 38PA is designed to provide the court with flexibility to conduct the control order proceeding in any manner it considers appropriate. This allows the court to appropriately balance the requirements of conducting the control order proceedings efficiently and effectively with the controlee's right to a fair hearing.

In some instances the court may decide that it can sufficiently safeguard the controlee's right to a fair hearing, while in other circumstances, it may decide that the special advocate can provide valuable assistance to the court in protecting the rights of the controlee. That determination should be made on a case by case basis, taking into account all relevant considerations.

For example, the new protective orders under revised section 38J are likely to be sought only in relation to specific information that forms part of the matrix of facts in relation to a control order application. Accordingly, there may be instances where the court considers itself sufficiently experienced and capable of analysing this targeted information. Under such circumstances, there may be little work left for the special advocate to do.

Comparable special advocate regimes in Canada and New Zealand provide the court with discretion as to whether to appoint a special advocate.<sup>4</sup>

### ***Committee response***

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that this provision is designed to provide the court with flexibility to conduct the proceedings as it considers appropriate, balancing the need for efficient and effective proceedings with the right to a fair hearing. The committee also notes the Attorney-General's advice that the court may consider itself sufficiently experienced and capable of analysing targeted information and, in such circumstances, there may be little work for the special advocate to do.

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<sup>4</sup> See for example, *Immigration and Refugee Protection Act* (Canada), section 83(1.2), *Telecommunications (Interception Capability and Security) Act 2013* (New Zealand), subsection 105(2) and *Health and Safety at Work Act 2015* (New Zealand), subsection 6(2) of Schedule 4.



**However, the committee considers that the right to a fair hearing requires a controlee to be able to challenge the case brought against them. If a controlee and their legal representative are excluded from all or parts of a proceeding, the ability to challenge that evidence is limited. The special advocate scheme was introduced to help to ameliorate the inherent unfairness of the court relying on secret evidence. However, if a special advocate is not appointed in all cases, the controlee may be left with no mechanism to challenge the evidence against them which could undermine the controlee's right to a fair hearing.**

**As such, proposed section 38PA, in giving courts the discretion as to whether to appoint a special advocate, significantly diminishes the adequacy of the special advocate scheme in ameliorating the unfairness of the secret evidence provisions set out in Schedule 15.**

**The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of giving the court the discretion not to appoint a special advocate when secret evidence is admitted to the consideration of the Senate as a whole.**

***Alert Digest No. 7 of 2016 - extract***

In addition, the bill tightly regulates communication between special advocates and controlees (and their legal representatives) after national security information has been disclosed. However, subsection 38PD(1) allows unrestricted communication prior to the disclosure of that information. Proposed subsection 38PD(2) provides that the court may restrict or prohibit communication between the controlee and the special advocate if satisfied that it is in the interests of national security to do so and the orders are not inconsistent with the Act or regulations made under it. No justification is provided in the explanatory memorandum as to why this exception is required. It is unclear why such communication need be restricted given at this point in time no sensitive information would have been disclosed to the special advocate. If communication prior to national security information being disclosed is restricted it may make it very difficult for the special advocate to adequately perform their functions given that communication after disclosure is so tightly regulated by the provisions.

**The committee considers that the exception in proposed subsection 38PD(2) is not sufficiently explained in the explanatory materials and seeks the Attorney-General's advice as to why it is necessary to empower the court to prohibit or restrict communication between a special advocate and a controlee prior to sensitive national security information being disclosed to the special advocate.**

## *Attorney-General's response - extract*

New section 38PD provides that communication between the special advocate and the controlee is generally not subject to any restriction prior to the special advocate being provided with the sensitive national security information under new subsection 38PE(2). The limited exception to this is outlined in new subsection 38PD(2). New subsection 38PD(2) states that the court may make orders restricting or prohibiting communications between the special advocate and the controlee even prior to the special advocate being disclosed the sensitive national security information if the court is satisfied that the order is in the interest of national security, and the order is not inconsistent with the NSI Act or regulations made under the Act.

The limited exception to the general rule in favour of unrestricted communication is to prevent the inadvertent unauthorised disclosure of sensitive national security information. There are circumstances where the appointed special advocate may have already acquired sensitive national security information, including the sensitive national security information that is to be subject to, or is already the subject of, a new protective order under revised section 38J. Where the special advocate has knowledge of such material, which is relevant to the control order proceeding, there is a risk that the special advocate may inadvertently disclose that information to the controlee. A court order under new subsection 38PD(2) which restricts or prohibits communication between the special advocate and controlee guards against the risk of inadvertent disclosure.

In making an order under new subsection 38PD(2), the court may require that any communication from the special advocate to the controlee be authorised by the court pursuant to the process outlined in new section 38PF. Such a process ensures that the court can review proposed communications from the special advocate to the controlee to minimise the risk of inadvertent disclosure of sensitive national security information. The process under new section 38PF still allows the controlee to communicate with the special advocate without restriction, so long as the communication is in writing and goes through their ordinary legal representative.

Noting the importance of promoting open and unrestricted communication between the special advocate and controlee prior to the special advocate receiving the sensitive national security information, it is likely that the court would only make an order under new subsection 38PD(2) in exceptional circumstances where the risk of inadvertent disclosure of sensitive national security information cannot be mitigated in any other way.

### ***Committee response***

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that there may be circumstances where the appointed special advocate may have already acquired sensitive national security information before a protective order is made. As such, the Attorney-General advises that proposed subsection 38PD(2), in allowing the court to restrict the disclosure of information between the special advocate and the controlee, is necessary to protect against the risk of inadvertent disclosure. The committee notes that the advice did not provide any examples as to the circumstances in which a special advocate would have knowledge of the national security information prior to it being officially disclosed to them.

The committee also notes the Attorney-General's advice that it is likely that the court would only make such an order in exceptional circumstances where the risk of disclosure could not be mitigated in any other way. However, proposed subsection 38PD(2), as drafted, is not limited to exceptional circumstances, and could be used any time the court considers it appropriate to do so if satisfied that it is in the interests of national security and the orders are not inconsistent with the proposed Act.

**In light of the above comments, the committee seeks the Attorney-General's further advice as to whether consideration has been given to:**

- **amending proposed subsection 38PD(2) to require the court to consider whether the risk of disclosure could be mitigated in any other way prior to restricting or prohibiting communications between a controlee and special advocate; and**
- **enabling the court to appoint a new special advocate who does not have access to sensitive national security information, to enable a controlee to properly communicate with their special advocate before a protective order is made.**

### ***Alert Digest No. 7 of 2016 - extract***

#### **Delegation of legislative power**

#### **Schedule 15, item 41, proposed subsection 38PA(2)(a)**

Proposed section 38PA sets out when a court may appoint a person as a special advocate. Paragraph 38PA(2)(a) provides that a person may be appointed as a special advocate only if they meet 'any requirements in the regulations'. The primary legislation does not specify any requirements as to the qualifications or experience of persons who are to be appointed as special advocates, nor does it specify any further details. The explanatory memorandum states that a special advocate is a 'security cleared lawyer', but this does not appear to be a legislative requirement for this (see p. 156).

The explanatory memorandum indicates that matters relating to the terms on which a person serves as a special advocate, including terms relating to remuneration, conflicts of interest or immunity will be dealt with in the regulations (see proposed section 38PI and p. 172 of the explanatory memorandum). The explanatory memorandum indicates that the additional details about the scheme to be provided for by regulations principally relate to 'administrative arrangements'. On the contrary, however, it may be argued that matters such as those listed above are centrally relevant to the question of whether special advocates are, and appear to be, impartial of the government. Such details would also presumably relate to the ethical obligations of special advocates.

**For the reasons set out above, the committee seeks the advice of the Attorney-General as to why details regarding the appointment process of persons as special advocates, and the terms and conditions of their appointment, are not provided for in the primary legislation.**

### *Attorney-General's response - extract*

Part 2 of Schedule 15 of the Bill creates the architecture for a special advocate role. The inclusion of a special advocate role implements Recommendation 5 of the PJCIS Advisory Report, which required that legislation giving effect to a special advocate system should be introduced as soon as possible, and by no later than the end of 2016.

The important details about the role and function of the special advocate are contained in the Bill. The supporting details and administrative arrangements to ensure the effective implementation of the special advocate role will be contained in regulations. The regulation-making power in new section 38PI allows for regulations to cover a range of matters relating to special advocates, including the terms of their remuneration, conflicts of interest and immunity. These features are the subject of ongoing consideration by the Government. Given there are no pre-existing legislative special advocate schemes in Australia, these matters raise issues that will require time to analyse and resolve. This is why the PJCIS, in recommending the implementation of a special advocate role, also noted that 'Extensive consultation will be necessary to ensure that a robust and highly effective system of special advocates tailored to the Australian context is ultimately established'.

Schedule 15 of the Bill provides that the special advocate amendments will commence no later than 12 months after the date on which the Act receives the Royal Assent. Accordingly, the supporting regulations and administrative arrangements will be established as soon as practicable in order to operationalise the special advocate role swiftly.

### *Committee response*

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that the regulations will set out a range of matters relating to special advocates. The explanation provided suggests that these are to be set out in regulations, rather than on the face of the primary legislation, because these features of the scheme are subject to ongoing consideration by the government and time is required to analyse and resolve these issues.

**The committee considers issues such as the appointment process for persons as special advocates and the terms and conditions of their appointment, particularly issues around conflict of interest and immunity provisions, are fundamental questions that go to whether special advocates are, and appear to be, impartial and likely to be effective in their role of representing a controlee. The committee considers it is important for Senators to know these details when considering this legislation in order to properly assess the adequacy of the special advocate scheme in ameliorating the unfairness of the secret evidence scheme.**

**The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of delegating important details about the appointment of special advocates to the regulations to the consideration of the Senate as a whole.**

### **Trespass unduly on personal rights and liberties—Delayed commencement Item 2 (commencement) and Schedule 15, Part 2**

The commencement provisions of the bill sets out that Part 2 of Schedule 15 will commence on a day to be fixed by proclamation, and in any event, within 12 months. This differs from Part 1 of Schedule 15, which sets out the changes to allow secret evidence to be adduced in court, which is said to commence the day after the Act receives Royal Assent. The explanatory memorandum justifies this approach on the following basis (at p. 159):

The delayed commencement ensures that sufficient time is provided to operationalise the special advocate role. This will include making appropriate regulations which will govern a range of matters including the process by which an individual serves as a special advocate, the remuneration of special advocates and conflicts of interests. It will also be necessary to ensure sufficient special advocates are available such that the controlee has a 'choice' of special advocates to choose from. These supporting regulations and administrative arrangements will be established as soon as practicable in order to operationalise the special advocates role swiftly.

The delayed commencement of the special advocates amendments mean that the amendments contained in Part 1 will apply for up to 12 months before the special advocates role in Part 2 becomes operational. However, as noted by the Committee advisory report, nothing in the amendments contained in Parts 1 or 2 of Schedule 15

preclude the court from exercising its inherent powers to appoint a special advocate on an ad hoc basis if it considers it necessary.

The committee notes the justification in the explanatory memorandum relies, in the main, on administrative convenience as the basis for delaying the commencement of these provisions. However, it also states that the court has an inherent power to appoint a special advocate on an ad hoc basis if it considers it appropriate and the provisions in the bill do not limit this inherent power. This claim is left unelaborated but it appears to be based on the following statement in the PJCIS's Advisory Report:

The Committee considers it important to note that prior to the establishment of a special advocates scheme, nothing in the proposed amendments to the NSI Act precludes the court from exercising its inherent discretion to appoint a special advocate on an ad hoc basis during control order proceedings where the subject of the control order and their legal representative have been excluded. The Committee further notes that in *R v Lodhi* [2006] NSWSC 586, Justice Whealy held that the framework of the NSI Act is not inconsistent with the appointment of a special advocate and that its provisions were sufficiently broad to permit special advocates to take part in specific hearings under the NSI Act. (see p. 80 of the PCJIS Advisory Report)

There are, however, difficulties with the reliance on the existence of the courts' inherent powers to appoint special counsel to justify the delayed commencement of the statutory scheme, a scheme which attempts to offset the unfairness involved in the secret evidence proposals.

The courts' power to make such appointments is uncertain. Based on the explanatory materials it appears that there is an absence of Australian appellate authority for the proposition that the courts' inherent powers warrant the development of the common law to construct a scheme for the appointment of special advocates and closed material proceeding generally in civil or criminal litigation, nor in a particular context. As Whealy J noted in *R v Lodhi* at [12], that case was the first in which an application for the appointment of a special advocate has been made in Australia. Furthermore, the *Lodhi* case was decided in a very different context and it is not clear to the committee that it provides direct support for the reliance on an inherent power to appoint special counsel, particularly in the context of the proposed legislative changes.

Given the dearth of legal analysis provided on this issue, the committee has concluded that the question of whether the courts in Australia possess an inherent power to appoint special counsel may be less certain than the explanatory material asserts. But even if such a power exists, it is unclear that the inherent power of the court to appoint special counsel (if it exists) would be exercised in particular cases, and if it could continue to exist in light of a statutory scheme to establish closed evidence procedures. Nor are senators able to evaluate any details about how such a judicially created scheme would work in practice. Details about how such a scheme would operate are unknown. No judicial practice of appointing special counsel has developed in Australia, in this or any other context.

**For the reasons set out above the committee does not believe that persuasive reasons have been provided for the delayed commencement of the amendments in Part 2. To the extent the special advocate scheme is thought to ameliorate the unfairness involved in the amendments in Part 1, this issue of delayed commencement is a matter of significant concern. The committee therefore seeks the Attorney-General's advice as to why the commencement of Part 1 of Schedule 15 should not be delayed until such time as the special advocate scheme is in place. The committee notes that if (as set out above in relation to the delegation of legislative power) the important details concerning the appointment of the special advocate scheme were included in the primary legislation then this issue may not arise.**

### ***Attorney-General's response - extract***

The Explanatory Memorandum, at paragraph 166, outlines the urgency of the amendments contained in Part 1 of Schedule 15:

In the absence of the amendments contained in Part 1 of Schedule 15 there is a substantial risk that the inability to rely on, and protect, sensitive information may result in a control order being unable to be obtained against an individual who poses a risk to the safety of the community. This is because law enforcement would not be satisfied that existing protections under the NSI Act mitigate the risks associated with the disclosure of such information.

In light of these operational realities, the PJCIS stated that:

cognisant of the changing nature of the operational environment and the increased need to rely on and protect sensitive information in control order proceedings, the Committee considers that the proposed amendments to the NSI Act in Schedule 15 [Part 1] should proceed without delay.

Practically, this results in an interim period of no longer than 12 months where the new protective orders under revised section 38J may be sought by the Attorney-General and a statutory special advocate role will not be in place. However, as recognised by the PJCIS, nothing in Schedule 15 precludes the court from exercising its inherent power to appoint a special advocate to represent the interests of the controlee where it considers it appropriate.

The PJCIS expressly cited *R v Lodhi* [2006] NSWSC 586 in support of the proposition that the court possesses an inherent power to appoint special advocates.

***Committee response***

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that nothing in Schedule 15 precludes the court from exercising its inherent power to appoint a special advocate even before the special advocate scheme is established by legislation. The committee notes the Attorney-General's advice did not address the concerns set out by the committee that the courts' power to make such appointments is uncertain. The committee notes the Attorney-General's advice that there is a need for urgency to establish the secret evidence provisions.

**The committee reiterates its view that delaying the commencement of the special advocate scheme for up to 12 months after the secret evidence provisions commence, significantly undermines the adequacy of the special advocate scheme in ameliorating the unfairness of the secret evidence provisions.**

**The committee draws its scrutiny concerns to the attention of Senators and leaves the appropriateness of delaying the commencement of the special advocate scheme for up to 12 months after the provisions in Part 1 of Schedule 15 commence to the consideration of the Senate as a whole.**

***Alert Digest No. 7 of 2016 - extract***

**Trespass unduly on personal rights and liberties—retrospective commencement**

**Schedule 15, item 32**

Item 32 of Schedule 15 states that the new special orders in relation to secret evidence that may be made under proposed section 38J apply to civil proceedings that begin before or after the commencement of this item.

The explanatory materials do not explain why the amendments should apply to proceedings which have already begun, especially given that (as explained above) the amendments may be in conflict with the fair hearing principle. The committee previously sought the Attorney-General's advice as to the rationale for the proposed retrospective application of the amendments to proceedings already commenced and as to how many current proceedings or potential proceedings are, or are likely to be, affected by this provision.



The Attorney-General responded:

It is appropriate that the new orders are available as soon as they come into force, regardless of whether a control order proceeding has already commenced. This is consistent with existing protections that are available under the NSI Act. Section 6A of the NSI Act provides that the Act can apply to civil proceedings that take place after the NSI Act has been invoked, irrespective of whether the proceedings commenced prior to the invocation of the Act. However, the new orders will only be available to those parts of the proceeding that have not yet occurred. Accordingly, the provisions will not operate retrospectively.

**Unfortunately this further information was not included in the current explanatory memorandum as requested by the committee. The committee requests that the explanatory memorandum be amended to include this information. On the basis of the committee's previous correspondence the committee leaves the question of whether the new orders should be available in proceedings that have started before the commencement of these new provisions to the Senate as a whole.**

### *Attorney-General's response - extract*

The Explanatory Memorandum currently states that the new protective orders will apply to control order proceedings irrespective of whether the control order proceeding has commenced and irrespective of whether or not the NSI Act has been invoked. However, this does not mean that the new protective orders can be sought in respect of parts of the control order proceeding which have already concluded. As noted in the Attorney-General's previous response, the new protective orders will only be available in those parts of the control order proceedings that have not yet occurred and where the NSI Act has been invoked. Accordingly, the provisions will not operate retrospectively.

The existing Explanatory Memorandum already provides a description of the operation of the amendments contained in Part 1 of Schedule 15.

### *Committee response*

The committee thanks the Attorney-General for this response.

**The committee reiterates its request that the key information provided by the Attorney-General be included in the explanatory memorandum, 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*).**

# Narcotic Drugs Legislation Amendment Bill 2016

<b>Purpose</b>	This bill amends the <i>Narcotic Drugs Act 1967</i> (the Act) to provide protection of sensitive law enforcement information used in licencing decisions under the Act
<b>Sponsors</b>	Health
<b>Introduced</b>	House of Representatives on 14 September 2016

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Minister responded to the committee's comments in a letter received on 27 October 2016. A copy of the letter is attached to this report.

## *Alert Digest No. 7 of 2016 - extract*

### **Delegation of legislative power**

#### **Schedule 1, item 1, proposed subsection 4(1)**

This item includes two new entries in the definition section of the *Narcotic Drugs Act 1967* to define 'law enforcement agency' and 'sensitive law enforcement agency'. Both of these definitions are of critical importance to achieving the principal purpose of this bill, namely, to protect sensitive law enforcement information provided by relevant agencies for the purpose of regulatory actions in relation to licences for the cultivation and use of cannabis for medicinal and research purposes.

'Law enforcement agency', is defined broadly to include any 'body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence in, or in a part of, Australia'. Paragraph (b) of this definition, however, provides that further entities can be prescribed by the regulations. The need for this regulation making power is not elaborated in the explanatory materials despite the breadth of the definition of law enforcement agency and the central role of the definition in the legislative scheme.

**The committee therefore seeks the Minister's advice as to why the definition of a 'law enforcement agency' can be expanded by regulation and seeks a justification as to the appropriateness of this delegation of legislative power.**

### ***Minister's response - extract***

The Committee sought the Minister's advice as to why the definition of a 'law enforcement agency' can be expanded by regulation and seeks justification as to the appropriateness of this delegation of legislative power.

Law enforcement agency is defined broadly under subsection 4(1) of the *Narcotic Drugs Act 1967* (the ND Act) as a body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence in, or in a part of, Australia. A body, agency or organisation that is prescribed in the regulations for the purposes of paragraph (b) of this definition would also be a law enforcement agency.

The Australian Federal Police, the Australian Criminal Intelligence Commission and State and Territory Police are clearly within the scope of the definition of a 'law enforcement agency'. Government agencies such as the Australian Border Force and the Australian Competition and Consumer Commission would not traditionally be known or be clearly covered by the definition as a law enforcement agency. These agencies may be investigating and hold sensitive law enforcement information about natural persons and bodies corporate that may be relevant to the granting or holding of a licence, or being associated with the holder of a licence, under the ND Act. The information may be about importation and exportation activities, or in relation to commercial activities of a person and association of that person with other bodies corporate in Australia. In order to protect sensitive law information provided by these agencies, it would be appropriate to prescribe them as a law enforcement agency in the regulations made for the purposes of paragraph (b) of the definition of a law enforcement agency.

The regulation is therefore proposed to prescribe Commonwealth agencies that are not specifically covered by the definition of a law enforcement agency, but is generally involved in the investigation of persons and hold information that may be relevant to law enforcement and regulatory actions in relation to licences under the Act and is within the scope of the definition of sensitive law enforcement information. The list would not be comprehensive and there would only be a few bodies or agencies that are proposed to be included in the regulation.

### ***Committee response***

The committee thanks the Minister for this response. The committee notes the Minister's advice that there are agencies that would not be specifically covered by the definition of a law enforcement agency and so there is a need to include these additional bodies. The committee also notes the Minister's advice that 'there would only be a few bodies or agencies that are proposed to be included in the regulation'.

*continued*

**The committee accepts that there may be a need to include other agencies in the definition of a ‘law enforcement agency’, however, it is not clear why these additional agencies (such as the Australian Border Force and the Australian Competition and Consumer Commission) cannot be listed in the primary legislation to allow for full parliamentary scrutiny, rather than enabling the regulations to prescribe any body, agency, or organisation.**

**The committee draws its concerns to the attention of Senators and leaves the appropriateness of the proposed approach to the delegation of legislative power to the consideration of the Senate as a whole.**

### *Alert Digest No. 7 of 2016 - extract*

#### **Trespass on personal rights and liberties—procedural fairness and disclosure of sensitive law enforcement information Schedule 1, items 4, 7, 16, 18, 20 and 21**

Various proposed amendments in Schedule 1 have the effect of precluding the disclosure of sensitive law enforcement information to various persons, prior to a hearing being granted in relation to regulatory actions or as part of the statement of reasons for such an action being taken (see items 4, 7, 16, and 18 of Schedule 1).

Relatedly, item 19 of Schedule 1 makes a number of amendments relating to the protection and use of sensitive law enforcement information in Administrative Appeals Tribunal (AAT) applications. Proposed section 15M allows for the Secretary to request that the AAT make orders directing a hearing or part of a hearing take place in private, orders about the persons who may attend a hearing and orders prohibiting or restricting the publication or disclosure of information relating to the AAT’s review of the matter. Such orders may be made if the Tribunal is satisfied the order is necessary for purposes listed in proposed subsection 15M(3) (which relate to protecting the integrity of law enforcement investigations and the safety of persons involved in those activities). Proposed section 15N would have the effect that the AAT’s general power to ensure that an adequate statement of reasons for a reviewable decision is provided to an applicant is varied, so that an applicant is not entitled to sensitive law enforcement information as part of the statement.

Finally, item 20 of Schedule 1 provides that if ‘the natural justice hearing rule would, but for the provisions of this Act, require the disclosure of information identified as sensitive law enforcement information under subsection 14LA(1) or (2), this Act is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the disclosure of that information’. The explanatory memorandum states that this measure

is ‘intended for consistency with the provisions relating to non-disclosure of sensitive law enforcement information, and to ensure that the natural justice hearing rule does not undermine the safeguards in the *Narcotic Drugs Act 1967* in relation to the non-disclosure of sensitive law enforcement information’ (at p. 15). The statement of compatibility (at p. 7) also states that the non-disclosure of such sensitive information is considered necessary to protect the integrity of the medicinal cannabis framework and the manufacture of narcotic drugs framework by ensuring that persons who are not fit and proper persons are not able to hold licences. The explanatory memorandum argues that ‘[w]ithout the assistance of law enforcement agencies, relevant information to support that objective may not be available to the decision-maker’ (p. 15).

It may be accepted that there is a need to balance a person’s interest in receiving a fair hearing with the public interest of protecting law enforcement operations and intelligence (see explanatory memorandum, pp 2–3). Nevertheless, it is not clear that the exclusion of the fair hearing rule is necessary to accomplish this objective. The common law rules of procedural fairness are applied with sensitivity to the statutory context. There is no doubt that the courts would recognise that there was a public interest in the Secretary and the AAT receiving sensitive law enforcement information and that the disclosure of such information may undermine the efficacy of the regulatory scheme. The common law rules of procedural fairness are, however, flexible and this flexibility may often mean that an individual’s interest in a fair hearing is promoted through the disclosure of some, but not all, of the information in which there is a broad public interest in non-disclosure. For example, it may be possible to give the ‘gist’ of allegations or information without revealing particular details that may compromise sensitive law enforcement information.

**The committee seeks the Minister’s advice as to why it is necessary to exclude the natural justice hearing rule, given that the courts apply that rule by reference to a particular statutory scheme and its underlying purposes.**

### ***Minister’s response - extract***

The Committee sought the Minister’s advice as to why it is necessary to exclude the natural justice hearing rule, given that the courts apply that rule by reference to a particular statutory scheme and its underlying purposes. The Committee notes that the provision may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee terms of reference.

Illegal cultivation of cannabis plants, trafficking of drugs (including cannabis) and manufacture of drugs are serious criminal offences and attract very high level penalties and long periods of imprisonment. Due to limited sources of lawfully manufactured medicinal cannabis products in Australia, some patients or their families have been sourcing cannabis products from illicit sources. Persons who have been unlawfully cultivating and supplying cannabis products may decide to continue to pursue these activities under the guise of a

Commonwealth cannabis licence under the ND Act. It is possible that law enforcement agencies may have been investigating or have information about these persons.

The ND Act now allows for the cultivation of cannabis plants and the production of cannabis and cannabis resins under a national licensing scheme. For a long time, only the cultivation of cannabis plants for industrial purposes (also known as industrial hemp) is allowed in Australia under State or Territory regulatory frameworks. Cultivation of cannabis plants and production of cannabis and cannabis resins carry a particularly high risk of diversion because the product can be readily be used in its raw state and is likely to be attractive to organised crime seeking to hide illegal activities under cover of a Commonwealth licence. In contrast, the cultivation of opium poppies and production of opium alkaloids regulated under State and Territory laws have lower diversion risk as the plant and alkaloids cannot be readily used in their raw state. The fit and proper person requirement under the ND Act is designed to address and manage the risks that unsuitable persons may be granted a licence. This requirement also applies to a manufacture licence.

The protection and non-disclosure of sensitive law enforcement information provided to, or held by, the Secretary of the Department of Health (Secretary) is absolutely necessary to protect the integrity of the national medicinal cannabis regulatory framework and the manufacture of drugs under the ND Act so that persons who are not fit to hold a licence are prevented from holding a licence to carry out activities under that Act. Sensitive law enforcement information is provided to the Secretary by Commonwealth, State or Territory law enforcement agencies, or from other sources.

The law enforcement agencies and other sources of sensitive law enforcement information must have confidence that when they provide sensitive law enforcement information it would be protected from disclosure and unauthorised use. Similarly, sensitive law enforcement information held by the Secretary and obtained from other sources must also be protected from disclosure and unauthorised use. Mere recommendations by law enforcement agencies to the Secretary not to grant a licence on the basis that they hold adverse information in relation to the suitability of a person, without providing supporting adverse information and providing reasons for such a refusal, would not be adequate and acceptable for the Secretary to make a decision under the Act. The Secretary must be able to consider that information and assess the relevance of that information before making a final decision.

It would be therefore important that the law enforcement agencies, in particular State and Territory law enforcement agencies, have confidence that sensitive law enforcement information would be protected from disclosure to the applicant or the public. Otherwise, from our consultations with law enforcement agencies, they will not be willing to provide sensitive law enforcement information to the Secretary. In this case, the objective of ensuring that only fit and proper persons are able to hold a licence and exclude individuals who have criminal history or part of an organised crime syndicate to use medicinal cannabis framework as cover for illegal activities may be frustrated.

Specifically excluding the natural justice hearing rule in the protection of that information under proposed section 21A of the ND Act (Item 20, Schedule 1 of the Bill) would provide confidence to law enforcement agencies and other persons who would be providing vital information for the integrity of the regulatory framework set out in the ND Act. Without the specific provision, there are likely to be legal challenges through the courts to seek access to the information and there would be uncertainty about the ability of the Secretary to protect sensitive law enforcement information.

The novelty of the Commonwealth medicinal cannabis scheme, which allow for the cultivation of cannabis plants and production of cannabis or cannabis resins that are supplied and carried out illicitly by organised crime networks require new measures for the protection of sensitive law enforcement information, such as the exclusion of the natural justice hearing rule in specified circumstances.

Uncertainties in the ability of the Secretary to protect this information from disclosure to the applicant or the public would adversely affect the effectiveness of the framework to exclude persons who are unsuitable to hold a licence, frustrate the objective of the scheme to ensure that cannabis cultivated, produced and manufactured in Australia for medicinal and scientific purposes, not for illicit purposes, and compromise the effective investigations and operations of law enforcement and other agencies.

#### ***Committee response***

The committee thanks the Minister for this detailed response.

The committee notes the Minister's advice that law enforcement agencies, particularly from the States and Territories, need to be confident that sensitive law enforcement information would be protected from disclosure to the applicant or the public, and if it is not so protected, consultations with those agencies suggest they will not be willing to provide such information to the Secretary of the Department of Health.

**The committee requests that the key information provided by the Minister be included in the explanatory memorandum, 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*).**

**In light of the information provided, the committee leaves the appropriateness of excluding the natural justice hearing rule to the consideration of the Senate as a whole.**

## ***Alert Digest No. 7 of 2016 - extract***

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

#### **Schedule 1, item 11, proposed subsection 14MA(2)**

This subsection provides for a number of exceptions to the offence created in subsection 14MA(1) for the disclosure or use of sensitive law enforcement information. A defendant bears an evidential burden in relation to establishing the matters relevant for each of these exceptions. The explanatory memorandum provides no explanation as to why it is appropriate to reverse the evidential burden of proof in this instance. Explanatory material should directly address these matters as outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

**In light of the importance of any reversal of the evidential burden of proof, the committee seeks the Minister’s detailed justification for the proposed approach that addresses each of the instances in the bill against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

## ***Minister’s response - extract***

The Committee sought the Minister’s detailed justification for the proposed approach that addresses each of the instances in the bill against the principles named in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. The Committee noted that this provision 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.

Subsection 14MA(2) provides that a person does not commit the offence set out in subsection 14MA(1) if:

- (a) the disclosure or use by the person for the purposes of, or in connection with, the performance of a function or the exercise of a power under the Narcotic Drugs Act 1967;
- (b) the disclosure or use by the person in compliance with a requirement under a law of the Commonwealth; or
- (c) the person or agency that gave information consents to the disclosure or use; or
- (d) the disclosure or use is required by a court or tribunal for the purposes of giving effect to this Act or another law of the Commonwealth; or



- (e) the information or a document or advice that included the information was given to the Secretary by a person or an agency under section 14K or 14L, and the use or the disclosure by that person or agency.

The drafting of the above provision took into account the requirements under Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

Subsection 14MA(2) creates exceptions that trigger subsection 13.3 of the Criminal Code Act. The burden of proof for the defence is evidential, and the prosecution still bears a legal burden to prove its case beyond reasonable doubt.

The facts set out in the defences set out in paragraphs (a) to (e) of subsection 14MA(2) are peculiarly within and remain wholly within the defendant's knowledge and not generally available to the prosecution. At the same time, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. For example, in relation to paragraph 14MA(2)(c), consent provided by a person or agency that gave the information for the disclosure or use by a specified person would be peculiarly within the defendant's knowledge and would be better placed to prove that a consent was provided to the person.

***Committee response***

The committee thanks the Minister for this response.

**The committee requests that the key information be included in the explanatory memorandum, 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*).**

**In light of the explanation provided the committee make no further comment on this matter.**

***Alert Digest No. 7 of 2016 - extract***

**Delegation of legislative power and parliamentary scrutiny  
Schedule 2, item 28, proposed subsection 26B(2)**

Proposed new subsection 26B(2) provides that in making legislative standards for the purposes of the Act, the standards may incorporate any matter contained in an instrument or other writing as in force or existing from time to time. The effect of this provision is to

deprive parliamentary oversight of legislative standards as they may be amended by virtue of changes made to any incorporated instrument or other writing.

At a general level, the committee has 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 is not publicly available or is available only if a fee is paid).

The explanatory memorandum provides no reason for the need for this provision, nor does it indicate whether any such standards will be publicly and freely available.

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

- **why it is necessary to rely on material incorporated by reference (including details about any measures taken to identify alternatives to incorporating material by reference and why such alternatives are not appropriate in this instance); and**
- **if the approach is still considered necessary:**
  - **how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law; and**
  - **whether a requirement specifying that any material incorporated by reference must be freely and readily available can be included in the bill.**

### ***Minister's response - extract***

The Committee sought the Minister's advice as to why it is necessary to rely on material incorporated by reference (including details about any measures taken to identify alternative to incorporating material by reference and why such alternatives are not appropriate in this instance) and if the approach is still considered necessary:

- how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law; and
- whether a requirement specifying that any material incorporated by reference must be freely available and readily available can be included in the Bill.

Recent amendments to the ND Act implement the national licensing scheme allowing the lawful cultivation in Australia of cannabis plants for medicinal and scientific purposes. This would enable a sustainable, high quality and safe supply of locally grown and manufactured medicinal cannabis products to Australian patients.

Subsection 26B(1) of the ND Act authorises the Minister for Health to issue standards for the purposes of the Act. The standards issued under subsection 26B(1) are legislative instruments. Decisions under that Act, such as the granting, suspension or revocation of a licence (medicinal cannabis licence, cannabis research licence and manufacture licence) would take into account whether applicable standards issued by the Minister under subsection 26B(1) have been met, or will be met as the case requires. These decisions are not legislative in nature.

A reliable source of high quality and safe cannabis plants, cannabis and cannabis resins for the manufacture of medicinal cannabis products for supply to patients in Australia is crucial for the success of the Australian medicinal cannabis framework. As the ultimate products are to be used for pharmaceutical and medical research, the overall process involving cultivation, production and manufacture of drugs derived from cannabis plants must be carried out to produce a product of acceptable pharmaceutical quality and safety standards like any medicine.

Suitable collection, cultivation, harvesting, drying, fragmentation and storage conditions are essential to the quality of the dried cannabis products. They must be free from impurities, such as soil, dust, dirt, and other contaminants (such as fungal, insect, bacterial contamination and other animal contamination). The dried cannabis products must also comply with requirements for pesticide residues, heavy metals content, aflatoxin content and microbial contamination. Most of these standards and requirements are set out in Pharmacopoeial Monographs such as the European Pharmacopoeia and British Pharmacopoeia. These Pharmacopoeias are amended from time to time.

In addition to pharmaceutical quality and safety standards in relation to medicinal cannabis products derived from cannabis plants, standards relating to security of the premises, packaging and transport may also be relevant to ensure that any storage, or movement of cannabis plants, cannabis, cannabis resins, drugs and narcotic preparations are protected from unauthorised access and to minimise diversion risks for illicit purposes.

The allowance for the Ministerial standards to refer to other documents or instruments is therefore appropriate where the standard seeks to apply specifications or restrictions for a given activity or product in relation to cannabis that are applicable to similar activities or products overseas. It will be appropriate to the emerging industry to comply with these international standards as the end products are for therapeutic use and that any inferior or poor quality products should not be supplied to patients. Allowing the use of such references and standards as they change from time to time ensures that Australia's regulatory framework in the cultivation, production and the manufacture of medicinal cannabis products from cannabis plants remain in step or is comparable with other pharmaceutical products internationally. This will also provide export opportunities for the

industry in the future if the medicinal cannabis products manufactured in Australia are of high quality and comply with overseas regulatory standards.

International standards and Pharmacopeias are not freely available. Any access or copying requires copyright licensing from the owners of these instruments, including for the use by Commonwealth Departments and agencies.

While the provision appears to be very wide in its application, the number and extent of documents that will be included in the issuing of standards will be limited and be mostly in relation to Pharmacopoeial monographs and Australian and international standards. In addition, before a standard is finalised and as part of the requirement for consultation under the Legislation Act 2003, the proposal will undergo consultation with the industry and other relevant stakeholders to ensure that the industry is informed and provided time to adhere to the relevant standards proposed to be issued. Any changes to the referenced material will be communicated to industry to ensure that they become aware and are able to get ready to comply with any amendments to the incorporated instrument.

As the standards to be issued by the Minister under subsection 26B(1) is a legislative instrument, the instrument is required to be tabled in Parliament after registration, and undergo Parliamentary scrutiny.

### ***Committee response***

The committee thanks the Minister for this detailed response.

The committee notes the Minister's advice that the 'cultivation, production and manufacture of drugs derived from cannabis plants must be carried out to produce a product of acceptable pharmaceutical quality and safety standards like any medicine' and that 'most of these standards and requirements are set out in Pharmacopoeial Monographs such as the European Pharmacopeia and British Pharmacopeia' which are amended from time to time. The committee also notes the Minister's advice that 'international standards and Pharmacopeias are not freely available' and that 'any access or copying requires copyright licensing from the owners of these instruments, including for the use by Commonwealth Departments and agencies'.

While the committee understands the need to ensure that medicinal cannabis products conform with pharmaceutical quality and safety standards, the committee takes this opportunity to reiterate its scrutiny concerns in relation to provisions such as proposed subsection 26B(2) which allow the incorporation of legislative provisions by reference to other documents. In particular, the committee will be concerned where incorporated information is not publicly available or is available only if a fee is paid as persons interested in or affected by the law may have inadequate access to its terms.

*continued*

A fundamental principle of the rule of the law is that every person subject to the law should be able to freely and readily access its terms. 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. The committee draws this report to the attention of Senators as the matters raised are relevant to all Australian jurisdictions.

The committee also takes this opportunity to highlight the expectations of the Senate Standing Committee on Regulations and Ordinances that delegated legislation which applies, adopts or incorporates any matter contained in an instrument or other writing should:

- clearly state the manner in which the documents are incorporated—that is, whether the material is being incorporated as in force or existing from time to time or as in force or existing at the commencement of the legislative instrument. This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material (see also section 14 of the *Legislation Act 2003*); and
- contain a description of the documents and indicate how they may be obtained (see paragraph 15J(2)(c) of the *Legislation Act 2003*).

**The committee requests that the key information provided by the Minister be included in the explanatory memorandum, 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*).**

**Noting the above comments, the committee also requests the Minister’s further advice as to whether material incorporated by reference under proposed subsection 26B(2) can be made available to persons interested in or affected by the law.**

# Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016

<b>Purpose</b>	This bill amends the <i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i> (OPGGS Act) to: <ul style="list-style-type: none"><li>• ensure the ongoing validity of apportionment agreements, where it becomes apparent that an agreement relates to an area which contains multiple petroleum pools, rather than a single discrete pool; and</li><li>• ensure legislative support for regulations that provide for refunds and remittals of environment plan levies and safety case levies</li></ul>
<b>Portfolio</b>	Industry, Innovation and Science
<b>Introduced</b>	House of Representatives on 15 September 2016

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Minister responded to the committee's comments in a letter dated 27 October 2016. A copy of the letter is attached to this report.

## *Alert Digest No. 7 of 2016 - extract*

### **Retrospective application Schedule 1, item 4**

This application provision states that subsections 54(1A) and (1E) of the OPGGS Act apply in relation to an agreement made before, at or after the commencement of this item.

The explanatory memorandum suggests that this is necessary as an apportionment agreement, about a particular petroleum pool which shares both Commonwealth and Western Australian waters, was made before the commencement of Schedule 1 to this bill (at p. 10).

However, although the explanatory memorandum indicates that this item will also give effect to any other agreement that may be negotiated and entered into before the commencement of schedule 1 to this bill, it does not expressly address the question of whether the application of subsections 54(1A) and (1E) to such agreements may cause any detriment to any parties.

**The committee seeks the Minister's advice as to whether the application of subsections 54(1A) and (1E) of the OPGGS Act to agreements made before the commencement of the provisions in this bill could cause detriment to any parties to those agreements.**

### ***Minister's response - extract***

Section 54 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) provides for a determination to be made, through agreement between the titleholder, the Joint Authority and the relevant State or Northern Territory Minister, of the proportion of petroleum derived from a Commonwealth title area, where a petroleum pool straddles a Commonwealth title area and a State or Northern Territory title area. The purpose of an apportionment agreement is to fix the proportions of recovered petroleum taxable respectively under Commonwealth legislation and State or Northern Territory legislation.

This Bill amends section 54 of the OPGGS Act to preserve the validity of apportionment agreements in the event that:

- a) the petroleum resource covered by the agreement is subsequently discovered to comprise, or be likely to comprise, multiple pools (subsection 54(1A)); or
- b) the parties are uncertain of the extent of a petroleum pool at the time the agreement is made (subsection 54(1E)).

As outlined at page 1 of the Explanatory Memorandum to the Bill, the purpose of apportionment agreements is to:

"...provide certainty for the titleholder and government parties, into the future, as to the revenue regimes that will apply to the petroleum once it is recovered. In the case of a titleholder whose resource straddles a Commonwealth-State boundary, an up-front apportionment between jurisdictional revenue regimes (Commonwealth petroleum resource rent tax and State royalty) may be a key factor in the titleholder's commercial decision whether to commit to further investment in the project at that point in time."

For new subsections 54(1A) or 54(1E) of the OPGGS Act to apply, the agreement must contain the specific terms required under those subsections (the apportionment provisions). If these terms are not included, existing subsection 54(1) of the OPGGS Act will continue to apply to an apportionment agreement. Subsection 54(1) contemplates that an apportionment agreement relates to a single discrete petroleum pool. If it subsequently becomes apparent that the area specified in the apportionment agreement contains multiple petroleum pools, as may be the case when fuller technical information is obtained as the resource is developed, the apportionment agreement would therefore fail and a new apportionment agreement would need to be reached. This would negate the revenue certainty for both Commonwealth and State/Northern Territory governments, as well as commercial certainty for the titleholder.

Parties are not required to take up these new preservation arrangements provided by new subsections 54(1A) or 54(1E) of the OPGGS Act, and would need to deliberately opt into them by adopting appropriate provisions as part of an apportionment agreement.

With respect to the retrospective application of the amendments, the Torosa apportionment Deed of Agreement (the Agreement) is currently the only apportionment agreement under section 54 of the OPGGS Act. All parties to the Agreement voluntarily agreed to the inclusion of specific terms in the agreement, that reflect the requirements of proposed subsection 54(1A). This was to ensure that the Agreement will remain valid if it becomes apparent that the Torosa resource comprises, or is likely to comprise, multiple petroleum pools. The parties also included a specific condition precedent for the commencement of the Agreement, linked to the commencement of the amendments to both Commonwealth and State legislation.

There is no detriment caused to any party to the Agreement by virtue of retrospective application of the amendments. Indeed, as described in the Explanatory Memorandum, the amendments will benefit the parties to the Agreement, by providing ongoing certainty as to the apportionment of petroleum recovered from the Torosa field. All parties to the Agreement were consulted regarding the proposed amendments to ensure they were satisfied with the form and application/effect.

The proposed amendments will give effect to any other agreement that may be negotiated and entered into before the commencement of Schedule 1 to this Bill which relies, for its ongoing effectiveness, on the provisions of subsection 54(1A) or 54(1E) of the OPGGS Act. As noted above, there are no other such agreements at this time. However, if any such agreement is made prior to passage and commencement of the Bill, retrospective application will only occur through deliberate inclusion by the parties of the specific terms as required under proposed subsections 54(1A) or 54(1E) of the OPGGS Act. It would therefore be up to the parties to elect to so incorporate such terms in their apportionment agreement, in order to achieve ongoing certainty. Retrospective application would not result in any detriment to such parties – noting that they would have taken positive steps to voluntarily opt into the new preservation arrangements.

***Committee response***

The committee thanks the Minister for this response. In particular, the committee notes the Minister's advice that there is currently only one apportionment agreement that will be affected by this bill and that all parties to that agreement voluntarily agreed to include terms reflecting the requirements of the bill. The committee also notes the Minister's advice that if any other agreement is made prior to passage and commencement of the bill, the parties to that agreement would need to deliberately include the specific terms as required under proposed subsections 54(1A) or 54(1E) and retrospective application would not result in any detriment to such parties.

*continued*



**The committee requests that the key information provided by the Minister be included in the explanatory memorandum, 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*).**

**In light of the detailed information provided, and the advice that any retrospective application would not cause any party detriment, the committee makes no further comment in relation to this provision.**

## Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016

<b>Purpose</b>	<p>This bill amends various Acts relating to taxation, superannuation and grants to:</p> <ul style="list-style-type: none"> <li>• establish a remedial power for the Commissioner of Taxation in relation to certain unforeseen or unintended outcomes in taxation and superannuation laws;</li> <li>• allow primary producers to access income tax averaging ten income years after choosing to opt out, instead of that choice being permanent;</li> <li>• provide relief from the luxury car tax to certain public institutions that import or acquire luxury cars for the sole purpose of public display; and</li> <li>• make a number of minor amendments</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	<p>House of Representatives on 14 September 2016</p> <p><i>This bill is identical to a bill introduced in the previous Parliament</i></p>

The committee dealt with this bill in *Alert Digest No. 7 of 2016*. The Minister responded to the committee's comments in a letter received on 27 October 2016. A copy of the letter is attached to this report.

### ***Alert Digest No. 7 of 2016 - extract***

#### **Delegation of legislative power—Commissioner of Taxation's remedial power Schedule 1**

Schedule 1 to this bill proposes to confer on the Commissioner of Taxation a new and significant 'remedial power' to modify, by a disallowable legislative instrument, the operation of a taxation law. Although the remedial power does not empower the Commissioner to make a textual amendment to the relevant taxation law, it is akin to a so-called Henry VIII law as it enables a legislative instrument to modify the operation of primary legislation. As applied, the power therefore clearly enables the content of the law to be changed.

The remedial power (see schedule 1, item 3, proposed section 370-5) gives the Commissioner a discretion to determine a modification of the operation of a taxation law where:

- the ‘modification is not is not inconsistent with the intended purpose or object of the provision’; and
- the 'Commissioner considers the modification to be reasonable, having regard to: (i) the intended purpose or object of the provision; and (ii) whether the cost of complying with the provision is disproportionate to that intended purpose or object’; and
- the Commissioner is advised, by a specified person, that ‘any impact of the modification on the Commonwealth budget would be negligible’.

The remedial power is an extraordinary power. It confers legislative power on an unelected official to modify the operation of significant primary legislation. Although it only arises in the limited circumstances outlined above, it nevertheless has a very broad application as it applies to any taxation law which is defined broadly in the *Income Tax Assessment Act 1997* to include an Act or parts of an Act of which the Commissioner has the general administration (and legislative instruments made under such Acts).

The explanatory materials provide a detailed and useful justification for the introduction of the remedial power. The following features of the approach taken, or the context in which the power will be exercised, were given emphasis:

- Proposed subsection 370-5(4) provides that an entity must treat a modification made under the power as not applying to it and any other entity if the modification would produce a result for the first entity that is ‘less favourable’ than would have been the case absent the modification (see explanatory memorandum, pp 11 and 25–28). Furthermore, proposed subsection 370-5(5) provides that a determination made under the remedial power will not apply to an entity where it would affect a right or liability of that entity under an order made by a court before the commencement of the determination. (explanatory memorandum, p. 29)
- The ‘jurisdictional limits’ on the exercise of the remedial power will be subject to judicial review (as is the case with any statutory power to make a legislative instrument).
- Section 17 of the *Legislation Act 2003* (the LA) provides, in effect, that before exercising the power the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken (see explanatory memorandum, pp 11 and 23–24).
- The explanatory memorandum (at p. 11) states that the remedial power will, in practice, only be used as a last resort, where other options (such as applying a purposive approach or the Commissioner’s general powers of administration) cannot provide a suitable solution. Further, in some cases it may be more appropriate for the Commissioner to seek a Parliamentary amendment rather than to use the power.

- The explanatory materials also emphasise that a determination is, as a disallowable instrument, subject to parliamentary accountability and that the ordinary rules in the LA apply. Thus, for example, any instrument made under this power would not be enforceable if it had not been registered on the Federal Register of Legislation.
- Item 4 of Schedule 1 confers a discretionary power on the Minister to seek a review of the remedial power provisions within 3–5 years of their commencement. If such a review is commissioned it must be tabled in each House of Parliament within 15 sitting days of the Minister receiving the report.

The explanatory memorandum also sets out in detail the reasons why the remedial power is considered necessary (see p. 14). In principle, the committee agrees that the complexity of taxation laws may give rise to unintended outcomes. It is also accepted that where the only response available is to amend the primary legislation this may (properly) involve a lengthy process. In light of these reasons and points offered in justification of the overall approach noted above, the committee considers that the remedial power may have the potential to be a plausible policy response to a practical problem encountered in the administration of taxation laws.

Nevertheless the committee has a number of questions and concerns.

First, the committee questions whether the full breadth of the power is necessary. The explanatory materials do not consider whether it would be possible to limit the application of the remedial power to those areas of taxation law and administration where the problem of unintended consequences regularly arises. Relatedly, from a scrutiny perspective, it would be preferable if the discretion to invoke the remedial power is limited or structured by the inclusion of legislative guidance as to the circumstances where parliamentary amendment of the primary legislation will be required (rather than use of the remedial power). The explanatory memorandum acknowledges (at p. 11) that there will be some circumstances where change to primary legislation is more appropriate but it does not expressly address whether the bill could include guidance about those circumstances. Nor are examples that illustrate such circumstances provided. The committee is concerned that there is nothing in the proposed amendments to ensure that the remedial power will be used in practice to complement rather than substitute ordinary processes to modify primary legislation. **The committee seeks the Assistant Treasurer’s advice in relation to the above points.**

### *Minister's response - extract*

The Committee noted that the Bill amends various Acts relating to taxation, superannuation and grants to:

- establish a remedial power for the Commissioner of Taxation (the Commissioner) in relation to certain unforeseen or unintended outcomes in taxation and superannuation laws;
- allow primary producers to access income tax averaging ten income years after choosing to opt out, instead of that choice being permanent;
- provide relief from the luxury car tax to certain public institutions that import or acquire luxury cars for the sole purpose of public displays; and
- make a number of minor amendments.

Schedule 1 to the Bill proposes to confer on the Commissioner of Taxation a remedial power to modify, by disallowable legislative instrument, the operation of a taxation law. The Committee sought my advice on six areas of the Bill.

### *Breadth of power*

The Committee queried whether the full breadth of the power is necessary and whether the remedial power could be limited to those areas of the law where unintended consequences generally arise. The Committee also queries whether the power should provide guidance as to when parliamentary amendment would be more appropriate. The Committee also was concerned that there appeared nothing in the proposed amendment to ensure that the remedial power will be used in practice to complement rather than substitute ordinary processes to modify primary legislation.

The proposed remedial power should apply to any taxation or superannuation law administered by the Commissioner as it is not known where unintended consequences would arise. As a result, the proposed legislation is subject to strict limitations:

- the modification must not be inconsistent with the intended purpose or object of the provision;
- the modification must be considered reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Secretary of the Department of the Treasury, Secretary of the Department of Finance or an authorised APS employee of either department advises the Commissioner that any impact on the Commonwealth budget would be negligible.

In addition, a modification will not apply to an entity if it would produce a less favourable outcome for the entity.

As unintended outcomes could arise from across the full range of taxation laws, the remedial power applies generally to all taxation law administered by the Commissioner. Limiting the remedial power to a specific set of taxation laws only would reduce the coverage of the power and its ability to resolve unintended issues.

There will be situations where the remedial power would not be appropriate to use to resolve an issue. Systemic problems and issues that evoke differing views would be more appropriately resolved through primary law change (as paragraphs 1.43-1.44 of the Explanatory Memorandum foreshadow).

Prior to the Commissioner contemplating using this proposed power, he would have had to exhaust his current powers, such as, applying a purposive approach or his general powers of administration. Subsequent to this process, the Commissioner could only use the proposed powers if addressing the problem met the strict limitations listed above.

### ***Committee response***

The committee thanks the Minister for this response.

The committee notes the Minister's advice that unintended consequences could arise across the full range of taxation laws, and as such, it is necessary that the proposed remedial power should apply to any taxation or superannuation law administered by the Commissioner.

The committee notes that the Minister's response did not directly address the committee's query as to whether the bill could include guidance as to the type of circumstances in which it would be more appropriate to seek changes to the primary legislation rather than using the remedial power. It also gave no examples that could illustrate when it would be more appropriate to amend the primary legislation, referring back to the explanatory memorandum and simply stating '[s]ystemic problems and issues that evoke differing views would be more appropriately resolved through primary law change'.

**In light of the Minister's reply, the committee remains concerned that the full breadth of the remedial power may not be necessary and that there is scope for further legislative guidance as to the use of these powers.**

**The committee draws its concerns to the attention of Senators and leaves the appropriateness of the proposed approach to the breadth of the Commissioner's remedial power to amend the operation of a taxation law to the consideration of the Senate as a whole.**

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

### ***Alert Digest No. 7 of 2016 - extract***

Second, although it is accepted that the satisfaction of the jurisdictional limits (proposed subsection 370-5(1)) for the making of a determination under the remedial power could be determined in judicial review proceedings, the committee notes that the question of the

reasonableness of the modification is a question which would only be reviewable on limited grounds (that is, courts would not be able to review the merits of these determinations). **In this context, the committee seeks the Minister's advice as to whether a breach of the budget notification requirement (in proposed paragraph 370-5(1)(c)) is intended to result in the invalidity of the determination.**

### ***Minister's response - extract***

#### ***Budget notification***

The Committee sought advice as to whether a breach of the budget notification requirement (in proposed paragraph 370-5(1)(c)) is intended to result in the invalidity of the determination.

Proposed paragraph 370-5(1)(c) provides that the Commissioner can only create a legislative instrument modifying the operation of a taxation law if he had been advised by the Secretary of the Department of the Treasury or the Finance Secretary that any impact of the modification on the Commonwealth budget would be negligible.

It follows that if the Commissioner acts without this advice, the exercise of the power would be invalid. However, if the Commissioner acts on advice given under the paragraph that is for some reason incorrect, the incorrectness of the advice would not invalidate and is not intended to invalidate the exercise of the power.

#### ***Committee response***

The committee thanks the Minister for this response which confirms that the exercise of the remedial modification power would be invalid if the Commissioner acts without advice that any impact of the modification on the Commonwealth budget would be negligible.

**The committee requests that the key information be included in the explanatory memorandum, 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 reiterates the fact that the question of the reasonableness of any modification to a taxation law made by the Commissioner under the proposed remedial power would only be reviewable on limited grounds (that is, courts would not be able to review the merits of these modifications). The committee draws this issue to the attention of Senators and makes no further comment in relation to this matter.**

## *Alert Digest No. 7 of 2016 - extract*

Third, it is noted that the ‘less favourable result’ test (see proposed subsection 370-5(4)) involves some complexity and may generate uncertainty in its application. The committee recognises (and welcomes) the need to ensure that changes to the operation of taxation laws made by use of this extraordinary remedial power do not adversely affect taxpayers. The committee also acknowledges the detailed explanation as to the rationale for adopting the ‘less favourable result’ test outlined in the explanatory memorandum (see pp 25–28). **However, the committee seeks the Minister’s advice as to whether uncertainty in the application of the remedial power, including the ‘less favourable result’ test, may be considered to negate any potential benefits of the proposed regime (for example, a central rationale for the proposed power is to increase certainty in the administration of taxation laws—see explanatory memorandum, p. 14).**

## *Minister's response - extract*

### *'Less favourable result' test*

The Committee sought advice as to whether uncertainty in the application of the remedial power, including the 'less favourable result' test, may be considered to negate any potential benefits of the proposed regime.

On balance, the power is expected to create benefits for taxpayers that outweigh any costs of learning and understanding as well as the alternative of over or under complying with unintended tax outcomes.

The remedial power itself will require some effort to learn and understand, as will any modifications resulting from the use of the proposed power. While a modification to the operation of the law could create some complexity, that would need to be weighed up against the uncertainty of complying with an unintended provision, or by applying the provision as intended and potentially facing the consequences of failing to comply with the law.

Moreover, in circumstances where the less favourable test created onerous requirements on an entity to assess the initial outcomes of a modification on itself, as well as complicated consequential impacts, the remedial power would most likely not be appropriate to use.



### *Committee response*

The committee thanks the Minister for this response.

The committee notes the Minister's advice that, on balance, the power is expected to create benefits for taxpayers that outweigh any potential uncertainty.

**The committee requests that the key information be included in the explanatory memorandum, 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*).**

**In light of the explanation provided, the committee leaves the appropriateness of the proposed approach relating to the application of the 'less favourable result' test to the consideration of the Senate as a whole.**

### *Alert Digest No. 7 of 2016 - extract*

Fourth, although the LA does include *general* consultation requirements, the committee would be assisted by more information about what consultation is, in practice, to be undertaken prior to the exercise of the remedial power. **In particular, the committee seeks the Minister's advice as to whether affected taxpayer(s) in each instance will be consulted.**

Noting the extraordinary nature of this proposed remedial power and the fact that breach of the LA consultation requirements does not result in the invalidity of a legislative instrument, **the committee also seeks the Minister's advice as whether consideration has been given to:**

- **including more specific consultation requirements in the bill (for example, to provide that all relevant stakeholders must be consulted, a minimum period of consultation, and/or minimum advertising requirements, such as a requirement for including information about consultations on the ATO's website); and**
- **making compliance with these requirements a condition of the validity of the determination.**

## ***Minister's response - extract***

### ***Consultation requirements***

The Committee sought advice as to whether affected taxpayer(s) would be consulted. The remedial power's use would be informed by any appropriate and reasonably practicable consultation. This is consistent with section 17 of the *Legislation Act 2003* (LA). Consultation would be undertaken routinely as part of the ordinary administrative processes to support the use of the remedial power. This consultation would engage interested stakeholders and be expected to include those directly affected by the remedial power's use, their representatives or industry bodies. The ATO would use its ordinary processes to ensure the right people are aware of the potential use of the remedial power and are consulted at the right time.

In addition, the ATO would consult with a technical advisory group (which will include private sector experts) and the Board of Taxation prior to any exercise of the power. This will provide further opportunities for affected entities to address particular problems prior to use of the remedial power.

Thorough consideration was given to the consultation arrangements for the use of the power and, on balance, the favoured approach was to rely on the requirements of the LA; ensure appropriate administrative arrangements to support consultation were part of the ordinary use of the remedial power; and engage with a technical advisory group and the Board of Taxation on the exercise of the power.

Creating a formal legislative requirement to consult, that extends beyond the requirements of the LA and which must be complied with in order for a modification to be validly made, would be inconsistent with wider processes for resolving tax law issues. This would also create a requirement that could be used to challenge the legality of the remedial power's use, creating the opportunity for disputes on issues of process to impede the remedial power's use to resolve substantive issues.

The remedial power is also given effect through legislative instruments that do not enter into effect until after the 15 sitting day disallowance period has ended. During this period Parliament can disallow a legislative instrument prior to it taking effect. This period presents a further opportunity for the community to respond to the actual instruments created to give effect to modifications under the power.

### *Committee response*

The committee thanks the Minister for this response.

The committee notes the Minister's advice that creating a formal legislative requirement to consult would be inconsistent with the wider processes for resolving tax law issues and would create the opportunity for disputes on issues of process.

**However, the committee restates its view that the remedial power is an extraordinary power; conferring legislative power on an unelected official to modify the operation of significant primary legislation. While the committee welcomes the Minister's advice that it is expected that consultation would include those directly affected by the remedial power's use, their representatives or industry bodies, given the breadth of the power, the committee considers it would be appropriate to include more specific consultation requirements in the bill and make compliance with these requirements a condition of the validity of the determination.**

**The committee draws its concerns to the attention of Senators and leaves the appropriateness of the proposed approach to consultation requirements to the consideration of the Senate as a whole.**

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

### *Alert Digest No. 7 of 2016 - extract*

Fifth, it appears that a determination modifying a taxation law may be given retrospective application (see explanatory memorandum, p. 49). Retrospective changes to the law may undermine public confidence in the legal system even if there are strong reasons to justify a particular change being applied from a date prior to commencement. In light of the fact that, in this instance, it is the determination of a non-elected official that may generate retrospective application, **the committee seeks the Minister's advice as to whether consideration has been given to including limits in the bill on the extent of retrospectivity allowed in determinations made under the remedial power (for example, that laws as modified may only be given retrospective operation for a limited time).**

## ***Minister's response - extract***

### ***Retrospective application***

The Committee sought advice as to whether consideration was given to including limits in the Bill on the extent of retrospectivity allowed in determinations made under the remedial power.

Legislative instruments created to give effect to modifications made under the remedial power are subject to the limits in section 12 of the LA. These ensure any retrospective application of the legislative instrument cannot affect a person's rights so as to disadvantage them, nor can liabilities be imposed on a person in relation to anything that occurred prior to the instruments registration.

In addition, the remedial power itself does not apply to an entity if a modification would produce a less favourable result for that entity.

In this context, the restrictions on any retrospective application are considered suitable in that they protect the community from adverse impacts, while also providing the opportunity for unintended outcomes with detrimental impacts on entities to be resolved retrospectively.

### ***Committee response***

The committee thanks the Minister for this response, and in particular his advice in relation to the limits on retrospectivity of instruments as set out in the *Legislation Act 2003*.

**In light of the explanation provided, the committee leaves the appropriateness of allowing the retrospective application of modifications to the taxation law to the consideration of the Senate as a whole.**

## ***Alert Digest No. 7 of 2016 - extract***

Sixth, the committee seeks the Minister's advice as to why the Minister's power to cause a review to be undertaken of the operation of the remedial power provisions within three to five years of them commencing is discretionary rather than mandatory. Given the extraordinary delegation of legislative power involved the committee considers that there should be a mandatory report provided to the Parliament within three years.

## *Minister's response - extract*

### *Review of operation of the power*

Finally, the Committee sought advice as to why the Minister's power to cause a review to be undertaken of the operation of the remedial power provisions is discretionary rather than mandatory.

The remedial power is a new power that warrants review following an initial period of experience with its use. This is reflected in provisions of the amending Bill (Schedule 1, item 4) which go beyond what would normally accompany a change to the taxation law. Under these provisions I can request a post implementation review of the power during the two years following the third anniversary of the remedial power's commencement. There is a balance to be achieved between reflecting the determination to conduct a post implementation review, providing flexibility to allow the review to take place at the most suitable time and only including necessary detail in the legislation.

The permissive provision creates the expectation a post implementation review should take place. Including a permissive rather than mandatory requirement to conduct the review provides flexibility to ensure the review takes place at a sensible time, whether that is earlier or later than contemplated in the provision.

It should also be noted the Bill introduces changes to the *Taxation Administration Act 1953* (Schedule 1, item 2, paragraph 3B(1AA)(e)) that would require the ATO Annual Report to include information on the exercise of the remedial power during the relevant year. This would include information regarding decisions on whether to use the power, as well as consultation undertaken prior to the power's use.

### *Committee response*

The committee thanks the Minister for this response.

The committee notes the Minister's advice that there is a need for flexibility as to the appropriate timing for the review and welcomes the provision which would require the ATO Annual Report to include information on the exercise of the remedial power during the relevant year. **However, the committee remains of the view that there should be a mandatory report to Parliament within three to five years of the commencement of the remedial power provisions. Such a provision would not preclude other reviews being undertaken either prior to or after this period has elapsed if this is considered necessary.**

*continued*

**The committee draws its concerns to the attention of Senators and leaves the appropriateness of the discretionary nature of a review of the operation of the remedial power provisions to the consideration of the Senate as a whole.**

Senator Helen Polley  
Chair



**SENATOR THE HON MATHIAS CORMANN**  
**Minister for Finance**  
**Deputy Leader of the Government in the Senate**

REF: MC16-002847

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Parliament House  
CANBERRA ACT 2600

  
Dear Senator Polley

I refer to the letters of Wednesday 13 October 2016, sent to my senior adviser by Ms Anita Coles, Acting Secretary to the Senate's Standing Committee for the Scrutiny of Bills (the Committee) drawing my attention to matters raised in the Committee's *Alert Digest No. 7 of 2016*.

The Committee has sought my advice as to whether future Budget documentation (such as Budget Paper No. 3 and the portfolio budget statements) could include additional information on payments to the States, Territories and local government.

I will ask my Department, in consultation with the Treasury, to review the current suite of Budget documentation and give consideration to including additional information on payments to the States, Territories and local government in time for the next Budget.

I have copied this response to the Treasurer.

Thank you for bringing the Committee's comments to my attention.

**Mathias Cormann**  
**Minister for Finance**

25 October 2016







## TREASURER

Ref: MC16-018796

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Suite 1 111  
Parliament House  
CANBERRA ACT 2600

Dear Senator Polley

Thank you for your correspondence of 15 September 2016 concerning the Budget Savings (Omnibus) Bill 2016 (the Bill).

I note the matters that the Committee raised regarding details in the explanatory memorandum, in relation to identifying new and previously introduced measures. As the Bill has now been enacted, the explanatory memorandum cannot be amended.

Regarding the former Schedule 9 (Dental Services), this measure was removed from the Bill. However, I have made the Minister for Health (who has carriage of this measure going forward) aware of these issues, for her to take into account when preparing the legislation for reintroduction.

I trust this information will be of assistance to you.

The Hon Scott Morrison MP

24 / 10 / 2016





## TREASURER

Ref: MC16-018796

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Suite 1 111  
Parliament House  
CANBERRA ACT 2600

Dear Senator Polley

Thank you for your correspondence of 13 October 2016 concerning the Budget Savings (Omnibus) Bill 2016 (the Bill).

I note the matter that the Committee raised regarding details in the explanatory memorandum of the item numbers in Schedule 8 to the Bill. As the Bill has now been enacted, the explanatory memorandum cannot be amended.

Regarding Schedule 8 (Aged Care), as stated in the explanatory memorandum, the purpose of retrospective validations is to ensure fair treatment of both providers and recipients, where a prior classification of the level of care has previously taken into account the manner in which the care is provided.

I trust this information will be of assistance to you.

The Hon Scott Morrison MP

( / / / 2016





ATTORNEY-GENERAL

CANBERRA

MC16-141052

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Suite 1.111  
Parliament House  
CANBERRA ACT 2600

Dear Senator Polley

Thank you for the letter of 13 October 2016 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2016* (the Bill).

I note the Committee previously considered an earlier iteration of this Bill, the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2015* in Alert Digest No. 13 of 2015. On 25 February 2016, I responded to the matters raised in that Digest by providing additional advice on a number of the components of that Bill.

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) released its Advisory Report into the Bill on 15 February 2016. The revised Bill, introduced into Parliament on 15 September 2016, implements all 21 recommendations made by the PJCIS.

In Alert Digest No. 7 of 2016, the Committee considered the revised Bill, and has sought additional advice regarding specific aspects of the Bill. In response to the Committee's request, I enclose detailed responses to the issues raised in the Digest.

I trust this information is of assistance to the Committee.

Thank you again for writing on this matter.





ATTORNEY-GENERAL

CANBERRA

# Attorney-General's response to the Senate Standing Committee for the Scrutiny of Bills

## Alert Digest No. 7 of 2016

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

Introduced into the Senate on 15 September 2016

Portfolio: Attorney-General

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## Introduction

The Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (the Bill) was introduced into the Senate on 15 September 2016. On 12 October 2016, the Senate Standing Committee for the Scrutiny of Bills (the Committee) released Alert Digest Number 7 of 2016, providing commentary on the Bill.

The Attorney-General's Department (the Department) thanks the Committee for its considered response on the Bill and provides the below information in reply.

As noted by the Committee, on 15 February 2016, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) released its Advisory Report on the Bill as it was introduced in November 2015. The PJCIS Advisory Report made 21 recommendations. The Bill implemented all 21 recommendations.

## Schedules 8, 9 and 10

### Use of information obtained where interim control order declared void

On page 29 of the Digest, the Committee raised the following concern with respect to the circumstances in which things seized, information obtained or a document produced pursuant to a monitoring warrant can be communicated or adduced as evidence where a court has subsequently declared the interim control order to be void:

**For the above reasons the committee reiterates its scrutiny concerns in relation to these provisions and requests the Attorney-General's advice as whether [sic] the provisions override judicial discretion as to whether the evidence should be adduced and, if so, why provisions similar to section 138 of the *Evidence Act 1995* do not apply (which sets out the matters that should be taken into account by the court in deciding to allow certain evidence to be admitted).**

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

Proposed section 3ZZTC of the *Crimes Act 1914*, section 299 of the *Telecommunications (Interception and Access Act 1979)* (the TIA Act) and section 65B of the *Surveillance Devices Act 2004* (the SD Act) expressly permit agencies to rely on things, information or documents obtained under a monitoring warrant where the control order is subsequently declared void in very limited circumstances. Specifically, the things, information or documents can be used to prevent, or lessen the risk of, a terrorist act, serious harm to a person, or serious damage to property. These provisions also permit the use of such information to apply for, and in connection with, a preventative detention order. While agencies are therefore entitled to adduce such evidence under these provisions, the court's discretion as to whether or not that evidence may be admitted as evidence into the proceedings, irrespective of the manner in which the information was obtained, remains unaffected.

The provisions do not affect a court's discretion to refuse to admit evidence in a proceeding before it. In addition, these provisions do not override a court's duty to refuse to admit improperly obtained evidence in particular circumstances, or its determination of the weight to be given to particular evidence. Similarly, these provisions do not impact upon a party's right to



adduce or challenge evidence in court.

## Schedule 15

### Right to a fair hearing

On page 37 of the Digest, the Committee raised the following concern about the operation of the proposed special advocate role with the requirement in Part 1 of the Schedule 15 that the subject of the control order (controlee) be provided 'sufficient information about the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations':

**The committee welcomes the amendment to ensure sufficient information is provided to a person who may be subject to a control order in order to obtain effective instructions. However, the committee seeks the Attorney-General's advice as to whether the 'sufficient information' will be provided to a person before a special advocate has been provided with national security information (disclosed pursuant to proposed section 38PE) to enable them to adequately communicate with the special advocate.**

The amendments contained in Part 1 of Schedule 15 enable a court to make three new types of protective orders in control order proceedings. Under revised section 38J of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), each of the new protective orders allows the court to consider sensitive national security information that the controlee and their ordinary legal representative are prevented from hearing or seeing. Part 2 of Schedule 15 provides that a special advocate may be appointed to represent the interests of the controlee in parts of the control order proceedings where the controlee and their ordinary legal representative have been excluded.

In determining whether to make a protective order under revised section 38J, the court must be satisfied that the controlee has been given 'sufficient information about the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations' (new paragraph 38J(1)(c)). This implements Recommendation 4 of the PJCIS Advisory Report.

Whether the controlee is provided the 'sufficient information' prior to the special advocate seeing the sensitive national security information will depend on the circumstances of the control order application.

In the ordinary case, the controlee will be given sufficient information about the allegations on which a control order request is based, such that they can instruct their ordinary legal representative and special advocate in relation to those allegations. This information is provided by the AFP pursuant to the various disclosure obligations under Division 104 (for instance, subparagraph 104.12A(2)(a)(iii)) as well as under other applicable procedural rights in federal civil proceedings (for instance, normal processes of discovery). Given the controlee will have access to this information prior to the special advocate seeing the sensitive national security information under new section 38PE, the controlee and the special advocate will generally be able to communicate freely.

There may be some circumstances where further information is disclosed to the controlee after a special advocate has been appointed and received the sensitive national security information. Following the receipt of the sensitive national security information by the special advocate, any communication from the special advocate to the controlee will require the authorisation of the court, pursuant to new section 38PF. Following the closed hearing, if the court determines that

the information should be subject to a new protective order under revised section 38J, the court must ensure the controlee is provided 'sufficient information' about the allegations contained in that 'information' such that they are able to instruct their ordinary legal representative and special advocate in relation to those allegations.

The communication restrictions in new section 38PF do not prevent the controlee from communicating with the special advocate nor providing information to the special advocate that the controlee considers relevant in relation to the 'sufficient information'. Pursuant to new subsection 38PF(8), the controlee can continue to communicate with the special advocate in writing through their ordinary legal representative without restriction.

### **Appointment of the special advocate**

On page 38 of the Digest, the Committee raised the following concern with respect to the requirement for the court to appoint a special advocate:

**Given this, the committee requests a more detailed justification from the Attorney-General as to the rationale for leaving the appointment of a special advocate to the discretion of the court.**

Under new subsection 38PA(1), the court may appoint a person to be a special advocate if the proceeding is a control order proceeding and the court makes an order under new subsection 38I(3A), or new subsections 38J(2), 38J(3) or 38J(4).

New section 38PA is designed to provide the court with flexibility to conduct the control order proceeding in any manner it considers appropriate. This allows the court to appropriately balance the requirements of conducting the control order proceedings efficiently and effectively with the controlee's right to a fair hearing.

In some instances the court may decide that it can sufficiently safeguard the controlee's right to a fair hearing, while in other circumstances, it may decide that the special advocate can provide valuable assistance to the court in protecting the rights of the controlee. That determination should be made on a case by case basis, taking into account all relevant considerations.

For example, the new protective orders under revised section 38J are likely to be sought only in relation to specific information that forms part of the matrix of facts in relation to a control order application. Accordingly, there may be instances where the court considers itself sufficiently experienced and capable of analysing this targeted information. Under such circumstances, there may be little work left for the special advocate to do.

Comparable special advocate regimes in Canada and New Zealand provide the court with discretion as to whether to appoint a special advocate.<sup>1</sup>

### **Communication restrictions between special advocate and controlee prior to disclosure of sensitive information to the special advocate**

On page 39 of the Digest, the Committee requested further information about the ability to restrict communication between the special advocate and the controlee prior to the special advocate being provided the sensitive national security information that is proposed to be the subject of, or is already subject to, a new protective order under revised section 38J.

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<sup>1</sup> See, for example, *Immigration and Refugee Protection Act* (Canada), section 83(1.2), *Telecommunications (interception Capability and Security) Act 2013* (New Zealand), subsection 105(2) and *Health and Safety at Work Act 2015* (New Zealand), subsection 6(2) of Schedule 4.

**The committee considers that the exception in proposed subsection 38PD(2) is not sufficiently explained in the explanatory materials and seeks the Attorney-General's advice as to why it is necessary to empower the court to prohibit or restrict communication between a special advocate and a controlee prior to sensitive national security information being disclosed to the special advocate.**

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

New section 38PD provides that communication between the special advocate and the controlee is generally not subject to any restriction prior to the special advocate being provided with the sensitive national security information under new subsection 38PE(2). The limited exception to this is outlined in new subsection 38PD(2). New subsection 38PD(2) states that the court may make orders restricting or prohibiting communications between the special advocate and the controlee even prior to the special advocate being disclosed the sensitive national security information if the court is satisfied that the order is in the interest of national security, and the order is not inconsistent with the NSI Act or regulations made under the Act.

The limited exception to the general rule in favour of unrestricted communication is to prevent the inadvertent unauthorised disclosure of sensitive national security information. There are circumstances where the appointed special advocate may have already acquired sensitive national security information, including the sensitive national security information that is to be subject to, or is already the subject of, a new protective order under revised section 38J. Where the special advocate has knowledge of such material, which is relevant to the control order proceeding, there is a risk that the special advocate may inadvertently disclose that information to the controlee. A court order under new subsection 38PD(2) which restricts or prohibits communication between the special advocate and controlee guards against the risk of inadvertent disclosure.

In making an order under new subsection 38PD(2), the court may require that any communication from the special advocate to the controlee be authorised by the court pursuant to the process outlined in new section 38PF. Such a process ensures that the court can review proposed communications from the special advocate to the controlee to minimise the risk of inadvertent disclosure of sensitive national security information. The process under new section 38PF still allows the controlee to communicate with the special advocate without restriction, so long as the communication is in writing and goes through their ordinary legal representative.

Noting the importance of promoting open and unrestricted communication between the special advocate and controlee prior to the special advocate receiving the sensitive national security information, it is likely that the court would only make an order under new subsection 38PD(2) in exceptional circumstances where the risk of inadvertent disclosure of sensitive national security information cannot be mitigated in any other way.

### **Delegation of legislative power (item 41, proposed subsection 38PA(2)(a))**

On page 40 of the Digest, the Committee sought further information about why the primary legislation does not contain additional details about the special advocate role.

**For the reasons set out above, the committee seeks the advice of the Attorney-General as to why details regarding the appointment process of persons as special advocates, and the terms and conditions of their appointment, are not provided for in**

**the primary legislation.**

*Pending the Attorney-General'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.*

Part 2 of Schedule 15 of the Bill creates the architecture for a special advocate role. The inclusion of a special advocate role implements Recommendation 5 of the PJCIS Advisory Report, which required that legislation giving effect to a special advocate system should be introduced as soon as possible, and by no later than the end of 2016.

The important details about the role and function of the special advocate are contained in the Bill. The supporting details and administrative arrangements to ensure the effective implementation of the special advocate role will be contained in regulations. The regulation-making power in new section 38PI allows for regulations to cover a range of matters relating to special advocates, including the terms of their remuneration, conflicts of interest and immunity. These features are the subject of ongoing consideration by the Government. Given there are no pre-existing legislative special advocate schemes in Australia, these matters raise issues that will require time to analyse and resolve. This is why the PJCIS, in recommending the implementation of a special advocate role, also noted that 'Extensive consultation will be necessary to ensure that a robust and highly effective system of special advocates tailored to the Australian context is ultimately established'.

Schedule 15 of the Bill provides that the special advocate amendments will commence no later than 12 months after the date on which the Act receives the Royal Assent. Accordingly, the supporting regulations and administrative arrangements will be established as soon as practicable in order to operationalise the special advocate role swiftly.

### **Delayed commencement (item 2 (commencement))**

On page 42 of the Digest, the Committee requested further information about why Part 1 of Schedule 15 should also not also be delayed until such time as the special advocate role has come into effect.

**For the reasons set out above the committee does not believe that persuasive reasons have been provided for the delayed commencement of the amendments in Part 2. To the extent the special advocate scheme is thought to ameliorate the unfairness involved in the amendments in Part 1, this issue of delayed commencement is a matter of significant concern. The committee therefore seeks the Attorney-General's advice as to why the commencement of Part 1 of Schedule 15 should not be delayed until such time as the special advocate scheme is in place. The committee notes that if (as set out above in relation to the delegation of legislative power) the important details concerning the appointment of the special advocate scheme were included in the primary legislation then this issue may not arise.**

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

The Explanatory Memorandum, at paragraph 166, outlines the urgency of the amendments contained in Part 1 of Schedule 15:

In the absence of the amendments contained in Part 1 of Schedule 15 there is a substantial

risk that the inability to rely on, and protect, sensitive information may result in a control order being unable to be obtained against an individual who poses a risk to the safety of the community. This is because law enforcement would not be satisfied that existing protections under the NSI Act mitigate the risks associated with the disclosure of such information.

In light of these operational realities, the PJCIS stated that:

cognisant of the changing nature of the operational environment and the increased need to rely on and protect sensitive information in control order proceedings, the Committee considers that the proposed amendments to the NSI Act in Schedule 15 [Part 1] should proceed without delay.

Practically, this results in an interim period of no longer than 12 months where the new protective orders under revised section 38J may be sought by the Attorney-General and a statutory special advocate role will not be in place. However, as recognised by the PJCIS, nothing in Schedule 15 precludes the court from exercising its inherent power to appoint a special advocate to represent the interests of the controlee where it considers it appropriate.

The PJCIS expressly cited *R v Lodhi* [2006] NSWSC 586 in support of the proposition that the court possesses an inherent power to appoint special advocates.

### **Retrospective commencement (item 32)**

On page 43 of the Digest, the Committee notes the response of the Attorney-General to their previous query regarding the supposed retrospective application of the amendments to control order proceedings which have already commenced. In relation to the information provided by the Attorney-General, the Committee observes that:

**Unfortunately this further information was not included in the current explanatory memorandum as requested by the committee. The committee requests that the explanatory memorandum be amended to include this information. On the basis of the committee's previous correspondence the committee leaves the question of whether the new orders should be available in proceedings that have started before the commencement of these new provisions to the Senate as a whole.**

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

The Explanatory Memorandum currently states that the new protective orders will apply to control order proceedings irrespective of whether the control order proceeding has commenced and irrespective of whether or not the NSI Act has been invoked. However, this does not mean that the new protective orders can be sought in respect of parts of the control order proceeding which have already concluded. As noted in the Attorney-General's previous response, the new protective orders will only be available in those parts of the control order proceedings that have not yet occurred and where the NSI Act has been invoked. Accordingly, the provisions will not operate retrospectively.

The existing Explanatory Memorandum already provides a description of the operation of the amendments contained in Part 1 of Schedule 15.





**THE HON SUSSAN LEY MP  
MINISTER FOR HEALTH AND AGED CARE  
MINISTER FOR SPORT**

Ref No: MC16-030594

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Suite 1.111  
Parliament House  
CANBERRA ACT 2600

Dear Chair

A handwritten signature in blue ink that reads "Helen".

Thank you for your correspondence of 13 October 2016, regarding the issues identified in the Scrutiny of Bills Committee's Alert Digest No 7 of 2016 concerning the Narcotic Drugs Legislation Amendment Bill 2016 (the Bill).

The response to the specific issues and comments by the Committee in relation to specified provisions of the Bill is attached.

Thank you for bringing this matter to my attention.

**The Hon Sussan Ley MP**

Encl: Response to specific issues and comments raised by the Scrutiny of Bills Committee in relation to specified provisions of the Narcotic Drugs Legislation Amendment Bill 2016.

**Delegation of legislative power  
Schedule 1, Item 1, proposed subsection 4(1)**

The Committee sought the Minister's advice as to why the definition of a 'law enforcement agency' can be expanded by regulation and seeks justification as to the appropriateness of this delegation of legislative power.

Law enforcement agency is defined broadly under subsection 4(1) of the *Narcotic Drugs Act 1967* (the ND Act) as a body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence in, or in a part of, Australia. A body, agency or organisation that is prescribed in the regulations for the purposes of paragraph (b) of this definition would also be a law enforcement agency.

The Australian Federal Police, the Australian Criminal Intelligence Commission and State and Territory Police are clearly within the scope of the definition of a 'law enforcement agency'. Government agencies such as the Australian Border Force and the Australian Competition and Consumer Commission would not traditionally be known or be clearly covered by the definition as a law enforcement agency. These agencies may be investigating and hold sensitive law enforcement information about natural persons and bodies corporate that may be relevant to the granting or holding of a licence, or being associated with the holder of a licence, under the ND Act. The information may be about importation and exportation activities, or in relation to commercial activities of a person and association of that person with other bodies corporate in Australia. In order to protect sensitive law enforcement information provided by these agencies, it would be appropriate to prescribe them as a law enforcement agency in the regulations made for the purposes of paragraph (b) of the definition of a law enforcement agency.

The regulation is therefore proposed to prescribe Commonwealth agencies that are not specifically covered by the definition of a law enforcement agency, but is generally involved in the investigation of persons and hold information that may be relevant to law enforcement and regulatory actions in relation to licences under the Act and is within the scope of the definition of sensitive law enforcement information. The list would not be comprehensive and there would only be a few bodies or agencies that are proposed to be included in the regulation.

**Trespass on personal rights and liberties – procedural fairness and disclosure of sensitive law enforcement information  
Schedule 1, Items 4, 7, 16, 18, 20 and 21**

The Committee sought the Minister's advice as to why it is necessary to exclude the natural justice hearing rule, given that the courts apply that rule by reference to a particular statutory scheme and its underlying purposes. The Committee notes that the provision may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee terms of reference.

Illegal cultivation of cannabis plants, trafficking of drugs (including cannabis) and manufacture of drugs are serious criminal offences and attract very high level penalties and long periods of imprisonment. Due to limited sources of lawfully manufactured medicinal cannabis products in Australia, some patients or their families have been sourcing cannabis products from illicit sources. Persons who have been unlawfully cultivating and supplying



cannabis products may decide to continue to pursue these activities under the guise of a Commonwealth cannabis licence under the ND Act. It is possible that law enforcement agencies may have been investigating or have information about these persons.

The ND Act now allows for the cultivation of cannabis plants and the production of cannabis and cannabis resins under a national licensing scheme. For a long time, only the cultivation of cannabis plants for industrial purposes (also known as industrial hemp) is allowed in Australia under State or Territory regulatory frameworks. Cultivation of cannabis plants and production of cannabis and cannabis resins carry a particularly high risk of diversion because the product can be readily be used in its raw state and is likely to be attractive to organised crime seeking to hide illegal activities under cover of a Commonwealth licence. In contrast, the cultivation of opium poppies and production of opium alkaloids regulated under State and Territory laws have lower diversion risk as the plant and alkaloids cannot be readily used in their raw state. The fit and proper person requirement under the ND Act is designed to address and manage the risks that unsuitable persons may be granted a licence. This requirement also applies to a manufacture licence.

The protection and non-disclosure of sensitive law enforcement information provided to, or held by, the Secretary of the Department of Health (Secretary) is absolutely necessary to protect the integrity of the national medicinal cannabis regulatory framework and the manufacture of drugs under the ND Act so that persons who are not fit to hold a licence are prevented from holding a licence to carry out activities under that Act. Sensitive law enforcement information is provided to the Secretary by Commonwealth, State or Territory law enforcement agencies, or from other sources.

The law enforcement agencies and other sources of sensitive law enforcement information must have confidence that when they provide sensitive law enforcement information it would be protected from disclosure and unauthorised use. Similarly, sensitive law enforcement information held by the Secretary and obtained from other sources must also be protected from disclosure and unauthorised use. Mere recommendations by law enforcement agencies to the Secretary not to grant a licence on the basis that they hold adverse information in relation to the suitability of a person, without providing supporting adverse information and providing reasons for such a refusal, would not be adequate and acceptable for the Secretary to make a decision under the Act. The Secretary must be able to consider that information and assess the relevance of that information before making a final decision.

It would be therefore important that the law enforcement agencies, in particular State and Territory law enforcement agencies, have confidence that sensitive law enforcement information would be protected from disclosure to the applicant or the public. Otherwise, from our consultations with law enforcement agencies, they will not be willing to provide sensitive law enforcement information to the Secretary. In this case, the objective of ensuring that only fit and proper persons are able to hold a licence and exclude individuals who have criminal history or part of an organised crime syndicate to use medicinal cannabis framework as cover for illegal activities may be frustrated.

Specifically excluding the natural justice hearing rule in the protection of that information under proposed section 21A of the ND Act (Item 20, Schedule 1 of the Bill) would provide confidence to law enforcement agencies and other persons who would be providing vital information for the integrity of the regulatory framework set out in the ND Act. Without the specific provision, there are likely to be legal challenges through the courts to seek access to the information and there would be uncertainty about the ability of the Secretary to protect sensitive law enforcement information.

The novelty of the Commonwealth medicinal cannabis scheme, which allow for the cultivation of cannabis plants and production of cannabis or cannabis resins that are supplied and carried out illicitly by organised crime networks require new measures for the protection of sensitive law enforcement information, such as the exclusion of the natural justice hearing rule in specified circumstances.

Uncertainties in the ability of the Secretary to protect this information from disclosure to the applicant or the public would adversely affect the effectiveness of the framework to exclude persons who are unsuitable to hold a licence, frustrate the objective of the scheme to ensure that cannabis cultivated, produced and manufactured in Australia for medicinal and scientific purposes, not for illicit purposes, and compromise the effective investigations and operations of law enforcement and other agencies.

**Trespass on personal rights and liberties-reversal of evidential burden of proof  
Schedule 1, Item 11, proposed subsection 14MA(2)**

The Committee sought the Minister's detailed justification for the proposed approach that addresses each of the instances in the bill against the principles named in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. The Committee noted that this provision 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.

Subsection 14MA(2) provides that a person does not commit the offence set out in subsection 14MA(1) if:

- (a) the disclosure or use by the person for the purposes of, or in connection with, the performance of a function or the exercise of a power under the Narcotic Drugs Act 1967;
- (b) the disclosure or use by the person in compliance with a requirement under a law of the Commonwealth; or
- (c) the person or agency that gave information consents to the disclosure or use; or
- (d) the disclosure or use is required by a court or tribunal for the purposes of giving effect to this Act or another law of the Commonwealth; or
- (e) the information or a document or advice that included the information was given to the Secretary by a person or an agency under section 14K or 14L, and the use or the disclosure by that person or agency.

The drafting of the above provision took into account the requirements under Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

Subsection 14MA(2) creates exceptions that trigger subsection 13.3 of the Criminal Code Act. The burden of proof for the defence is evidential, and the prosecution still bears a legal burden to prove its case beyond reasonable doubt.

The facts set out in the defences set out in paragraphs (a) to (e) of subsection 14MA(2) are peculiarly within and remain wholly within the defendant's knowledge and not generally available to the prosecution. At the same time, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. For example, in relation to paragraph 14MA(2) (c), consent provided by a person or agency that gave the information for the disclosure or use by a specified person would be peculiarly within the defendant's knowledge and would be better placed to prove that a consent was provided to the person.

**Delegation of legislative power and parliamentary scrutiny  
Schedule 2, Item 28, proposed subsection 26B(2).**

The Committee sought the Minister's advice as to why it is necessary to rely on material incorporated by reference (including details about any measures taken to identify alternative to incorporating material by reference and why such alternatives are not appropriate in this instance) and if the approach is still considered necessary:

- how persons interested in, or likely to be affected by, any changes will be notified or otherwise become aware of changes to the law; and
- whether a requirement specifying that any material incorporated by reference must be freely available and readily available can be included in the Bill.

Recent amendments to the ND Act implement the national licensing scheme allowing the lawful cultivation in Australia of cannabis plants for medicinal and scientific purposes. This would enable a sustainable, high quality and safe supply of locally grown and manufactured medicinal cannabis products to Australian patients.

Subsection 26B(1) of the ND Act authorises the Minister for Health to issue standards for the purposes of the Act. The standards issued under subsection 26B(1) are legislative instruments. Decisions under that Act, such as the granting, suspension or revocation of a licence (medicinal cannabis licence, cannabis research licence and manufacture licence) would take into account whether applicable standards issued by the Minister under subsection 26B(1) have been met, or will be met as the case requires. These decisions are not legislative in nature.

A reliable source of high quality and safe cannabis plants, cannabis and cannabis resins for the manufacture of medicinal cannabis products for supply to patients in Australia is crucial for the success of the Australian medicinal cannabis framework. As the ultimate products are to be used for pharmaceutical and medical research, the overall process involving cultivation, production and manufacture of drugs derived from cannabis plants must be carried out to produce a product of acceptable pharmaceutical quality and safety standards like any medicine.

Suitable collection, cultivation, harvesting, drying, fragmentation and storage conditions are essential to the quality of the dried cannabis products. They must be free from impurities, such as soil, dust, dirt, and other contaminants (such as fungal, insect, bacterial contamination and other animal contamination). The dried cannabis products must also comply with requirements for pesticide residues, heavy metals content, aflatoxin content and microbial contamination. Most of these standards and requirements are set out in Pharmacopoeial Monographs such as the European Pharmacopoeia and British Pharmacopoeia. These Pharmacopoeias are amended from time to time.

In addition to pharmaceutical quality and safety standards in relation to medicinal cannabis products derived from cannabis plants, standards relating to security of the premises, packaging and transport may also be relevant to ensure that any storage, or movement or cannabis plants, cannabis, cannabis resins, drugs and narcotic preparations are protected from unauthorised access and to minimise diversion risks for illicit purposes.

The allowance for the Ministerial standards to refer to other documents or instruments is therefore appropriate where the standard seeks to apply specifications or restrictions for a given activity or product in relation to cannabis that are applicable to similar activities or

products overseas. It will be appropriate to the emerging industry to comply with these international standards as the end products are for therapeutic use and that any inferior or poor quality products should not be supplied to patients. Allowing the use of such references and standards as they change from time to time ensures that Australia's regulatory framework in the cultivation, production and the manufacture of medicinal cannabis products from cannabis plants remain in step or is comparable with other pharmaceutical products internationally. This will also provide export opportunities for the industry in the future if the medicinal cannabis products manufactured in Australia are of high quality and comply with overseas regulatory standards.

International standards and Pharmacopeias are not freely available. Any access or copying requires copyright licensing from the owners of these instruments, including for the use by Commonwealth Departments and agencies.

While the provision appears to be very wide in its application, the number and extent of documents that will be included in the issuing of standards will be limited and be mostly in relation to Pharmacopoeial monographs and Australian and international standards. In addition, before a standard is finalised and as part of the requirement for consultation under the Legislation Act 2003, the proposal will undergo consultation with the industry and other relevant stakeholders to ensure that the industry is informed and provided time to adhere to the relevant standards proposed to be issued. Any changes to the referenced material will be communicated to industry to ensure that they become aware and are able to get ready to comply with any amendments to the incorporated instrument.

As the standards to be issued by the Minister under subsection 26B(1) is a legislative instrument, the instrument is required to be tabled in Parliament after registration, and undergo Parliamentary scrutiny.



**Senator the Hon Matthew Canavan**

**Minister for Resources and Northern Australia**

MC16-007419

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
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CANBERRA ACT 2600

**27 OCT 2016**

By Email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)

Dear Senator Polley *Helen,*

I refer to the Committee Secretary's letter, dated 13 October 2016, seeking further information about the Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill (the Bill).

In the *Alert Digest No.7 of 2016*, the Committee requested further information about the retrospective application of Schedule 1, item 4 of the Bill, namely whether the application of proposed subsections 54(1A) and (1E) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to agreements made before the commencement of the provisions could cause detriment to any parties to those agreements.

A response addressing the concerns raised is attached.

The Committee also commented on the retrospective commencement of Schedule 2, item 3 of the Bill. I note that the *Alert Digest No.7 of 2016* states that, due to the nature of the amendment and the explanation provided in the explanatory memorandum, no further comment is required. As such, we have not addressed this provision in our response.

Thank you for bringing the Committee's comments to my attention.

Yours sincerely

*Matthew Canavan*

Matthew Canavan

October 2016

Encl.

Response to the Committee's question about the retrospective commencement of provisions in Schedule 1, item 4 of the Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill (the Bill)

Section 54 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) provides for a determination to be made, through agreement between the titleholder, the Joint Authority and the relevant State or Northern Territory Minister, of the proportion of petroleum derived from a Commonwealth title area, where a petroleum pool straddles a Commonwealth title area and a State or Northern Territory title area. The purpose of an apportionment agreement is to fix the proportions of recovered petroleum taxable respectively under Commonwealth legislation and State or Northern Territory legislation.

This Bill amends section 54 of the OPGGS Act to preserve the validity of apportionment agreements in the event that:

- a) the petroleum resource covered by the agreement is subsequently discovered to comprise, or be likely to comprise, multiple pools (subsection 54(1A)); or
- b) the parties are uncertain of the extent of a petroleum pool at the time the agreement is made (subsection 54(1E)).

As outlined at page 1 of the Explanatory Memorandum to the Bill, the purpose of apportionment agreements is to:

*“... provide certainty for the titleholder and government parties, into the future, as to the revenue regimes that will apply to the petroleum once it is recovered. In the case of a titleholder whose resource straddles a Commonwealth-State boundary, an up-front apportionment between jurisdictional revenue regimes (Commonwealth petroleum resource rent tax and State royalty) may be a key factor in the titleholder's commercial decision whether to commit to further investment in the project at that point in time.”*

For new subsections 54(1A) or 54(1E) of the OPGGS Act to apply, the agreement must contain the specific terms required under those subsections (the apportionment provisions). If these terms are not included, existing subsection 54(1) of the OPGGS Act will continue to apply to an apportionment agreement. Subsection 54(1) contemplates that an apportionment agreement relates to a single discrete petroleum pool. If it subsequently becomes apparent that the area specified in the apportionment agreement contains multiple petroleum pools, as may be the case when fuller technical information is obtained as the resource is developed, the apportionment agreement would therefore fail and a new apportionment agreement would need to be reached. This would negate the revenue certainty for both Commonwealth and State/Northern Territory governments, as well as commercial certainty for the titleholder.

Parties are not required to take up these new preservation arrangements provided by new subsections 54(1A) or 54(1E) of the OPGGS Act, and would need to deliberately opt into them by adopting appropriate provisions as part of an apportionment agreement.

With respect to the retrospective application of the amendments, the Torosa apportionment Deed of Agreement (the Agreement) is currently the only apportionment agreement under section 54 of the OPGGS Act. All parties to the Agreement voluntarily agreed to the inclusion of specific terms in the agreement, that reflect the requirements of proposed subsection 54(1A). This was to ensure that the Agreement will remain valid if it becomes apparent that the Torosa resource comprises, or is likely to comprise, multiple petroleum pools. The parties also included a specific condition precedent for the commencement of the Agreement, linked to the commencement of the amendments to both Commonwealth and State legislation.

There is no detriment caused to any party to the Agreement by virtue of retrospective application of the amendments. Indeed, as described in the Explanatory Memorandum, the amendments will benefit the parties to the Agreement, by providing ongoing certainty as to the apportionment of petroleum recovered from the Torosa field. All parties to the Agreement were consulted regarding the proposed amendments to ensure they were satisfied with the form and application/effect.

The proposed amendments will give effect to any other agreement that may be negotiated and entered into before the commencement of Schedule 1 to this Bill which relies, for its ongoing effectiveness, on the provisions of subsection 54(1A) or 54(1E) of the OPGGS Act. As noted above, there are no other such agreements at this time. However, if any such agreement is made prior to passage and commencement of the Bill, retrospective application will only occur through deliberate inclusion by the parties of the specific terms as required under proposed subsections 54(1A) or 54(1E) of the OPGGS Act. It would therefore be up to the parties to elect to so incorporate such terms in their apportionment agreement, in order to achieve ongoing certainty. Retrospective application would not result in any detriment to such parties – noting that they would have taken positive steps to voluntarily opt into the new preservation arrangements.







## Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Suite 1.111  
Parliament House  
Canberra ACT 2600

Dear Senator Polley

A handwritten signature in blue ink that reads 'Helen'.

I am writing in response to comments contained in the Senate Scrutiny of Bills Committee's *Alert Digest No. 7 of 2016* concerning the Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016 (the Bill).

The Committee noted that the Bill amends various Acts relating to taxation, superannuation and grants to:

- establish a remedial power for the Commissioner of Taxation (the Commissioner) in relation to certain unforeseen or unintended outcomes in taxation and superannuation laws;
- allow primary producers to access income tax averaging ten income years after choosing to opt out, instead of that choice being permanent;
- provide relief from the luxury car tax to certain public institutions that import or acquire luxury cars for the sole purpose of public displays; and
- make a number of minor amendments.

Schedule 1 to the Bill proposes to confer on the Commissioner of Taxation a remedial power to modify, by disallowable legislative instrument, the operation of a taxation law. The Committee sought my advice on six areas of the Bill.

### ***Breadth of power***

The Committee queried whether the full breadth of the power is necessary and whether the remedial power could be limited to those areas of the law where unintended consequences generally arise. The Committee also queries whether the power should provide guidance as to when parliamentary amendment would be more appropriate. The Committee also was concerned that there appeared nothing in the proposed amendments

to ensure that the remedial power will be used in practice to complement rather than substitute ordinary processes to modify primary legislation.

The proposed remedial power should apply to any taxation or superannuation law administered by the Commissioner as it is not known where unintended consequences would arise. As a result, the proposed legislation is subject to strict limitations:

- the modification must not be inconsistent with the intended purpose or object of the provision;
- the modification must be considered reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Secretary of the Department of the Treasury, Secretary of the Department of Finance or an authorised APS employee of either department advises the Commissioner that any impact on the Commonwealth budget would be negligible.

In addition, a modification will not apply to an entity if it would produce a less favourable outcome for the entity.

As unintended outcomes could arise from across the full range of taxation laws, the remedial power applies generally to all taxation law administered by the Commissioner. Limiting the remedial power to a specific set of taxation laws only would reduce the coverage of the power and its ability to resolve unintended issues.

There will be situations where the remedial power would not be appropriate to use to resolve an issue. Systemic problems and issues that evoke differing views would be more appropriately resolved through primary law change (as paragraphs 1.43-1.44 of the Explanatory Memorandum foreshadow).

Prior to the Commissioner contemplating using this proposed power, he would have had to exhaust his current powers, such as, applying a purposive approach or his general powers of administration. Subsequent to this process, the Commissioner could only use the proposed powers if addressing the problem met the strict limitations listed above.

### ***Budget notification***

The Committee sought advice as to whether a breach of the budget notification requirement (in proposed paragraph 370-5(1)(c) is intended to result in the invalidity of the determination.

Proposed paragraph 370-5(1)(c) provides that the Commissioner can only create a legislative instrument modifying the operation of a taxation law if he had been advised by the Secretary of the Department of the Treasury or the Finance Secretary that any impact of the modification on the Commonwealth budget would be negligible.

It follows that if the Commissioner acts without this advice, the exercise of the power would be invalid. However, if the Commissioner acts on advice given under the paragraph that is for some reason incorrect, the incorrectness of the advice would not invalidate and is not intended to invalidate the exercise of the power.

### *'Less favourable result' test*

The Committee sought advice as to whether uncertainty in the application of the remedial power, including the 'less favourable result' test, may be considered to negate any potential benefits of the proposed regime.

On balance, the power is expected to create benefits for taxpayers that outweigh any costs of learning and understanding as well as the alternative of over or under complying with unintended tax outcomes.

The remedial power itself will require some effort to learn and understand, as will any modifications resulting from the use of the proposed power. While a modification to the operation of the law could create some complexity, that would need to be weighed up against the uncertainty of complying with an unintended provision, or by applying the provision as intended and potentially facing the consequences of failing to comply with the law.

Moreover, in circumstances where the less favourable test created onerous requirements on an entity to assess the initial outcomes of a modification on itself, as well as complicated consequential impacts, the remedial power would most likely not be appropriate to use.

### *Consultation requirements*

The Committee sought advice as to whether affected taxpayer(s) would be consulted. The remedial power's use would be informed by any appropriate and reasonably practicable consultation. This is consistent with section 17 of the *Legislation Act 2003* (LA). Consultation would be undertaken routinely as part of the ordinary administrative processes to support the use of the remedial power. This consultation would engage interested stakeholders and be expected to include those directly affected by the remedial power's use, their representatives or industry bodies. The ATO would use its ordinary processes to ensure the right people are aware of the potential use of the remedial power and are consulted at the right time.

In addition, the ATO would consult with a technical advisory group (which will include private sector experts) and the Board of Taxation prior to any exercise of the power. This will provide further opportunities for affected entities to address particular problems prior to use of the remedial power.

Thorough consideration was given to the consultation arrangements for the use of the power and, on balance, the favoured approach was to rely on the requirements of the LA; ensure appropriate administrative arrangements to support consultation were part of the ordinary use of the remedial power; and engage with a technical advisory group and the Board of Taxation on the exercise of the power.

Creating a formal legislative requirement to consult, that extends beyond the requirements of the LA and which must be complied with in order for a modification to be validly made, would be inconsistent with wider processes for resolving tax law issues. This would also create a requirement that could be used to challenge the legality

of the remedial power's use, creating the opportunity for disputes on issues of process to impede the remedial power's use to resolve substantive issues.

The remedial power is also given effect through legislative instruments that do not enter into effect until after the 15 sitting day disallowance period has ended. During this period Parliament can disallow a legislative instrument prior to it taking effect. This period presents a further opportunity for the community to respond to the actual instruments created to give effect to modifications under the power.

### *Retrospective application*

The Committee sought advice as to whether consideration was given to including limits in the Bill on the extent of retrospectivity allowed in determinations made under the remedial power.

Legislative instruments created to give effect to modifications made under the remedial power are subject to the limits in section 12 of the LA. These ensure any retrospective application of the legislative instrument cannot affect a person's rights so as to disadvantage them, nor can liabilities be imposed on a person in relation to anything that occurred prior to the instruments registration.

In addition, the remedial power itself does not apply to an entity if a modification would produce a less favourable result for that entity.

In this context, the restrictions on any retrospective application are considered suitable in that they protect the community from adverse impacts, while also providing the opportunity for unintended outcomes with detrimental impacts on entities to be resolved retrospectively.

### *Review of operation of the power*

Finally, the Committee sought advice as to why the Minister's power to cause a review to be undertaken of the operation of the remedial power provisions is discretionary rather than mandatory.

The remedial power is a new power that warrants review following an initial period of experience with its use. This is reflected in provisions of the amending Bill (Schedule 1, item 4) which go beyond what would normally accompany a change to the taxation law. Under these provisions I can request a post implementation review of the power during the two years following the third anniversary of the remedial power's commencement.

There is a balance to be achieved between reflecting the determination to conduct a post implementation review, providing flexibility to allow the review to take place at the most suitable time and only including necessary detail in the legislation.

The permissive provision creates the expectation a post implementation review should take place. Including a permissive rather than mandatory requirement to conduct the review provides flexibility to ensure the review takes place at a sensible time, whether that is earlier or later than contemplated in the provision.

It should also be noted the Bill introduces changes to the *Taxation Administration Act 1953* (Schedule 1, item 2, paragraph 3B(1AA)(e)) that would require the ATO Annual

Report to include information on the exercise of the remedial power during the relevant year. This would include information regarding decisions on whether to use the power, as well as consultation undertaken prior to the power's use.

I trust that this additional information will be sufficient to address the Committee's comments in *Alert Digest No. 7 of 2016* in relation to the Bill.

Yours sincerely

/ Kelly O'Dwyer

A blue handwritten flourish or signature mark consisting of a single, smooth, curved line.