

The Senate

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Standing  
Committee for the  
Scrutiny of Bills

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# Terms of Reference

## Extract from **Standing Order 24**

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



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# Introduction

## Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament in relation to:

- undue trespass on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

## Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will often correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

## Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

## General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant legislation committee for information.



# Chapter 1

## Commentary on Bills

1.1 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

### Appropriation Bill (No. 3) 2016-2017

<b>Purpose</b>	This bill provides for additional appropriations from the Consolidated Revenue Fund for the ordinary annual services of the government in addition to the appropriations provided for by the <i>Appropriation Act (No. 1) 2016-2017</i> and the <i>Supply Act (No. 1) 2016-2017</i>
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives on 9 February 2017

#### Parliamentary scrutiny—ordinary annual services of the government

1.2 This bill seeks to appropriate money from the Consolidated Revenue Fund. The appropriations in this bill are said to be for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation some measures in the bill may have been inappropriately classified as ordinary annual services.

1.3 The inappropriate classification of items in appropriation bills as ordinary annual services when they in fact relate to new programs or projects undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.<sup>1</sup>

1.4 By way of background, under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation. Noting these provisions, the Senate Standing Committee on

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<sup>1</sup> See Senate standing order 24(1)(a)(v).

Appropriations and Staffing<sup>2</sup> has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years.<sup>3</sup>

1.5 The distinction between appropriations for the ordinary annual services of the government and other appropriations is reflected in the division of proposed appropriations into pairs of bills—odd-numbered bills which should only contain appropriations for the ordinary annual services of the government and even-numbered bills which should contain all other appropriations (and be amendable by the Senate). However, the Appropriations and Staffing Committee has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.<sup>4</sup> The Senate has not accepted this assumption.

1.6 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 (in accordance with a recommendation made in the 50<sup>th</sup> Report of the Appropriations and Staffing Committee), the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
- 2) That appropriations for expenditure on:
  - a) the construction of public works and buildings;
  - b) the acquisition of sites and buildings;
  - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
  - d) grants to the states under section 96 of the Constitution;
  - e) new policies not previously authorised by special legislation;
  - f) items regarded as equity injections and loans; and
  - g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for

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2 Now known as the Senate Standing Committee on Appropriations, Staffing and Security.

3 See Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and recent annual reports of the committee.

4 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

1.7 There were also two other parts to the resolution: the Senate clarified its view of the correct characterisation of payments to international organisations and, finally, the order provided that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as part of ordinary annual services.<sup>5</sup>

1.8 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

...completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.<sup>6</sup>

1.9 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill that is not for the ordinary annual services of the government.<sup>7</sup>

1.10 Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether an appropriation relates to a new program or project, continues and appears to be reflected in the allocation of some items in the most recent appropriation bills.

1.11 For example, it appears that the initial expenditure in relation to the following items may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2016-2017:

- Launch into Work pilot — establishment (\$10 million over four years)<sup>8</sup>
- Royal Commission into the Protection and Detention of Children in the Northern Territory (\$57.1 million over two years)<sup>9</sup>

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5 *Journals of the Senate*, 22 June 2010, pp 3642–3643.

6 Senate Standing Committee on Appropriations and Staffing, *45<sup>th</sup> Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

7 Senate Standing Committee on Appropriations and Staffing, *45<sup>th</sup> Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

8 Mid-Year Economic and Fiscal Outlook 2016-17, p. 150.

- Rural Health Commissioner and Pathway for Rural Professionals — establishment (\$4.4 million over four years)<sup>10</sup>

1.12 The committee has previously written to the Minister for Finance and considered this general matter in relation to inappropriate classification of items in other appropriation bills on a number of occasions.<sup>11</sup>

1.13 On each of these occasions, the committee noted the government's advice that it does not intend to reconsider its approach to the classification of items that constitute ordinary annual services of the government; that is, the government will continue to prepare appropriation bills in a manner consistent with the view that only administered annual appropriations for new outcomes (rather than appropriations for expenditure on new policies not previously authorised by special legislation) should be included in even-numbered appropriation bills.

**1.14 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010 relating to the classification of ordinary annual services expenditure in appropriation bills.**

**1.15 The committee reiterates its agreement with the comments made on this matter by the Senate Standing Committee on Appropriations and Staffing, and in particular that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing outcome should be classified as ordinary annual services expenditure.**

**1.16 The committee draws the 2010 Senate resolution to the attention of Senators and notes that the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.**

**1.17 The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to some items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual**

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9 Mid-Year Economic and Fiscal Outlook 2016-17, p. 137.

10 Mid-Year Economic and Fiscal Outlook 2016-17, p. 173.

11 See Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014* at pp 402–406; *Fourth Report of 2015* at pp 267–271; *Alert Digest No. 6 of 2015* at pp 6–9 and *Fourth Report of 2016* at pp 249–255; and *Alert Digest No. 7 of 2016*.

services (and therefore improperly included in Appropriation Bill (No. 3) 2016-2017 which should only contain appropriations that are not amendable by the Senate).

**1.18 The committee will continue to draw this important matter to the attention of Senators where appropriate in the future.**

*The committee draws Senators' attention to this matter, as the current approach to the classification of ordinary annual services expenditure in appropriation bills may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

## Appropriation Bill (No. 4) 2016-2017

<b>Purpose</b>	This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the <i>Appropriation Act (No. 2) 2016-2017</i> and the <i>Supply Act (No. 2) 2016-2017</i> .
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives on 9 February 2017

### Parliamentary scrutiny of section 96 grants to the States<sup>12</sup>

1.19 Clause 14 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.'

1.20 Clause 14 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;<sup>13</sup> and
- the amounts and timing of those payments.<sup>14</sup>

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

...because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 14(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.<sup>15</sup>

1.22 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.<sup>16</sup>

1.23 The committee takes this opportunity to reiterate 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

12 Clause 14 and Schedules 1 and 2.

13 Paragraph 14(2)(a).

14 Paragraph 14(2)(b).

15 Explanatory memorandum, p. 11.

16 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015* (at pp 511–516), *Ninth Report of 2015* (at pp 611–614) and *Fifth Report of 2016* (at pp 352–357).

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 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.

1.24 In relation to appropriations for payments to the States, Territories and local governments in the annual appropriation bills, the committee has previously requested that additional explanatory material be made available to Senators and others, including detailed information about the particular purposes for which money is sought to be appropriated. 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.

1.25 Most recently the committee considered this matter in its *Eighth Report of 2016*.<sup>17</sup> The committee sought 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

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17 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, pp 457–460.

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.

1.26 At that time the Minister for Finance advised the committee that he would ask his 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.<sup>18</sup>

**1.27 The committee thanks the Minister for his ongoing engagement with the committee on this matter and seeks the Minister's advice in relation to any progress that has been made in relation to including additional information on payments to the States, Territories and local government in this year's Budget documentation.**

**1.28 In relation to this bill, the committee draws its comments about the delegation of legislative power in clause 14 to the attention of Senators.**

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

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18 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, p. 460.

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## Australian Human Rights Commission Amendment (Preliminary Assessment Process) Bill 2017

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<b>Purpose</b>	This bill seeks to amend the <i>Australian Human Rights Commission Act 1986</i> to make changes to the complaints handling procedure of the Australian Human Rights Commission
<b>Sponsor</b>	Senator Brian Burston
<b>Introduced</b>	Senate on 7 February 2017

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*The committee has no comment on this bill.*

## Building and Construction Industry (Improving Productivity) Amendment Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> (the Act) that transitionally exempts building industry participants from the requirement to comply with any enterprise agreement content rules in a document issued under section 34 of the Act as a condition of eligibility to submit expressions of interest, tender for or be awarded Commonwealth funded building work
<b>Portfolio</b>	Employment
<b>Introduced</b>	House of Representatives 8 February 2017

*The committee has no comment on this bill.*

## Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Criminal Code Act 1995</i> to make it an offence to wear full face coverings in a public place under Commonwealth jurisdiction
<b>Sponsor</b>	Senator Jacqui Lambie
<b>Introduced</b>	Senate on 8 February 2017

### Significant matters in delegated legislation<sup>19</sup>

1.29 The bill proposes making it an offence to wear, or compel a person to wear, a full face covering in public when a terrorism threat declaration is in place. Proposed section 395.2 sets out how such a terrorism threat declaration is to be made. It provides that the Minister must, by legislative instrument, make such a declaration if the national terrorism threat level is higher than 'possible', as set by the National Terrorism Threat Advisory System. Subsection 395.2(2) states that such a legislative instrument is not subject to disallowance under section 42 of the *Legislation Act 2003*.

1.30 Two scrutiny concerns arise in respect of this provision. The first relates to the exclusion of the legislative instrument from disallowance by the Parliament. The explanatory memorandum explains the basis for the exclusion of the Parliament's normal disallowance power as that it is inappropriate for the Parliament to disallow a determination based on 'national security reasons'. It states that the time period for disallowance is 15 sitting days whereas 'a terrorist threat, or terrorist action, must be dealt with immediately for the safety of the nation and cannot be put on hold for an indefinite period of time'.<sup>20</sup>

1.31 However, the Parliament would not, in disallowing a declaration, be acting against any decision made within the executive government that the terrorist threat level warranted a ban on the wearing of full face coverings. If the National Terrorism Threat Advisory System generates a threat level above 'possible' then the Minister is obliged to make the declaration. Neither the Minister, nor any decision-maker within the National Terrorism Threat Advisory System, will have made a determination about whether a ban of face coverings is required for national security reasons. In addition, while the disallowance period is 15 sitting days, the process under the *Legislation Act 2003* is that the instrument would come into force the day after registration. As such, any concerns regarding the appropriateness of allowing

<sup>19</sup> Schedule 1, item 1, proposed section 395.2.

<sup>20</sup> Explanatory memorandum p. 3.

disallowance based on the need to deal with any threat urgently is not affected by the disallowance process. For these reasons it is difficult to see why a disallowance power is inappropriate.

1.32 The second scrutiny issue relates to the fact that an element of the offence depends on a ministerial declaration being in force. From a scrutiny perspective, it is desirable for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear so those who are subject to the offence may readily ascertain their obligations. The way this offence is structured means that those who wish, for religious or other reasons, to wear face coverings are required to check whether a ministerial declaration is in force.

**1.33 The committee draws the above scrutiny concerns relating to proposed section 395.2 to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding the instrument from disallowance and making an element of an offence dependent on a ministerial declaration being in force.**

*The committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties and insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principles 1(a)(i) and (v) of the committee's terms of reference.*

### **Reversal of evidential burden of proof<sup>21</sup>**

1.34 Proposed section 395.3 introduces an offence of wearing a full face covering in a public place, or compelling another person to do so, if a terrorism threat declaration is in force. Subsection 395.3(4) provides that the offence provisions do not apply in certain specified circumstances.

1.35 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.36 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

**1.37 As neither the statement of compatibility nor the explanatory memorandum addresses this issue, the committee requests the Senator's advice as to why offence-specific defences (which reverse the evidential burden of proof) have been used in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it**

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21 Schedule 1, item 1, proposed subsection 395.3(4).

**explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>22</sup>**

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

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22 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 50–52.

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## Diverted Profits Tax Bill 2017

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<b>Purpose</b>	This bill seeks to amend the <i>Income Tax Assessment Act 1936</i> to impose a tax on the amount of diverted profit at a rate of 40 per cent
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 9 February 2017

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*The committee has no comment on this bill.*

## Enhancing Online Safety for Children Amendment Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend the <i>Enhancing Online Safety for Children Act 2015</i> (the Act) to:</p> <ul style="list-style-type: none"><li>• expand the functions of the Children's eSafety Commissioner to cover promoting online safety for Australians (not limited to children);</li><li>• change the title of the Act and the title of the statutory office of the Children's eSafety Commissioner;</li><li>• make several minor, consequential amendments to other Acts to reflect the new title of the Act and title of the statutory office and some necessary transitional and savings provisions</li></ul>
<b>Portfolio</b>	Communications
<b>Introduced</b>	House of Representatives on 9 February 2017

*The committee has no comment on this bill.*

## Farm Household Support Amendment Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Farm Household Support Act 2014</i> to: <ul style="list-style-type: none"><li>• ensure that recipients of Farm Household Allowance (FHA) are not required to serve an ordinary waiting period or liquid assets waiting period before they can commence receiving the FHA; and</li><li>• clarify the asset test treatment of certain assets necessary for the operation of the farm enterprise</li></ul>
<b>Portfolio</b>	Agriculture and Water Resources
<b>Introduced</b>	House of Representatives on 9 February 2017

*The committee has no comment on this bill.*

## Fisheries Legislation Amendment (Representation) Bill 2017

<b>Purpose</b>	<p>This bill seeks to:</p> <ul style="list-style-type: none"><li>• require the Australian Fisheries Management Authority (AFMA) to have regard to ensuring that the interests of all fisheries users are taken into account in Commonwealth fisheries management decisions</li><li>• allow for increased membership of AFMA advisory bodies and extend the eligibility criteria for serving on the AFMA Commission to include expertise in matters relating to recreational and Indigenous fishing</li></ul>
<b>Portfolio</b>	Agriculture and Water Resources
<b>Introduced</b>	Senate on 8 February 2017

*The committee has no comment on this bill.*

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## Health Insurance Amendment (National Rural Health Commissioner) Bill 2017

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<b>Purpose</b>	This bill seeks to amend the <i>Health Insurance Act 1973</i> to provide for the appointment of a National Rural Health Commissioner
<b>Portfolio</b>	Health
<b>Introduced</b>	House of Representatives on 9 February 2017

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*The committee has no comment on this bill.*

## Independent Parliamentary Expenses Authority Bill 2017

<b>Purpose</b>	This bill seeks to establish the Independent Parliamentary Expenses Authority as an independent statutory authority with responsibilities relating to work expenses of parliamentarians and their staff
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives on 9 February 2017

### Parliamentary scrutiny<sup>23</sup>

1.38 One of the functions of the proposed Independent Parliamentary Expenses Authority is to produce regular public reports on parliamentarians' and MOPS staff<sup>24</sup> travel expenditure (and other related reports as the Authority considers appropriate).<sup>25</sup>

1.39 Clause 60 provides that certain sensitive information must not be included in these public reports. Paragraphs 60(1)(a) and (b) provide that where the Authority or the Attorney-General is of the opinion that disclosure of certain information would be contrary to the public interest because it would prejudice the security, defence, or international relations of the Commonwealth, this information must not be included by the Authority in a public report.

1.40 Additionally, paragraph 60(1)(c) provides that information must not be included in a public report if the Authority is of the opinion that disclosure of the information would be likely to result in serious harm to the individual, or any of the individuals, to whom the information relates. 'Harm' is defined as having 'the same meaning as in the Dictionary to the *Criminal Code*', that is, physical or mental harm (whether temporary or permanent).<sup>26</sup> The explanatory memorandum notes that:

This paragraph is intended to protect individuals from threats to their personal safety that fall short of national security matters covered by paragraphs (a) and (b). It might, for example, be necessary to protect an

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23 Subclause 60(2).

24 MOPS staff is defined as a person employed under Parts III or IV of the *Members of Parliament (Staff) Act 1984*, see explanatory memorandum, p. 28.

25 Paragraphs 12(1)(d), 12(1)(e), 12(1)(s) and 12(1)(t).

26 Clause 4.

MP who has suffered family violence, or who is being stalked by a member of the public.<sup>27</sup>

1.41 Subclause 60(2) provides that where such a determination in relation to the non-disclosure of sensitive information has been made, the Authority also cannot disclose that information to Parliament, a member of Parliament or a parliamentary committee. The explanatory memorandum notes that this provision is modelled on subsection 37(3) of the *Auditor-General Act 1997*. Therefore, it is intended 'to act as a declaration for the purposes of section 49 of the Constitution'; that is, it is intended to affect the scope of the powers, privileges and immunities of Parliament. The explanatory memorandum suggests that this limitation is necessary:

...given the highly sensitive nature of information that would be covered by a determination under subclause 60(1). It is also consistent with existing concepts of public interest immunity. The Government guidelines for official witnesses before Parliamentary Committees and related matters, February 2015, notes that public interest immunity claims may be made in relation to information the disclosure of which would, or might reasonably be expected to, 'damage Australia's national security, defence or international relations', or 'endanger the life or physical safety of any person' (at paragraph 4.6.1).<sup>28</sup>

1.42 In seeking to make a declaration for the purposes of section 49 of the Constitution, subclause 60(2) represents a significant intrusion on the powers, privileges and immunities of the Parliament. It is therefore important that the Parliament is very clear about the necessity and rationale for such a provision before it legislates to place limitations on its own powers.

1.43 It is unclear to the committee in what instances the inclusion of historical travel information in public reports may prejudice the security, defence or international relations of the Commonwealth. The committee notes that regular reports on travel expenditure are currently released by the Department of Finance every six months. It is proposed that over time the Authority will shift to quarterly and then monthly reporting,<sup>29</sup> although there is no suggestion that public reporting will occur in real-time or before the relevant travel has been undertaken. There is also no indication as to how the content of the public reporting by the Authority will differ from the content of current public reporting by the Department of Finance. The committee notes the current public reporting does not go to the level of detail as to the specific addresses stayed at by the parliamentarian or staff member. The

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27 Explanatory memorandum, p. 25.

28 Explanatory memorandum, p. 25.

29 Explanatory memorandum, p. 9.

explanatory memorandum suggests that 'it is not anticipated clause 60 would be used frequently'.<sup>30</sup>

1.44 The committee notes that even if it is considered necessary to limit the ability of the Authority to include particular information in a public report, it is not clear that the Parliament should take the significant step of legislating to preemptively limit its own powers to require the production of information. The committee notes that there are existing processes in place that provide a basis for parliamentary committees to handle sensitive information.<sup>31</sup>

1.45 In addition, the committee notes that the current drafting of clause 60 provides that information must not be included in a public report or released to Parliament on the basis that either the Authority or the Attorney-General is 'of the opinion' that the disclosure could cause prejudice or harm. The committee notes that this does not require the Authority or Attorney-General to 'reasonably' hold this opinion and, as such, any review of such a decision would be extremely difficult to challenge.

**1.46 In order to further understand the necessity of proposed clause 60 in light of the existing public reporting regime of historical travel information, the committee requests that the Minister provide examples of how the public release of historical information relating to parliamentarians' travel expenditure by the Authority could prejudice the security, defence, or international relations of the Commonwealth or cause harm to an individual (if the information published does not include specific addresses).**

**1.47 The committee also seeks the Minister's advice as to why the provision is drafted so that the information must not be disclosed on the basis only of the Authority or Attorney-General's 'opinion' that the disclosure could cause prejudice or harm, rather than their 'reasonable belief'.**

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30 Explanatory memorandum, p. 25. In 2010 the Auditor-General advised the Privileges Committee that the equivalent provision in s 37(3) of the *Auditor-General Act 1997* had only been used once since its inception: Mr Ian McPhee, Auditor-General, Submission No 9 to the Senate Committee of Privileges, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*, June 2010, p. 2.

31 For example, the Senate Committee of Privileges has noted that the standing orders, privilege resolutions and the resolution of the Senate relating to public interest immunity claims all provide a sound structure for committees to either handle sensitive information and retain it on an in-camera basis or, in cases where a claim of public interest immunity has been made out, to decide to not receive the information at all. Senate Committee of Privileges, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*, June 2010, p. 30.

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

## Independent Parliamentary Expenses Authority (Consequential Amendments) Bill 2017

<b>Purpose</b>	This bill seeks to provide exemptions to the freedom of information scheme established under the <i>Freedom of Information Act 1982</i> for the Independent Parliamentary Expenses Authority
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives on 9 February 2017

*The committee has no comment on this bill.*

## Parliamentary Entitlements Legislation Amendment Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend the <i>Parliamentary Entitlements Act 1990</i> to:</p> <ul style="list-style-type: none"> <li>• require that if an adjustment to certain travel claims is made or required, a loading of 25 per cent in addition to the full amount of the adjustment will apply; and</li> <li>• restrict the 'additional travel for children' entitlement for senior officers to children under the age of 18 from where it currently stands at under the age of 25.</li> </ul> <p>The bill also seeks to amend the <i>Members of Parliament (Life Gold Pass) Act 2002</i> to rename the Act the <i>Parliamentary Retirement Travel Act 2002</i>, and implement reforms to the Life Gold Pass scheme.</p>
<b>Portfolio</b>	Special Minister of State
<b>Introduced</b>	House of Representatives on 9 February 2017

### Retrospective commencement<sup>32</sup>

1.48 The amendments proposed to be made by Schedule 1 to the bill will apply retrospectively from 14 May 2014.

1.49 These measures rename the Life Gold Pass scheme as the Parliamentary Retirement Travel Entitlement, and also reduce, remove, and reform benefits under the scheme. Those measures that were announced as part of the 2014-15 Budget apply retrospectively from the end of 13 May 2014 (the day of the Budget announcement). The other reforms in the bill commence, or have effect, the day after Royal Assent.

1.50 The statement of compatibility notes that at the time of the announcement, affected people were advised of the impact the proposed reforms would have on their eligibility to access travel from 13 May 2014 and that the measures do not affect the validity of return trips commenced up to the end of 13 May 2014.<sup>33</sup>

**1.51 The committee has a long-standing scrutiny concern that provisions that back-date commencement to the date of the announcement of the bill (i.e. 'legislation by press release') challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively).**

<sup>32</sup> Item 2 (commencement provisions for Schedule 1).

<sup>33</sup> Explanatory memorandum, pp 26–27.

**1.52** However, in this case, the changes affect a limited number of people in relation to a workplace entitlement and all persons affected were advised of the impact of the proposed reform at the time and were able to act accordingly. In such circumstances, the committee leaves to the Senate as a whole the appropriateness of making these changes to parliamentary entitlements retrospective.

*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.*

## Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017

### Purpose

This bill seeks to amend Acts relating to family assistance, social security, paid parental leave, veterans' entitlements, military rehabilitation and compensation and farm household support to:

- increase the family tax benefit Part A standard fortnightly rate by \$20.02 for each FTB child in the family aged up to 19;
- from 1 July 2017 remove the entitlement to Family Tax Benefit Part B for single parent families who are not single parents aged 60 or more or grandparents or great-grandparents, from 1 January of the calendar year their youngest child turns 17;
- phase out the family tax benefit Part A supplement for families with an adjusted taxable income of \$80,000 a year or less by reducing it to \$602.25 a year from 1 July 2016, and to \$302.95 a year from 1 July 2017. It will then be withdrawn from 1 July 2018;
- introduce a new child care subsidy;
- reduce from 26 weeks to six weeks the proportional payments of pensions with unlimited portability outside Australia. After six weeks, payment will be adjusted according to the length of the pensioner's Australian working life residence;
- cease pensioner education supplement from the first 1 January or 1 July after the day the Act receives Royal Assent;
- cease the education entry payment from the first 1 January or 1 July after the Act receives Royal Assent;
- implement the following changes to Australian Government payments:
  - maintain at level for three years from 1 July of the first financial year beginning on or after the day the bill receives Royal Assent the income free areas for all working age allowances (other than student payments) and for parenting payment single; and
  - maintain at level for three years from 1 January of the first calendar year beginning on or after the day the bill receives Royal Assent the income free areas and other means test thresholds for student payments, including the student income bank limits;
- cease from 20 September the energy supplement payment

<p><b>Portfolio</b></p> <p><b>Introduced</b></p>	<p>to recipients who were not receiving a welfare payment on 19 September 2016 and close the energy supplement to new welfare recipients from 20 September 2017;</p> <ul style="list-style-type: none"> <li>• cease payment of pension supplement after six weeks temporary absence overseas and immediately for permanent departures;</li> <li>• enable the Secretary to require income stream providers to transfer a dataset to the Department of Human Services on a regular basis;</li> <li>• provide a social security income test incentive aimed at increasing the number of job seekers who undertake specified seasonal horticultural work;</li> <li>• extend and simplify the ordinary waiting period for working age payments;</li> <li>• provide for young unemployed people aged 22 to 24 to claim youth allowance instead of newstart allowance or sickness allowance until they turn 25 years of age;</li> <li>• introduce a four-week waiting period, for job ready young people who are looking for work, to receive income support payments;</li> <li>• require job seekers who do not have significant barriers to obtaining employment to complete pre-benefit activities during their four-week income support waiting period in order to receive payments;</li> <li>• introduce revised arrangements for the Paid Parental Leave scheme; and</li> <li>• remove the employer paymaster role in administering the Paid Parental Leave scheme</li> </ul> <p>Social Services</p> <p>House of Representatives on 8 February 2017</p>
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1.53 The committee commented on the measures in Schedule 4 to this bill when it considered the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016.<sup>34</sup> The committee also commented on the measures in Schedule 13 to the bill when it considered the Social Services Legislation Amendment (Youth Employment) Bill 2016.<sup>35</sup> The committee takes this opportunity to restate these comments below with some modifications and to make some further comments on this bill.

34 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp 60–70.

35 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 6 of 2016*, pp 33–34.

### **Retrospective application (Schedule 3)<sup>36</sup>**

1.54 Item 2 of the bill sets out the commencement provisions for each part of the bill. It provides that Schedule 3, Part 1 commences on 1 July 2016. The explanatory memorandum notes that the Schedule will phase out the Family Tax Benefit Part A supplement for families earning a certain amount from 1 July 2016. No explanation is provided in the explanatory memorandum as to why these provisions are to apply retrospectively, and no information is given as to the effect this retrospective application will have on individuals.

1.55 It is a basic principle of the rule of law that, in general, laws should only operate prospectively (not retrospectively). This is because people should be able to guide their actions on the basis of fair notice about the legal rules and requirements that will apply to them.

**1.56 The committee therefore requests the Minister's advice as to why Part 1 of Schedule 3 is intended to commence retrospectively from 1 July 2016 and what effect this will have on individuals.**

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

### **Delegation of legislative power—Henry VIII clause (Schedule 4)<sup>37</sup>**

1.57 The explanatory memorandum<sup>38</sup> states that proposed section 199G may be characterised as a Henry VIII clause because it appears to 'provide a broad modification power of principal legislation'. The explanatory memorandum states that it is 'intended to operate in a purely beneficial way to deal with any anomalies that may arise where an approval is taken to be backdated in time'. Nevertheless, the proposed section itself does not appear to include a limitation which ensures that it is only used beneficially.

1.58 As the explanatory memorandum accompanying the version of this bill introduced in the previous Parliament did not include a justification for this approach, the committee sought the Minister's advice as to the rationale for the proposed approach and sought the Minister's advice as to whether this provision could be drafted to ensure that the provisions are only used beneficially (i.e. in the manner described in the explanatory materials).

1.59 The Minister responded to the committee in a letter received on 24 March 2016:

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36 Item 2 (commencement) provision.

37 Schedule 1, item 205, proposed section 199G.

38 Explanatory memorandum, p. 84.

The Committee asked for the rationale for the proposed sections of the Bill which provide broad powers of modification of the principal legislation.

The Secretary may approve a provider for the purposes of the family assistance law under section 194B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the FAA Act). Under subsection 194B(5) an approval can take effect on a date prior to the date of the approval decision, but no earlier than the date of the application. This means that there may be cases where an applicant is taken to have been approved in the time prior to notification of the approval decision. This in turn may mean that providers are retrospectively required to meet obligations by timeframes that have already passed and they could possibly be in a position where they are in breach of those requirements (such as the requirement to submit attendance reports under new section 204B). Similarly, it is possible that suspensions of services could be revoked with retrospective effect, again retrospectively requiring providers to meet obligations in the past.

In view of this, proposed section 199G gives Ministerial power to make rules which modify the FAA Act, so that it operates without anomalous or unfair consequences for providers where their approval takes effect during a past period. Such modifications would be beneficial for providers as they would ensure providers are not unfairly exposed to obligations in the past that they are unable to meet. One such possible modification, for example, would be to extend the time in which attendance reports under section 204B are required to be provided where providers are taken to have been approved in a past period.

Although it may be possible to include limiting words to ensure the provisions are only used beneficially, amendments of this nature could be equivocal and possibly confusing due to difficulties in defining what a 'benefit' is in the context of lifting obligations relating to backdated approvals. I note that any rules made in accordance with section 199G will be subject to further parliamentary scrutiny through the disallowance process for legislative instruments, which means that Parliament will be able to disallow any rules that are considered non-beneficial or otherwise unfair.<sup>39</sup>

1.60 The committee thanked the Minister for this response and for including further explanatory information in relation to these provisions in the explanatory

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39 See response as set out in Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2016*, pp 366-367.

memorandum accompanying the previous bill<sup>40</sup> and which are now contained in the explanatory memorandum accompanying this bill.<sup>41</sup>

1.61 However, the committee remains concerned about the breadth of the power in section 199G which allows rules (delegated legislation) to override the operation of the primary legislation. While the committee notes that the intention is for modifications to be beneficial, the suggestion that including limiting words to ensure the provisions are only used beneficially 'could be equivocal and possibly confusing', is not a compelling justification for a provision that allows delegated legislation to modify the operation of primary legislation.

**1.62 The committee draws the breadth and nature of this power to the attention of Senators and, noting that any rules made in accordance with section 199G will be subject to disallowance, leaves to the Senate as a whole the appropriateness of the scope of this delegation of legislative power.**

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

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

#### **Strict liability offences (Schedule 4)<sup>42</sup>**

1.64 Item 205 proposes inserting a new Part 8A, which contains a number of strict liability offences. The explanatory memorandum provides a justification for why these offences impose strict liability.<sup>43</sup> This explanation for the application of strict liability appears to be consistent with the *Guide to Framing Commonwealth Offences*.<sup>44</sup> However, there are five proposed offence provisions<sup>45</sup> that impose penalties above 60 penalty units (which is the maximum amount for strict liability offences set out in the *Guide to Framing Commonwealth Offences*). The explanatory memorandum states that higher penalties have been set in relation to these provisions 'because non-compliance with these obligations is increasing and there is

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40 The Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016. See the committee's comments at: Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp 60–70.

41 See explanatory memorandum p. 84.

42 Schedule 4, item 205, new Part 8A, various provisions.

43 See pp 84-85 of the explanatory memorandum.

44 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22-25.

45 See item 205, proposed sections 201A, 201C and 202C (80 penalty units) and proposed sections 204B and 204C (70 penalty units).

growing concern about child care provider compliance'.<sup>46</sup> However, it remains the case that in order to be consistent with the principles outlined in the *Guide to Framing Commonwealth Offences*, strict liability offences should be applied only where the penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.<sup>47</sup>

**1.65 The committee therefore draws this matter to the attention of Senators and leaves to the Senate as a whole the appropriateness of providing for strict liability offences with penalties above 60 penalty units.**

*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.*

**Reverse evidential burden (Schedule 4)<sup>48</sup>**

1.66 Proposed section 201A requires a provider to whom a notice is given of a fee reduction decision to pass on the fee reduction amount within 14 days. Subsection (3) makes it an offence to fail to comply with this requirement. Subsection (2) provides an exception (an offence-specific defence) to this stating that this does not apply to a notice that includes a statement to the effect that the Secretary has decided to pay the fee reduction amount directly to the individual.

1.67 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.68 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

**1.69 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of provisions which reverse the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.<sup>49</sup>**

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46 Explanatory memorandum, p. 85.

47 See pp 23–24.

48 Schedule 4, item 205, proposed subsection 201A.

49 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 50–52.

### **Incorporation of material as in force from time to time (Schedule 4)**<sup>50</sup>

1.70 Items 230 and 231 of Schedule 4 seek to amend section 4 of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) by specifying that, despite subsection 14(2) of the *Legislation Act 2003*, a determination made for subsection (1) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

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

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

1.72 However, in this instance the explanatory memorandum<sup>51</sup> contains a comprehensive explanation for the proposed approach which addresses these scrutiny concerns:

The departure from the general position reflected in section 14 of the *Legislation Act 2003* is intended to ensure that future versions of the instruments that set out vaccination and immunisation details and schedules (including the Australian Immunisation Handbook) can continue to be meaningfully referred to. The Australian Immunisation Handbook is approved by the National Health and Medical Research Council to provide clinical advice on vaccination. As the Handbook is updated regularly to take account of scientific evidence as it becomes available (and is currently in its 10<sup>th</sup> edition of publication) it is important to ensure that any reference in a legislative instrument made under section 4 is a reference to the current and up to date edition. The Handbook is publicly, readily and freely available to access from the National Health and Medical Research Council website, through the Australian Government Department of Health, for those seeking to access the content of the law. It is understood that updates to the Handbook are also regularly notified on the National Health and Medical Research Council's homepage.

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50 Schedule 4, items 230 and 231, section 4 of the *A New Tax System (Family Assistance) Act 1999*.

51 Explanatory memorandum, p. 95.

**1.73** The committee thanks the Minister for including this comprehensive justification in the explanatory memorandum and in light of this explanation makes no further comment.

**1.74** 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;<sup>52</sup> and
- contain a description of the documents and indicate how they may be obtained.<sup>53</sup>

*In light of the detailed explanation in the explanatory memorandum the committee makes no further comment on these provisions.*

#### **Delegation of legislative power—Henry VIII clause (Schedule 4)<sup>54</sup>**

**1.75** Item 261 of Schedule 4 gives the Minister a broad power to make rules (delegated legislation) dealing with transitional issues, including allowing the Minister to modify the effect of principal legislation. The explanatory memorandum<sup>55</sup> indicates that the power is intended to only be exercised beneficially but, as with the proposed section 199G above (see paragraphs [1.57] to [1.63]), there is no legislative provision requiring this approach.

**1.76** When the committee considered the version of this bill introduced in the previous Parliament, the committee also sought the Minister's advice as to whether this provision could be drafted to ensure that the provisions are only used beneficially (i.e. in the manner described in the explanatory materials).

**1.77** The Minister responded to the committee in a letter received on 24 March 2016:

I intend that this power will be used in a beneficial way to ensure a smooth transition into the new system, including to ensure that: provider approvals happen seamlessly and without unintended or unfair

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52 See also section 14 of the *Legislation Act 2003*.

53 See paragraph 15J(2)(c) of the *Legislation Act 2003*.

54 Schedule 4, item 261.

55 Explanatory memorandum, p. 99.

consequences for child care services with existing approval under family assistance law; payment arrangements for individuals transitioning to the new Child Care Subsidy can operate without unexpected complications; and the public purse is appropriately protected by ensuring that outstanding debt or compliance matters on transition can still be dealt with under the new system. I consider that the power to make transitional rules needs to be worded as broadly as possible to ensure that any unforeseen and unintended consequences of repealing and amending legislation can be remedied promptly and flexibly by legislative instrument.

I consider this broad power is justified and proportionate given it can only operate for a limited period of two years, and any rules made would be subject to further parliamentary scrutiny through the process of disallowance of legislative instruments. Any rules that attempt to broadly modify the Act other than to assist transition would be beyond power and ineffective.<sup>56</sup>

1.78 The committee thanked the Minister for this response and for including further explanatory information in relation to these provisions in the explanatory memorandum accompanying the previous version of this bill<sup>57</sup> and which are now contained in the explanatory memorandum accompanying this bill.<sup>58</sup>

**1.79 The committee notes the justification provided for giving the Minister the power to make rules (delegated legislation) dealing with transitional issues that modifies the effect of principal legislation, in particular that the disallowance process will apply and that the operation of the provision will be limited to two years. In light of this information, the committee leaves to the Senate as a whole the appropriateness of the scope of this delegation of legislative power.**

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

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

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56 See response as set out in Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2016*, pp 368.

57 The Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016. See the committee's comments at: Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp 60–70.

58 Explanatory memorandum, p. 99.

**Retrospective application (Schedule 9)<sup>59</sup>**

1.81 Schedule 9 closes the payment of the Energy Supplement (ES) to new welfare recipients from 20 September 2017. However, people who received the ES on 19 September 2016 retain access to the supplement for so long as they have continuous entitlement to their ES-attracting payment on and after that date. However, people who start, or who do not have continuous entitlement, to receive their ES-attracting payment between 20 September 2016 and 19 September 2017 are treated differently. The explanatory memorandum is silent on why the provisions apply differently from 19 September 2016 onwards.

**1.82 The committee requests the Minister's advice as to:**

- **why the date of 19 September 2016 is used to determine that some welfare recipients of Energy Supplement will be treated differently to others;**
- **whether the proposed amendments may be considered to apply with retrospective effect from that date; and**
- **if this has a retrospective effect, whether this may cause any welfare recipient disadvantage, and any justification for so doing.**

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

**Delegation of legislative power (Schedule 13)<sup>60</sup>**

1.83 Proposed subsection 19DA(5) empowers the Secretary to prescribe, by legislative instrument, circumstances for the purpose of determining whether a person is experiencing a personal financial crisis and for the purpose of waiving the ordinary waiting period for receipt of certain welfare payments. There is no legislative guidance in the primary legislation as to what type of circumstances may be prescribed.

1.84 The statement of compatibility suggests that the use of a legislative instrument provides the Secretary 'with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences'. As such, the provision is said to allow the Secretary to 'consider other unforeseeable or extreme circumstances...where it would be appropriate for a person to have immediate access to income support'.<sup>61</sup>

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59 Schedule 9, item 4, proposed section 22; items 67, 76, 89 and 91, 94 and 95.

60 Schedule 13, item 5, proposed subsection 19DA(5).

61 Statement of compatibility, p. 239.

**1.85** While the committee remains concerned as a matter of general principle about the delegation of legislative power in such circumstances, in light of the explanation provided and the fact that the legislative instrument will be subject to disallowance the committee draws the provision to the attention of Senators and leaves to the Senate as a whole the appropriateness of this proposed approach.

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

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

## Treasury Laws Amendment (Bourke Street Fund) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Income Tax Assessment Act 1997</i> to include the 2017 Bourke Street Fund Trust Account (the Fund) on the list of deductible gift recipients to allow members of the public to make tax deductible donations to the Fund
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 9 February 2017

*The committee has no comment on this bill.*

## Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017

<b>Purpose</b>	This bill seeks to amend various taxation Acts to: <ul style="list-style-type: none"> <li>• introduce a new diverted profits tax;</li> <li>• increase the administrative penalties that can be applied by the Commissioner of Taxation to significant global entities;</li> <li>• update the reference to <i>Organisation for Economic Cooperation and Development</i> (OECD) transfer pricing guidelines in Australia's transfer pricing rules to include the 2016 OECD amendments to the guidelines</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 9 February 2017

### Review rights<sup>62</sup>

1.87 Item 1 of Schedule 1 proposes to exclude merits review before the Administrative Appeals Tribunal (AAT) of decisions made by the Commissioner of Taxation in assessing diverted profits tax (DPT). Item 44 of Schedule 1 proposes to insert a new Part into the *Taxation Administration Act 1953* (TA Act) that sets out that an entity subject to an assessment of DPT can appeal to the Federal Court regarding the assessment.

1.88 The explanatory memorandum explains that the combined effect of these proposed amendments is that in relation to DPT assessments any taxation objection must be an appeal to the Federal Court and not to the AAT.<sup>63</sup> However, in general, taxation legislation provides for its own comprehensive scheme of review of taxation assessments, enabling taxpayers to object to an assessment by way of an appeal to the AAT or the Federal Court.<sup>64</sup> The general position is that taxpayers may elect whether to pursue their appeal in the AAT or the Federal Court.

1.89 The explanatory materials do not indicate why the taxpayer may not, as is usually the case, elect to take their objection to the AAT.

**1.90 The committee seeks the Treasurer's explanation as to why merits review before the AAT is excluded in relation to diverted profits tax assessments and whether the inability to seek review in the AAT may, in any way, change the nature**

62 Schedule 1, items 1 and 44.

63 Explanatory memorandum, p. 58.

64 This scheme is set out in Part IVC of the *Taxation Administration Act 1953*.

**of the substantive outcome or the remedy for a taxpayer who succeeds in proceedings under Part IVC of the TA Act objecting to an assessment.**

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

**Retrospective application<sup>65</sup>**

1.91 Schedule 3 of the bill seeks to update Australia's transfer pricing rules to include updated OECD guidance materials. Item 4 provides that the amendments are applied to income years starting on or after 1 July 2016. The explanatory materials do not justify applying this retrospectively, except to note that the measure was announced on 3 May 2016 in the 2016-17 Budget.

1.92 In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for the law and the underlying values of the rule of law.

1.93 However, in outlining scrutiny issues around this matter previously, the committee has been prepared to accept that some amendments may have some retrospective effect when the legislation is introduced if this has been limited to the introduction of a bill within six calendar months after the date of that announcement. In fact, where taxation amendments are not brought before the Parliament within six months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 44). In this case the amendments proposed by Schedule 3 were announced over six months prior to the bill's introduction.

**1.94 The committee seeks the Treasurer's advice as to why the amendments are proposed to apply retrospectively to income years starting on or after 1 July 2016 and whether this will cause detriment to any taxpayer.**

*Pending the Treasurer'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.*

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65 Item 4, Schedule 3.

## Commentary on amendments and explanatory materials

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

*[Digest 7/16 – Report 8/16]*

1.95 On 8 February 2017 the Minister for Resources and Northern Australia (Senator Canavan) tabled an addendum to the explanatory memorandum and the bill was read a third time.

1.96 **The committee thanks the Minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.**<sup>1</sup>

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1 Senate Standing Committee for the Scrutiny of Bills, *Eight Report of 2016*, 9 November 2016, pp 500–503.

## Chapter 2

### Commentary on ministerial responses

2.1 This chapter considers the responses of ministers to matters previously raised by the committee.

2.2 Correspondence relating to these matters is included at **Appendix 1**.

### Fairer Paid Parental Leave Bill 2016

<b>Purpose</b>	This bill seeks to amend the <i>Paid Parental Leave Act 2010</i> to introduce revised arrangements for paid parental leave
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives on 20 October 2016
<b>Bill status</b>	Before House of Representatives
<b>Scrutiny principle</b>	Standing Order 24(1)(a)

2.3 The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Minister responded to the committee's comments in a letter dated 14 February 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

#### **Trespass on personal rights and liberties—retrospective effect<sup>1</sup>**

##### ***Initial scrutiny – extract***

2.4 Clause 2 of the bill sets out when the provisions of the bill are to commence. It states that Schedule 1, which seeks to amend the paid parental leave scheme, will commence on the first 1 January, 1 April, 1 July or 1 October to occur after the day the Act receives Royal Assent.

2.5 Depending on what date the bill may pass the Parliament, this could mean that the changes to the paid parental leave scheme could commence in a matter of weeks after the Act becomes law.

2.6 The paid parental leave scheme gives parents access to 18 weeks of government-funded parental leave pay following the birth of, or adoption of, their child. The amendments proposed in this bill would mean, for some prospective

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1 Clause 2, commencement.

parents, the 18 weeks parental leave pay would not be available after the relevant provisions commence. This could apply to women who are already pregnant and who have made decisions regarding the amount of leave to take from their workplace and childcare arrangements on the basis of the existing paid parental leave scheme.

2.7 Although it may be considered that the commencement of the provision is not, technically speaking, retrospective, there may be a question of fairness as to whether those who are pregnant should have their entitlement to parental leave pay removed after they have already made decisions regarding work and care based on the existing entitlements. Neither the explanatory memorandum nor the statement of compatibility addresses this issue. The committee therefore seeks the Minister's advice as to the justification for this approach.

### ***Minister's response***

2.8 The Minister advised:

With regard to the Fairer Paid Parental Leave Bill 2016, the Committee expressed concerns about the proposed period of time before the measures commence. I am aware of the concern of families in relation to this measure.

The Committee will be aware that the Government introduced a new Bill into Parliament on 8 February 2017, the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017, which includes among other measures, the Paid Parental Leave (PPL) changes previously introduced in the Fairer Paid Parental Leave Bill 2016.

The PPL measures in the new Bill before Parliament also include changes that address concerns expressed about the 2015-16 Mid-Year Economic and Fiscal Outlook measure. The measure will now commence on the first 1 January, 1 April, 1 July or 1 October that is 9 months after the legislation receives Royal Assent, with an earliest commencement date of 1 January 2018. This will ensure prospective parents have time to plan their finances and structure their leave arrangements before their newborn or adopted child arrives.

In this Bill, the Government will also be increasing the maximum number of weeks of Government-provided Parental Leave Pay from 18 to 20 weeks. This means that the taxpayer funded scheme will now be better targeted to those who do not receive any employer-provided paid parental leave, or whose employer-provided paid parental leave is for less than 20 weeks.

The taxpayer-funded Parental Leave Pay for women without access to any employer paid parental leave will increase from 18 weeks to 20 weeks at the National Minimum Wage, an increase of around \$1,300.

Under the revised measure, all eligible parents will be guaranteed a safety net of financial support equivalent to 20 weeks of Parental Leave Pay at the rate of the National Minimum Wage. Those eligible parents with

access to an employer scheme of less than 20 weeks paid parental leave will receive a mix of employer and taxpayer-funded paid parental leave, up to 20 weeks in total. Only those with a generous employer entitlement of 20 weeks or more will lose access to the taxpayer funded scheme (around 2 per cent of mothers).

***Committee comment***

2.9 The committee thanks the Minister for this response. The committee notes the Minister's advice that the recently introduced Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 (Omnibus bill) includes, among other measures, the Paid Parental Leave changes previously introduced in this bill. The committee notes the Minister's advice that the measures in the Omnibus bill will now commence on the first 1 January, 1 April, 1 July or 1 October that is nine months after the legislation receives Royal Assent, and this 'will ensure prospective parents have time to plan their finances and structure their leave arrangements before their newborn or adopted child arrives'.

**2.10 The committee considers its scrutiny concerns regarding the potential retrospective effect of the provisions have been addressed in the Omnibus bill. In light of the Minister's advice that the provisions of this bill have now been incorporated in the Omnibus bill, the committee makes no further comment on this matter.**

## Seafarers and Other Legislation Amendment Bill 2016

<b>Purpose</b>	This bill seeks to repeal the Occupational Health and Safety (Maritime Industry) Act 1993 and extend the Commonwealth Work Health and Safety Act 2011 to apply to the Seacare scheme
<b>Portfolio</b>	Employment
<b>Introduced</b>	House of Representatives on 13 October 2016
<b>Bill status</b>	Before the House of Representatives
<b>Scrutiny principles</b>	Standing Order 24(1)(a)(i), (ii) and (iii)

2.11 The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Minister responded to the committee's comments in a letter dated 6 February 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

### Trespass on personal rights and liberties—strict liability offences<sup>2</sup>

#### *Initial scrutiny – extract*

2.12 Items 8, 9 and 176 introduce three new provisions which make it an offence for a person with certain notification obligations to omit to do an act and that omission breaches those requirements. Each offence is stated to be one of strict liability and subject to 20 penalty units. The explanatory memorandum provides no justification as to why the offences are subject to strict liability.

2.13 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including commenting whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

2.14 The committee seeks a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at pp 22–25).

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<sup>2</sup> Schedule 2, items 8, 9 and 176.

**Minister's response**

## 2.15 The Minister advised:

New subsection 94A(1) (Schedule 2, item 8) requires an employer to notify the Seacare Authority (and after the transition time, the Safety Rehabilitation and Compensation Commission (the SRCC)) of any changes to, or cancellation of, an insurance policy or membership of an indemnity association within 14 days. New subsections 94A(2) and 94A(3) create a strict liability offence for failure to comply with subsection 94A(1).

New subsection 95A(1) (Schedule 2, item 9) requires an employer who becomes aware that the employer's policy or membership is to be cancelled or terminated to notify each employee of that fact, as soon as practicable and before the policy or membership is cancelled or terminated. New subsections 95A(2) and 95A(3) create a strict liability offence for failure to comply with subsection 95A(1).

New section 95B (Schedule 2, item 9) requires an employer or an operator of an Australian registered vessel to display on board the vessel a certificate of insurance that complies with the requirements of subsection 95B(3) and an information statement that complies with the requirements of subsection 95B(4). New subsections 95B(5) and 95B(6) create a strict liability offence for failure to display this information.

The requirements are to comply with Australia's international obligations under the Maritime Labour Convention.

These offences arise in a regulatory context where an employer can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are. Employers will be placed on notice by the existence of the offences to actively ensure they are complying with and do not contravene the new subsections. The offences would not be punishable by imprisonment and would have a relatively low maximum penalty of 20 penalty units.

New section 106 requires employers to provide information to the SRCC to assist in the monitoring of work related injuries in the scheme and to Comcare to assist it to determine eligibility of claims against the safety net fund. It is a strict liability offence for an employer to fail to comply with the requirements without reasonable excuse.

These offences also arise in a regulatory context where strict liability is justified in the interest of ensuring the regulatory scheme is observed and the SRCC and Comcare are able to perform their functions.

**Committee comment**

2.16 The committee thanks the Minister for this response. The committee notes the Minister's advice that the offences arise in a regulatory context where the employer can reasonably be expected to know what the requirements of the law are; strict liability is justified in the interest of ensuring the regulatory scheme is

observed; and the offences are not punishable by imprisonment and have a relatively low maximum penalty of 20 penalty units.

**2.17 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*).**

**2.18 In light of the information provided, the committee makes no further comment on this matter.**

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### **Insufficiently defined administrative powers—breadth of discretion<sup>3</sup>**

#### ***Initial scrutiny – extract***

2.19 Proposed new section 25M provides that the Safety, Rehabilitation and Compensation Commission may make a written instrument exempting the employment of certain employees on a particular vessel from the application of this proposed Act and the *Seafarers Safety and Compensation Levies Act 2016* and the *Seafarers Safety and Compensation Levies Collection Act 2016* (currently bills before Parliament). In deciding whether to make such an instrument the Commission must have regard to any matters prescribed by the legislative rules and any such other matters that the Commission considers relevant.

2.20 This is a broad discretionary power with no legislative guidance on how such decisions would be made. The explanatory memorandum does not explain why this provision is considered necessary and does not explain what type of matters the Commission would take into account in making such an instrument. There is also no requirement in the bill that legislative rules must be made setting out the matters the Commission must have regard to in exercising this discretionary power.

2.21 The committee seeks the Minister's advice as to why it is necessary to give the Commission the power to exempt the employment of people on particular vessels from the operation of the specified legislation (and what effect this would have on the employment of persons on those vessels). It also seeks the Minister's advice as to why the legislation does not set out the relevant considerations the Commission must have regard to in exercising this discretionary power or, at a minimum, provide that rules (subject to Parliamentary disallowance) are required to be made which specify the relevant matters the Commission must have regard to.

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3 Schedule 2, item 84, proposed new section 25M.

**Minister's response****2.22 The Minister advised:**

The Bill replaces the coverage provision in section 19 of the Seafarers Act and the current exemption provision in section 20A of that Act.

New section 25M mirrors the existing discretion of the Seacare Authority in section 20A of the Seafarers Act to exempt the employment of employees from the application of the Seafarers Act and associated levies. The opt-in and opt-out (exemption) provisions are intended to maintain the status quo for vessels covered by the scheme, without giving more or less power to any of the participants in the current scheme.

Section 20A currently operates to allow the Seacare Authority to declare vessels exempt from the scheme with an absolute discretion. There are no requirements in the Seafarers Act which direct how that discretion is exercised. The Seacare Authority has issued Exemption Guidelines (which are not a legislative instrument) to provide assistance to the industry on when an exemption may be appropriate and the factors to be taken into account by the Seacare Authority.

Exemption from the Seacare scheme means that seafarers covered by the exemption would fall under relevant state or territory, rather than the national workers' compensation insurance arrangements, reducing the need for employers to maintain two insurance policies because of uncertainty of coverage.

The amendments prohibit the Seacare Authority, and after passage of the Bill the SRCC, from acting in a way contrary to Australia's obligations under an international agreement. As a party to the Maritime Labour Convention, Australia is obliged to ensure that all seafarers have adequate compensation for injuries (see MLC Title 4, regulation 4.2). The Bill ensures that the views of the maritime industry stakeholders are taken into account by the SRCC in making exemptions through assistance provided to the SRCC by the Seacare Advisory Group (see new subparagraph 89RA(2)(a)(i)).

The Bill has improved on the current position by allowing for legislative rules to be made prescribing the matters to be taken into account by the SRCC when granting an exemption. These rules will be developed following further industry consultation and subject to parliamentary scrutiny through disallowance procedures.

The Bill ensures the SRCC has flexibility to grant an exemption where the circumstances require and enables the SRCC to take into account all relevant matters, subject to any guidance that is prescribed in the rules. To fetter that process would be to impose red tape on a system that is working well at this time and is largely replicated in Part IA of the amending Bill.

**Committee comment**

2.23 The committee thanks the Minister for this response. The committee notes the Minister's advice that proposed section 25M mirrors the existing absolute discretion of the Seacare Authority to declare vessels exempt from the scheme. The committee notes the Minister's advice that the Seacare Authority has issued Exemption Guidelines to provide assistance to the industry on when an exemption may be appropriate and the factors to be taken into account, but that this is not a legislative instrument. The committee also notes the Minister's advice that the bill has improved on the current position by allowing for legislative rules to be made prescribing the matters to be taken into account by the Safety Rehabilitation and Compensation Commission (SRCC) when granting an exemption and ensures the SRCC has the flexibility to grant an exemption and take into account all relevant matters, subject to any guidance prescribed in the rules. The committee notes the Minister's statement that to fetter that process would be to 'impose red tape on a system that is working well at this time'.

2.24 The fact that a provision already exists in legislation does not address the committee's scrutiny concerns regarding the provision in this bill. The committee's long-standing preference is that there be guidance in the primary legislation as to how broad discretionary powers are to be exercised. The committee considers that the power to exempt a vessel from the operation of the federal legislative framework regarding seafarers is a significant matter. While the SRCC must have regard to the matters prescribed by the legislative rules, there is no legal requirement that rules be in place before the provisions in the bill become operative.<sup>4</sup>

**2.25 The committee considers that the power to exempt a vessel and its employees from the operation of a federal legislative framework is a significant matter that should be subject to appropriate guidance in the primary legislation. While the committee appreciates that this power already exists, this does not alleviate the committee's scrutiny concerns in relation to the provision in this bill.**

**2.26 The committee considers it would be appropriate for at least high-level guidance about the exercise of the Safety Rehabilitation and Compensation Commission's (SRCC) power to exempt a vessel to be included in the primary legislation or, at a minimum, that there should be a positive duty on the Minister to make disallowable rules guiding the exercise of the SRCC's power.**

**2.27 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the broad discretionary power of the SRCC to exempt vessels from the application of the federal legislative framework for seafarers.**

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4 See Schedule 2, item 84, proposed subsection 25M(5).

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

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## **Merits review<sup>5</sup>**

### ***Initial scrutiny – extract***

2.29 Proposed new section 25R provides that an application for review of a decision by the Commission to make an instrument of exemption under proposed section 25M can be made to the Administrative Appeals Tribunal. However, an application can only be made if the decision to make an instrument of exemption was made following an application to the Commission by the owner of the vessel or the employer. If the Commission on its own initiative decides to make the exemption there is no right to seek merits review of that decision. No justification is provided in the explanatory memorandum as to why this is not subject to merits review.

2.30 The committee seeks the Minister's advice as to why the right to seek merits review of the Commission's decision to make an instrument exempting the employment of persons on a particular vessel is restricted when the Commission has made the instrument of exemption on its own motion.

### ***Minister's response***

2.31 The Minister advised:

The committee also seeks advice on why decisions of the SRCC to exempt an employee (or class of employees) from the coverage of the scheme are not subject to merits review by the Administrative Appeals Tribunal (AAT) where the SRCC's power is exercised on its own motion.

Exemptions are currently issued by the Seacare Authority and the decision is not reviewable by the AAT.

As noted above, the exemption helps remove uncertainty of coverage and reduces need for employers to take out two insurance policies (i.e. under the Seacare scheme and a relevant state or territory scheme). Allowing the SRCC to grant exemptions on its own motion enables it to respond quickly to any issues affecting coverage of the scheme and can reduce the administrative burden on employers. Section 25M provides that an exemption cannot be granted without taking into account the advice of members the Seacare Advisory Group who represent employers and employees in the industry. Any AAT review is likely to involve reconsideration of these processes already undertaken by the SRCC that would be unnecessarily time-consuming and costly to repeat on review.

### ***Committee comment***

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5 Schedule 2, item 84, proposed new section 25R.

2.32 The committee thanks the Minister for this response. The committee notes the Minister's advice that allowing the SRCC, on its own motion, to grant exemptions from the requirements of a number of pieces of legislation enables it to respond quickly to any issues affecting coverage of the scheme. The committee also notes the Minister's advice that any AAT review is likely to involve reconsideration of the processes already undertaken by the SRCC and it would be unnecessarily time-consuming and costly to repeat this process on review.

**2.33 The committee notes that the purpose of merits review is to consider whether the original decision was the correct or preferable decision. In doing so a tribunal will reconsider the matter afresh. The committee does not consider that the fact that the tribunal would take time to undertake the review, and that there is a cost in doing so, is a sufficient basis on which to exclude merits review.**

**2.34 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding merits review where the Safety Rehabilitation and Compensation Commission has, on its own motion, granted an exemption.**

## Seafarers Safety and Compensation Levies Collection Bill 2016

<b>Purpose</b>	This bill seeks to provide for the collection of the seafarers' insurance levy and cost recovery levy
<b>Portfolio</b>	Employment
<b>Introduced</b>	House of Representatives on 13 October 2016
<b>Bill status</b>	Before the House of Representatives
<b>Scrutiny principle</b>	Standing Order 24(1)(a)(i)

2.35 The committee dealt with this bill in *Alert Digest No. 8 of 2016*. The Minister responded to the committee's comments in a letter dated 6 February 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

### **Trespass on personal rights and liberties—privilege against self-incrimination<sup>6</sup>**

#### ***Initial scrutiny – extract***

2.36 Clause 9 requires an employer to give the Safety, Rehabilitation and Compensation Commission a return setting out information about seafarer berths within a set period of time. Subclause 9(7) abrogates the privilege against self-incrimination, as it provides that a person is not excused from giving a return on the ground that the return might tend to incriminate them or expose them to a penalty. However, subclause 9(8) provides for a use and derivative use immunity as it provides that the return or anything obtained as a direct or indirect consequence of giving the return is not admissible in evidence in most proceedings.

2.37 As the explanatory memorandum does not provide a justification for abrogating the privilege against self-incrimination, the committee seeks the Minister's advice as to the rationale for the approach, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (specifically pages 94–97).

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6 Subclause 9(7).

**Minister's response**

2.38 The Minister advised:

Clause 9 of the Bill requires employers to regularly report information to the Commission about the number of seafarer berths on a vessel. This information must be provided within 14 days of the end of the quarter to facilitate the timely collection of levies to support the scheme.

Subclause 9(7) provides a person cannot refuse to provide information on the ground that it might incriminate them. This information is critical to the Commission's ability to calculate levies. Collecting the information through other means, for example, through physical inspections of the number of berths on ships at sea, would be impractical and extremely costly for the scheme.

The abrogation of the privilege is limited. Sub clause 9(8) prevents any information in the return, or document or thing obtained as a direct or indirect consequence of giving the return, being used in future proceedings against the person.

**Committee comment**

2.39 The committee thanks the Minister for this response. The committee notes the Minister's advice that the requirement for employers to regularly report information to the Commission about the number of seafarers booths on a vessel is critical to the Commission's ability to calculate levies, and collecting the information through other means would be impractical and extremely costly for the scheme. The committee also notes the Minister's advice that the abrogation is limited, as the bill contains a use and derivative use immunity.

**2.40 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*).**

2.41 In light of the information provided, the committee makes no further comment on this matter.

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## Trespass on personal rights and liberties—reversal of the evidential burden of proof<sup>7</sup>

### *Initial scrutiny – extract*

2.42 As set out above, clause 9 requires an employer to give the Safety, Rehabilitation and Compensation Commission a return setting out information about seafarer berths within a set period of time. Subclauses 9(4) and (5) make it an offence of strict liability to omit to comply with these requirements and subclause 9(6) states the offence does not apply if the person has a reasonable excuse. This defence reverses the burden of proof by placing an evidential burden on the defendant.

2.43 Subclause 20(3) provides that a person commits an offence if they have been issued with an identity card and, as soon as practicable after ceasing to be an authorised person, the person does not return the card. Subclause 20(4) makes this an offence of strict liability and subclause 20(5) states that the offence does not apply if the identity card was lost or destroyed. This defence reverses the burden of proof by placing an evidential burden on the defendant.

2.44 The explanatory memorandum provides a justification as to why strict liability attaches to the offences, and in light of those justifications the committee makes no comment in relation to that aspect of the offences. However, the explanatory memorandum does not provide any justification for reversing the evidential burden of proof.

2.45 The committee therefore seeks the Minister's advice as to the rationale for seeking to reverse the evidential burden of proof, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (specifically pages 50–51).

### *Minister's response*

2.46 The Minister advised:

Failure to provide information on the number of berths on a vessel within 14 days of the end of the quarter is an offence unless the person has a reasonable excuse. Subclause 9(6) places an evidential burden on the employer in relation to this defence. This is because the employer is the only person in a position to provide evidence of any reasonable excuse for failing or refusing to comply with the obligation.

Clause 20 provides that a person commits an offence if they have been issued with an identity card and the person does not return the card as soon as practicable after ceasing to be an authorised person. The offence does not apply if the identity card was lost or destroyed. Subclause 20(5) places the evidential burden on the authorised person in relation to this

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7 Subclauses 9(6) and 20(5).

defence because the authorised person is best placed to adduce evidence that the card has be [sic] lost or destroyed and the circumstances leading to the card being lost or destroyed. This information is peculiar to their knowledge.

***Committee comment***

2.47 The committee thanks the Minister for this response. The committee notes the Minister's advice in relation to subclause 9(6) that the employer is the only person in a position to provide evidence of any reasonable excuse for failing or refusing to comply with the relevant obligation. The committee also notes the Minister's advice in relation to subclause 20(5) that the authorised person is best placed to adduce evidence as to the circumstances leading to an identity card being lost or destroyed and that the information is peculiar to their knowledge.

**2.48 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*).**

**2.49 In light of the information provided, the committee makes no further comment on this matter.**

## Transport Security Legislation Amendment Bill 2016

<b>Purpose</b>	This bill seeks to introduce regulation making powers in the Aviation Act that will enable aviation security screening to be undertaken on people, vehicles and goods operating within a restricted area or zone at a security controlled airport
<b>Portfolio/Sponsor</b>	Infrastructure and Regional Development
<b>Introduced</b>	House of Representatives on 1 December 2016
<b>Bill status</b>	Before Senate
<b>Scrutiny principle</b>	Standing Order 24(1)(a)(ii)

2.50 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2017*. The Minister responded to the committee's comments in a letter dated 14 February 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

### **Broad delegation of administrative powers<sup>8</sup>**

#### ***Initial scrutiny – extract***

2.51 Items 7 and 8 will allow the Secretary of the Department of Infrastructure and Regional Development to, by writing, delegate most of his or her powers and functions under the *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) to any APS employee in the Department. Currently these delegations are limited to departmental officers at the Executive 2 level or above. These include some very

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8 Schedule 1, item 7, subsection 127(2) of the *Aviation Transport Security Act 2004* and Schedule 1, item 8, subsection 202(2) of the *Maritime Transport and Offshore Facilities Security Act 2003*.

significant powers and functions, including the giving of security directions or determinations of adverse aviation security status.<sup>9</sup>

2.52 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated officers or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

2.53 The only explanation provided for allowing the delegation of most of the Secretary's functions to APS employees of any level is that it would 'give the Department greater administrative flexibility and capacity to process increased numbers of regulatory submissions from industry participants within statutory timeframes and to adapt administrative practices to changes in the security environment'.<sup>10</sup> The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

2.54 The committee requests the Minister's detailed advice as to why the bill proposes to allow most of the Secretary's powers and functions to be delegated to APS employees at any level. In particular, the committee notes that some very significant powers and functions will be able to be delegated to *any* APS employee and seeks the Minister's advice as to whether further exceptions to this broad delegation of administrative power could be added to subsection 127(2) of the Aviation Act and subsection 202(2) of the Maritime Act so that the delegation is more appropriately constrained.

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9 See, for example, s 44(3) (Requirements for screening and clearing—written notices), ss 51 & 59 (Secretary may permit by class—weapons/prohibited items), s 67 (Secretary may give special security directions), s 74G (Secretary may determine that a person has an adverse aviation security status), and ss 109 & 111 (Secretary may require security compliance information/aviation security information) of the Aviation Act and s 22 (Secretary may declare maritime security level 2 or 3), ss 33, 36 & 36A (Secretary may give security directions), ss 88 & 100ZE (Secretary may delegate powers and functions), ss 99 & 100ZM (Secretary may give control directions), ss 125 & 132 (Secretary may permit by class—weapons/prohibited items), ss 136, 145D & 147 (Appointment of inspectors and duly authorised officers), and s 184 (Secretary may require security compliance information) of the Maritime Act. Please note these provisions are provided as examples only and are not an exhaustive list of the significant powers and functions within these Acts.

10 Explanatory memorandum, p. 2.

**Minister's response**

## 2.55 The Minister advised:

I note that the Committee has asked the Senate to consider the question of why the Bill proposes to allow most of the Secretary's powers and functions to be delegated to Australian Public Service (APS) employees at any level in the Department of Infrastructure and Regional Development (the Department).

The *Aviation Transport Security Act 2004* (ATSA) and the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA) establish a regulatory framework to safeguard against unlawful interference with aviation, maritime transport and offshore facilities. Both the ATSA and the MTOFSA, and their supporting regulations, require the Department to consider most regulatory submissions from industry in 30 or 60 days. Regulatory submissions received by the Department include transport security plans and programs for aviation, air cargo, issuing bodies, maritime, and offshore oil and gas industry participants. The submissions vary greatly in complexity and there is significant administrative efficiency to be gained by allowing less complex or sensitive submissions to be dealt with by a broader range of appropriately trained staff. I note that industry have also provided feedback that more timely processing of regulatory submissions would bring greater operational flexibility and efficiency.

Amending the administrative power of the Secretary to delegate will not automatically grant lower level employees the authority to make decisions. As in other Commonwealth agencies, the delegation of powers is managed through a Delegation Instrument. The Secretary determines on a risk basis who can exercise these powers. Accordingly, significant, complex or sensitive regulatory decisions covered by this Bill - such as those that affect international gateway airports and major city ports - will remain with Senior Executive Service and Executive level staff. Simple regulatory decisions, for example a change to the contact list of key personnel, may be delegated to a small number of appropriately trained, lower level employees within the Office of Transport Security. We do not expect that any delegation will be devolved beyond the APS6 level.

In addition to the Delegation Instrument, administrative processes are in place to ensure staff exercise delegations appropriately. The regulatory management system used by staff within the Office of Transport Security has controls in place to ensure that only duly authorised persons can exercise a function or power. Delegates who exercise powers and functions under the Acts receive appropriate training and support to make effective and lawful decisions. This includes an internal training course specifically covering the exercise of delegations.

I am confident that the measures currently in place appropriately manage the proper exercise of power under a delegation. The decision making principles and responsibilities of the delegate are the same, regardless of

the APS level of the delegate. The delegate must consider the following principles in their decision making approach: within power; relevant; well-founded; fair; clear; and logical. The management of delegations will not change with the introduction of broad delegation under the Acts.

***Committee comment***

2.56 The committee thanks the Minister for this response. The committee notes the Minister's advice that there is a need to have a broader range of appropriately trained staff able to process less complex or sensitive regulatory submissions. The committee also notes the Minister's advice that decisions to grant lower level employees the authority to make decisions would be managed through a delegation instrument (which the committee notes would not be subject to the parliamentary disallowance process). The Minister also advised that significant, complex or sensitive regulatory decisions will remain with Senior Executive Service and Executive level staff and that it is not expected 'that any delegation will be devolved beyond the APS6 level'.

**2.57 The committee reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, a limit is set on the scope and type of powers that might be delegated. While the committee notes the Minister's advice as to how it is intended this power will be exercised, there is nothing on the face of the bill to limit it in the way set out in the response. The committee notes that it would be possible to amend the bill to provide that significant powers and functions can only be delegated to members of the Senior Executive Service.**

**2.58 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*).**

**2.59 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of enabling all of the Secretary's powers and functions to be delegated to any APS employee.**

## Chapter 3

### Scrutiny of standing appropriations

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

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

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

**Bills introduced with standing appropriation clauses in the 45<sup>th</sup> Parliament since the previous Scrutiny Digest was tabled:**

**Parliamentary Entitlements Legislation Amendment Bill 2017** — Schedule 2, item 8, section 11; and item 9, section 31

**Other relevant appropriation clauses in bills**

Nil

**Senator Helen Polley (Chair)**



# **Appendix 1**

## **Ministerial correspondence**





**The Hon Christian Porter MP**  
Minister for Social Services

14 FEB 2017

MC17-002433

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

Dear ~~Senator Polley~~ *Helen*

Thank you for your letter of 10 November 2016 regarding the Fairer Paid Parental Leave Bill 2016 and the Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016. I appreciate the time you have taken to bring these matters to my attention. I regret the delay in responding.

The Senate Standing Committee for the Scrutiny of Bills, in its *Alert Digest No.8 of 2016*, has sought advice on certain components included in the Fairer Paid Parental Leave Bill 2016 and the Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016.

With regard to the Fairer Paid Parental Leave Bill 2016, the Committee expressed concerns about the proposed period of time before the measures commence. I am aware of the concern of families in relation to this measure.

The Committee will be aware that the Government introduced a new Bill into Parliament on 8 February 2017, the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017, which includes among other measures, the Paid Parental Leave (PPL) changes previously introduced in the Fairer Paid Parental Leave Bill 2016.

The PPL measures in the new Bill before Parliament also include changes that address concerns expressed about the 2015-16 Mid-Year Economic and Fiscal Outlook measure. The measure will now commence on the first 1 January, 1 April, 1 July or 1 October that is 9 months after the legislation receives Royal Assent, with an earliest commencement date of 1 January 2018. This will ensure prospective parents have time to plan their finances and structure their leave arrangements before their newborn or adopted child arrives.

In this Bill, the Government will also be increasing the maximum number of weeks of Government-provided Parental Leave Pay from 18 to 20 weeks. This means that the taxpayer funded scheme will now be better targeted to those who do not receive any employer-provided paid parental leave, or whose employer-provided paid parental leave is for less than 20 weeks.

The taxpayer-funded Parental Leave Pay for women without access to any employer paid parental leave will increase from 18 weeks to 20 weeks at the National Minimum Wage, an increase of around \$1,300.

Under the revised measure, all eligible parents will be guaranteed a safety net of financial support equivalent to 20 weeks of Parental Leave Pay at the rate of the National Minimum Wage. Those eligible parents with access to an employer scheme of less than 20 weeks paid parental leave will receive a mix of employer and taxpayer-funded paid parental leave, up to 20 weeks in total. Only those with a generous employer entitlement of 20 weeks or more will lose access to the taxpayer funded scheme (around 2 per cent of mothers).

With regard to the Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016, a separate letter has been provided to the Committee.

Thank you for raising these matters with me.



**Senator the Hon Michaelia Cash**  
Minister for Employment  
Minister for Women  
Minister Assisting the Prime Minister for the Public Service

Reference: MC17-009509

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

Dear Senator

**Seafarers and Other Legislation Amendment Bill 2016**  
**Seafarers Safety and Compensation Levies Collection Bill 2016**

Thank you for the letter from the Committee's secretariat of 10 November 2016 concerning the Seafarers and Other Legislation Amendment Bill 2016 (Seafarers Bill) and the Seafarers Safety and Compensation Levies Collection Bill 2016 (Levies Collection Bill). You have sought my advice about issues raised in the Senate Scrutiny of Bills Committee's *Alert Digest No. 8 of 2016* in relation to these Bills.

*Overview of the Seacare Reform package*

The Seacare scheme provides workers' compensation and work health and safety protections to a very small defined section of the Australian maritime industry. As of July 2016, the scheme was known to apply to 219 vessels and 5,984 employees (a small portion of approximately 80,000 domestic seafarers in Australia).

The Seafarers Bill clarifies the coverage of the scheme following the Federal Court decision *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC182 and gives effect to recent changes to the Maritime Labour Convention (among other things).

The Seafarers Safety and Compensation Levies Bill 2016 imposes a new cost recovery levy on the scheme and continues the existing insurance levy supporting the safety net fund. Claims may be made by injured employees against the fund where there is no employer whom to make a workers' compensation claim against (due to winding up etc). The Levies Collection Bill provides for the collection of these levies.

A detailed response to the questions posed by the Committee is at Attachment A.

Yours sincerely

**Seafarers and Other Legislation Amendment Bill 2016**

**Trespass on personal rights and liberties—strict liability offences  
Schedule 2, items 8, 9 and 176**

New subsection 94A(1) (Schedule 2, item 8) requires an employer to notify the Seacare Authority (and after the transition time, the Safety Rehabilitation and Compensation Commission (the SRCC)) of any changes to, or cancellation of, an insurance policy or membership of an indemnity association within 14 days. New subsections 94A(2) and 94A(3) create a strict liability offence for failure to comply with subsection 94A(1).

New subsection 95A(1) (Schedule 2, item 9) requires an employer who becomes aware that the employer's policy or membership is to be cancelled or terminated to notify each employee of that fact, as soon as practicable and before the policy or membership is cancelled or terminated. New subsections 95A(2) and 95A(3) create a strict liability offence for failure to comply with subsection 95A(1).

New section 95B (Schedule 2, item 9) requires an employer or an operator of an Australian registered vessel to display on board the vessel a certificate of insurance that complies with the requirements of subsection 95B(3) and an information statement that complies with the requirements of subsection 95B(4). New subsections 95B(5) and 95B(6) create a strict liability offence for failure to display this information.

The requirements are to comply with Australia's international obligations under the Maritime Labour Convention.

These offences arise in a regulatory context where an employer can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are. Employers will be placed on notice by the existence of the offences to actively ensure they are complying with and do not contravene the new subsections. The offences would not be punishable by imprisonment and would have a relatively low maximum penalty of 20 penalty units.

New section 106 requires employers to provide information to the SRCC to assist in the monitoring of work related injuries in the scheme and to Comcare to assist it to determine eligibility of claims against the safety net fund. It is a strict liability offence for an employer to fail to comply with the requirements without reasonable excuse.

These offences also arise in a regulatory context where strict liability is justified in the interest of ensuring the regulatory scheme is observed and the SRCC and Comcare are able to perform their functions.

**Insufficiently defined administrative powers—breadth of discretion  
Schedule 2, item 84, proposed new section 25M**

The Bill replaces the coverage provision in section 19 of the Seafarers Act and the current exemption provision in section 20A of that Act.

New section 25M mirrors the existing discretion of the Seacare Authority in section 20A of the Seafarers Act to exempt the employment of employees from the application of the Seafarers Act and associated levies. The opt-in and opt-out (exemption) provisions are intended to maintain the status quo for vessels covered by the scheme, without giving more or less power to any of the participants in the current scheme.

Section 20A currently operates to allow the Seacare Authority to declare vessels exempt from the scheme with an absolute discretion. There are no requirements in the Seafarers Act which direct how that discretion is exercised. The Seacare Authority has issued Exemption Guidelines (which are not a legislative instrument) to provide assistance to the industry on when an exemption may be appropriate and the factors to be taken into account by the Seacare Authority.

Exemption from the Seacare scheme means that seafarers covered by the exemption would fall under relevant state or territory, rather than the national workers' compensation insurance arrangements, reducing the need for employers to maintain two insurance policies because of uncertainty of coverage.

The amendments prohibit the Seacare Authority, and after passage of the Bill the SRCC, from acting in a way contrary to Australia's obligations under an international agreement. As a party to the Maritime Labour Convention, Australia is obliged to ensure that all seafarers have adequate compensation for injuries (see MLC Title 4, regulation 4.2). The Bill ensures that the views of the maritime industry stakeholders are taken into account by the SRCC in making exemptions through assistance provided to the SRCC by the Seacare Advisory Group (see new subparagraph 89RA(2)(a)(i)).

The Bill has improved on the current position by allowing for legislative rules to be made prescribing the matters to be taken into account by the SRCC when granting an exemption. These rules will be developed following further industry consultation and subject to parliamentary scrutiny through disallowance procedures.

The Bill ensures the SRCC has flexibility to grant an exemption where the circumstances require and enables the SRCC to take into account all relevant matters, subject to any guidance that is prescribed in the rules. To fetter that process would be to impose red tape on a system that is working well at this time and is largely replicated in Part 1A of the amending Bill.

#### **Merits review**

##### **Schedule 2, item 84, proposed new section 25R**

The committee also seeks advice on why decisions of the SRCC to exempt an employee (or class of employees) from the coverage of the scheme are not subject to merits review by the Administrative Appeals Tribunal (AAT) where the SRCC's power is exercised on its own motion.

Exemptions are currently issued by the Seacare Authority and the decision is not reviewable by the AAT.

As noted above, the exemption helps remove uncertainty of coverage and reduces need for employers to take out two insurance policies (i.e. under the Seacare scheme and a relevant state or territory scheme). Allowing the SRCC to grant exemptions on its own motion enables it to respond quickly to any issues affecting coverage of the scheme and can reduce the administrative burden on employers. Section 25M provides that an exemption cannot be granted without taking into account the advice of members the Seacare Advisory Group who represent employers and employees in the industry. Any AAT review is likely to involve reconsideration of these processes already undertaken by the SRCC that would be unnecessarily time-consuming and costly to repeat on review.

#### **In relation to the *Seafarers Safety and Compensation Levies Collection Bill 2016***

##### **Trespass on personal rights and liberties—privilege against self-incrimination Subclause 9(7)**

Clause 9 of the Bill requires employers to regularly report information to the Commission about the number of seafarer berths on a vessel. This information must be provided within 14 days of the end of the quarter to facilitate the timely collection of levies to support the scheme.

Subclause 9(7) provides a person cannot refuse to provide information on the ground that it might incriminate them. This information is critical to the Commission's ability to calculate levies. Collecting the information through other means, for example, through physical inspections of the number of berths on ships at sea, would be impractical and extremely costly for the scheme.

The abrogation of the privilege is limited. Subclause 9(8) prevents any information in the return, or document or thing obtained as a direct or indirect consequence of giving the return, being used in future proceedings against the person.

**Trespass on personal rights and liberties—strict liability offences—reversal of the evidential burden of proof**

**Subclauses 9(6) and 20(5)**

Failure to provide information on the number of berths on a vessel within 14 days of the end of the quarter is an offence unless the person has a reasonable excuse. Subclause 9(6) places an evidential burden on the employer in relation to this defence. This is because the employer is the only person in a position to provide evidence of any reasonable excuse for failing or refusing to comply with the obligation.

Clause 20 provides that a person commits an offence if they have been issued with an identity card and the person does not return the card as soon as practicable after ceasing to be an authorised person. The offence does not apply if the identity card was lost or destroyed. Subclause 20(5) places the evidential burden on the authorised person in relation to this defence because the authorised person is best placed to adduce evidence that the card has been lost or destroyed and the circumstances leading to the card being lost or destroyed. This information is peculiar to their knowledge.



**The Hon Darren Chester MP**  
Minister for Infrastructure and Transport  
*Deputy Leader of the House*  
*Member for Gippsland*

PDR ID: MC17-000280

14 FEB 2017

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

Dear Senator 

Thank you for the comments contained in the Scrutiny of Bills Committee's Alert Digest No.1 of 2017, concerning the Transport Security Legislation Amendment Bill 2017. I offer the following comments in response.

**Items 7 and 8, proposed amendments to subsection 127(2) and subsection 202(2)**

I note that the Committee has asked the Senate to consider the question of why the Bill proposes to allow most of the Secretary's powers and functions to be delegated to Australian Public Service (APS) employees at any level in the Department of Infrastructure and Regional Development (the Department).

The *Aviation Transport Security Act 2004* (ATSA) and the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA) establish a regulatory framework to safeguard against unlawful interference with aviation, maritime transport and offshore facilities. Both the ATSA and the MTOFSA, and their supporting regulations, require the Department to consider most regulatory submissions from industry in 30 or 60 days. Regulatory submissions received by the Department include transport security plans and programs for aviation, air cargo, issuing bodies, maritime, and offshore oil and gas industry participants. The submissions vary greatly in complexity and there is significant administrative efficiency to be gained by allowing less complex or sensitive submissions to be dealt with by a broader range of appropriately trained staff. I note that industry have also provided feedback that more timely processing of regulatory submissions would bring greater operational flexibility and efficiency.

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I am confident that the measures currently in place appropriately manage the proper exercise of power under a delegation. The decision making principles and responsibilities of the delegate are the same, regardless of the APS level of the delegate. The delegate must consider the following principles in their decision making approach: within power; relevant; well-founded; fair; clear; and logical. The management of delegations will not change with the introduction of broad delegation under the Acts.

I trust this information will be of assistance to the Committee.