The Senate

Standing Committee for the Scrutiny of Bills

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Members of the Committee

Current members

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

Secretariat

Ms Anita Coles, Acting Secretary

Mr Glenn Ryall, Principal Research Officer

Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_scrutiny

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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.

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 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.

ASIC Supervisory Cost Recovery Levy Bill 2017

Purpose	This bill is part of a package of bills. The bill seeks to impose a levy on persons regulated by the Australian Securities and Investments Commission
Portfolio	Treasury
Introduced	House of Representatives on 30 March 2017

Modified disallowance procedures[1]

1.2 This bill seeks to impose a levy on persons regulated by the Australian Securities and Investments Commission (ASIC) to recover ASIC's regulatory costs. The amount of levy payable each year is to be set through a combination of regulations and legislative instruments. Regulations made by the Governor-General (and subject to the normal disallowance procedures) will set out the methods or formula that will be used to apportion ASIC's regulatory costs. Annual legislative instruments made by ASIC will set out certain information that will be input into these methods or formulas, including:

- the amounts to be input into the formulas for a particular financial year;
- the number of leviable entities in a particular class, sector or sub-sector for a particular financial year; and
- the amount of ASIC's regulatory costs for a financial year (including the extent to which these costs are attributable to each sub-sector).[2]

1.3 The bill proposes to modify the disallowance procedures in relation to these annual legislative instruments in three ways. First, subclause 11(3) provides that these legislative instruments are not to take effect until the end of the disallowance period, or a later day specified in the legislative instrument. The explanatory memorandum notes that this is to ensure 'that ASIC is not able to collect amounts of levy before Parliament has had the opportunity to consider and scrutinise the

1 Subclause 11(2).

2 See subclauses 9(6) and 10(2).

matters included in those legislative instruments'.[3] The committee welcomes this aspect of the modified disallowance procedures which will improve parliamentary oversight of these instruments.

1.4 Secondly, paragraph 11(2)(a) seeks to reduce the time that these instruments will be available for disallowance from the standard 15 sitting days to 5 sitting days. The explanatory memorandum states that this is necessary because if these instruments were subject to the usual disallowance period and ASIC was unable to collect a levy before the end of that period:

> …the collection may take place over twelve months (and a full financial year) after the relevant regulation occurred. This would create considerable commercial uncertainty for ASIC's regulated population and detract from one of the strategic aims of cost-recovery, that is creating a price signal on the cost of regulation, to help shape ASIC's strategic priorities.[4]

1.5 The committee notes this explanation for the proposal to reduce the time that the annual legislative instruments made by ASIC will available for disallowance from 15 to 5 sitting days. The committee has consistently raised scrutiny concerns where it is proposed to modify the usual disallowance process as this can significantly impact parliamentary oversight of delegated legislation. However, in light of the explanation provided, the committee leaves the question of whether the reduced disallowance period is appropriate to the Senate as a whole.

1.6 Thirdly, paragraph 11(2)(b) seeks to reverse the usual procedure in subsection 42(2) of the *Legislation Act 2003* so that where a motion to disallow an instrument is unresolved at the end of the proposed 5 sitting day disallowance period, the instrument (or relevant provision(s) of the instrument) is taken *not* to have been disallowed and would therefore continue in effect. Normally, subsection 42(2) of the Legislation Act provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) *are taken to have been disallowed* and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.[5]

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3 Explanatory memorandum, p. 22.

4 Explanatory memorandum, p. 22.

5 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

1.7 Under the modified disallowance procedure in paragraph 11(2)(b), if a disallowance motion is lodged, but not brought on for debate before the end of the 5 sitting day disallowance period, the relevant instrument will remain in force by default. In practice, as the executive has significant control over the conduct of business in the Senate, there may be occasions where no time is available to consider the disallowance motion within the 5 sitting day disallowance period and therefore the instrument would prevail regardless of the attempt to disallow it. The explanatory memorandum provides no justification for this proposed reversal of the usual disallowance procedures in subsection 42(2) of the Legislation Act.

1.8 Noting the significant practical impact on parliamentary scrutiny of this measure, the committee requests the Minister's detailed justification as to why it is proposed to reverse the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* so that where a motion to disallow an instrument is unresolved at the end of the reduced disallowance period, the instrument will be taken *not* to have been disallowed and would therefore continue in effect.

> *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.*

ASIC Supervisory Cost Recovery Levy (Consequential Amendments) Bill 2017

Purpose	This bill is part of a package of bills and it seeks to amend a number of Acts to: • require ASIC to publish information on all of its regulatory costs for the previous financial year as soon as practicable after 31 October each year; • authorise ASIC to take administrative actions against entities that have failed to pay their levy, late payment penalty, or shortfall penalty within a year; and • abolish the existing market supervision cost recovery regime
Portfolio	Treasury
Introduced	House of Representatives on 30 March 2017

The committee has no comment on this bill.

ASIC Supervisory Cost Recovery Levy (Collection) Bill 2017

Purpose	This bill is part of a package of bills and it seeks to: • provide for the collection of levy to be payable by all entities regulated by ASIC to offset their regulatory costs; and • require all ASIC regulated entities to report to ASIC on their actual activities throughout the financial year
Portfolio	Treasury
Introduced	House of Representatives on 30 March 2017

The committee has no comment on this bill.

Banking Amendment (Establishing an Effective Code of Conduct) Bill 2017

Purpose	This bill seeks to amend the *Banking Act 1959* to: • require the Minister to create a Banking Code of Conduct (the Code) as a legislative instrument, review the Code every three years and consult with customers of authorised deposit-taking institutions (ADIs); • empower the Australian Prudential Regulation Authority (APRA) to receive and assess complaints by customers of ADIs; • allow APRA to impose civil penalties on ADIs that have breached the Code and require them to publish their details on their website and in newspapers; • require the Minister to review the Code every three years and consult with customers of ADIs
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 27 March 2017

Significant matters in delegated legislation[6]

1.9 This bill seeks to establish a Banking Code of Conduct (the Code) in legislation. Proposed section 36A requires the Minister to make the proposed Code by legislative instrument. The proposed Code forms the basis of a banking complaints system to be administered by the Australian Prudential Regulation Authority (APRA) and, as the Code is to be made by legislative instrument, represents a significant delegation of legislative power. The Code can include civil penalty provisions.[7] Further, if APRA finds that a breach of the Code is substantiated it may 'name and shame' the offending institution.[8] The only guidance on the face of the bill in relation to the contents of the proposed Code is that, when it is first made, 'the Code must, and must only, include standards equivalent to those in the Code of Banking Practice published by the Australian Bankers' Association as in force on 27 March 2017'.[9] There is no ongoing guidance in relation to the standards to be included in the Code.

6 Schedule 1, item 3, proposed section 36A of the *Banking Act 1959*.

7 Schedule 1, item 2.

8 Schedule 1, item 3, proposed sections 36D and 36E of the *Banking Act 1959*.

9 Schedule 1, item 4.

1.10 The committee's view is that significant matters, such as the central details of regulatory schemes, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case, as the central elements of proposed banking complaints scheme are left to be prescribed in the proposed Code, these central elements of the new scheme will not be subject to the full range of parliamentary scrutiny inherent in establishing the scheme in primary legislation.

1.11 The committee notes that there is no guidance about the contents of the proposed Banking Code of Conduct (beyond when it is first made) in the primary legislation. The committee therefore seeks the Member's advice as to why it is proposed to delegate the central details of this new regulatory scheme to the Minister, rather than including at least some ongoing guidance on the face of the bill.

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

Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017

Purpose	This bill seeks to amend various Acts relating to communications to: • amend account keeping and licence fee administration arrangements for commercial broadcasters and datacasting transmitter licensees; • remove the requirement that licensees audit certain financial information that they are required to provide to the Australian Communications and Media Authority (ACMA); • repeal the requirement for licensees to use the film classification scheme the *Classification (Publications, Films and Computer Games) Act 1995* when broadcasting films; • amend the ACMA's complaints handling and investigation functions; • amend the publication methods for notices in respect of program standards or standards relating to datacasting; • enable the telecommunications industry to develop an industry-based scheme for the management of telephone numbering resources; • repeal tariff filing directions applying to certain carriers and carriage service providers; • amend the statutory information and reporting functions of the ACMA and the Australian Competition and Consumer Commission (ACCC); • remove the ability of NBN Co to issue and keep a register of statements that it is not installing fibre in a new real estate development; • provide for NBN Co to dispose of surplus non-communications goods; and • remove redundant and unnecessary legislation including through the repeal of various spent historical Acts
Portfolio	Communications and the Arts
Introduced	House of Representatives on 29 March 2017

Parliamentary scrutiny—removing requirements to table certain documents[10]

1.12 Certain provisions in the bill propose to remove requirements in the *Competition and Consumer Act 2010* and the *Telecommunications Act 1997* for the Minister to table documents in Parliament, including:

- annual reports of the ACCC regarding competitive safeguards within the telecommunications industry (this does not apply where the ACCC is directed by the Minister to report);[11]
- monitoring by the ACCC of telecommunications charges paid by consumers; and[12]
- the annual report of the ACMA.[13]

1.13 While the bill ensures that some of this information will be published online, the bill proposes to remove legislative provisions which *require* that this information be made available to the Parliament (and therefore the public at large).

1.14 The committee notes that removing the requirement for certain information to be tabled in Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. As such, the committee expects there to be appropriate justification for removing a tabling requirement. The committee generally does not consider the costs involved in tabling the documents to be a sufficient basis for removing the requirement to table in Parliament.

1.15 The reason for removing these tabling requirements appears to be on the basis that it is also proposed that the ACCC and the ACMA will no longer be required to provide such reports to the Minister. Rather, flexibility will be given to the ACCC and the ACMA as to what matters are reported on. The explanatory memorandum states:

> The ACCC would be empowered to decide which charges to monitor and report on… The ACCC would no longer report to the Minister, and the report would no longer be tabled in Parliament, but instead the ACCC

10 Schedule 3, items 15, 18 and 22.

11 Schedule 3, item 15, amendments to section 151CL of the *Competition and Consumer Act 2010*.

12 Schedule 3, item 18, amendments to section 151CM of the *Competition and Consumer Act 2010*.

13 Schedule 3, item 22, amendments to section 105 of the *Telecommunication Act 1997*.

> would be required to publish the report on its website as soon as practicable but no later than 6 months after the end of the financial year.[14]
>
> …
>
> It is preferable to provide the ACMA with greater flexibility to prepare targeted reports.[15]

1.16 However, while the committee notes the basis for making the reporting requirements to the Minister more flexible, this does not provide a justification for why the requirement to table the reports that are produced by the ACCC and the ACMA is being removed.

1.17 Noting the potential impact on parliamentary scrutiny of removing the requirement for certain information to be made available to the Parliament, the committee requests the Minister's advice as to why the requirement for these documents to be tabled in Parliament is proposed to be removed.

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

Consultation prior to making delegated legislation[16]

1.18 Schedule 5, item 2 seeks to repeal section 152ELB of the *Competition and Consumer Act 2010*. This would remove the requirement for the ACCC to, before making any Procedural Rules, publish a draft on the ACCC's website and to invite people to make submissions during a period of at least 30 days and consider any submissions received. In explaining the repeal of this provision, the explanatory memorandum states that:

> this provision is considered unnecessary in light of the standard consultation requirement in section 17 of the *Legislation Act 2003,* which require a rule maker, subject to certain exceptions, to be satisfied that appropriate and practicable consultation has been undertaken prior to making a legislative instrument.[17]

1.19 However, the committee notes that section 17 of the *Legislation Act 2003* does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not

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14 Explanatory memorandum, p. 21.

15 Explanatory memorandum, p. 22.

16 Schedule 5, item 2, in relation to the proposed repeal of section 152ELB of the *Competition and Consumer Act 2010.*

17 Explanatory memorandum, p. 28.

think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, there are no equivalent process requirements to those contained in the current provision, which provides for at least 30 days for people to make submissions on the draft Rules and for those submissions to be considered. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.[18]

1.20 Where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

1.21 The committee therefore requests the Minister's detailed justification for removing the current, specific requirements for consultation by the ACCC prior to the making of procedural rules by legislative instrument.

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

18 See sections 18 and 19 of the *Legislation Act 2003*.

Competition and Consumer Amendment (Competition Policy Review) Bill 2017

Purpose	This bill seeks to amend the *Competition and Consumer Act 2010* (the Act) to: • amend the definition of 'competition' in section 4 of the Act, to clarify that competition includes competition from goods and services that are capable of importation, in addition to those actually imported; • amend provisions relating to cartel conduct and anti-competitive conduct; • repeal price signalling provisions and separate prohibition on exclusionary provisions; • repeal the definition of 'exclusionary provision' and a defence to the prohibition on exclusionary provisions; • define 'contract' and 'party' to include covenants, and repeal redundant provisions which separately deal with covenants; • increase the maximum penalty applying to breaches of the secondary boycott provisions; • prohibit third line forcing only where it has the purpose, effect or likely effect of substantially lessening competition; • amend the resale price maintenance and notification provisions; • amend notification and authorisation provisions; • extend section 83 of the Act relating to admissions of fact and findings of fact made in certain proceedings; • extend the Commission's power to obtain information, documents and evidence in section 155; • introduce a 'reasonable search' defence to the offence of refusing or failing to comply and increase the penalties under section 155 of the Act; • amend Part IIIA of the Act relating to competition in markets for nationally significant infrastructure services; • insert a new Division 3 into Part XIII of the Act relating to transitional application of amendments made by the bill; • make various other minor amendments relating to the administration of the Act

Portfolio	Treasury
Introduced	House of Representatives on 30 March 2017

Legal burden of proof[19]

1.22 Section 155 of the *Competition and Consumer Act 2010* provides the Australian Competition and Consumer Commission (ACCC) with compulsory evidence-gathering powers. In particular, it makes it an offence for a person to refuse or fail to comply with a notice to furnish or produce information or to appear before the ACCC. This is currently subject to a penalty of imprisonment for up to 12 months or 20 penalty units (although it is proposed to increase this penalty, see paragraphs [1.29] to [1.34] below).

1.23 Item 3 of Schedule 11 proposes introducing a defence to this offence, to provide that the offence of refusing or failing to comply with a notice does not apply in relation to producing documents if the person proves that, after a reasonable search, the person is not aware of the documents and provides a written response to the notice. A legal burden of proof is proposed to be placed on the defendant, ensuring that the defendant would need to prove, on the balance of probabilities, that they were not aware of the documents and that they undertook a reasonable search.

1.24 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove one or more elements of an offence, interferes with this common law right.

1.25 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of people affected being the paramount consideration.

1.26 The explanatory memorandum notes that whether a person has made a reasonable search is an objective test,[20] but that it is appropriate to place a legal burden on the defendant:

> because the facts amounting to a reasonable search will be peculiarly within the knowledge of the defendant. For example, it is likely that only a defendant will possess information such as how many documents could possibly have been searched to find the documents the notice requested, and how many documents were actually searched. With this knowledge,

19 Schedule 11, item 3.

20 Explanatory memorandum, p. 89.

> the defendant *could readily and cheaply provide evidence*, on the balance of probabilities, that they conducted a reasonable search.
>
> By contrast, it would be extremely difficult and costly for the prosecution to *gather the same evidence* through its own investigations.[21]

1.27 The committee considers that the explanatory memorandum has provided a justification as to why the *evidential* burden of proof needs to be reversed, but has not established why it is necessary to reverse the *legal* burden of proof. It would appear that if the facts amounting to a reasonable search are peculiarly within the knowledge of the defendant, it would be sufficient to require the defendant to raise evidence that suggests a reasonable possibility that a reasonable search was undertaken (which is an objective fact) and that the defendant was not aware of the documents, and the prosecution could then be required, as usual, to disprove the matters that had been raised, beyond reasonable doubt.

1.28 As the explanatory materials do not adequately address this issue, the committee requests the Minister's advice as to why it is proposed to reverse the legal burden of proof in this instance and why it is not sufficient to reverse the evidential, rather than the legal, burden of proof.

> *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.*

Significant penalties[22]

1.29 Item 4 of Schedule 11 proposes increasing the penalty for a contravention of section 155 of the *Competition and Consumer Act 2010*. This provision makes it an offence for a person to refuse or fail to comply with a notice to furnish or produce information or to appear before the ACCC. This is currently subject to a penalty of imprisonment for up to 12 months or up to 20 penalty units. Item 4 proposes increasing this penalty to imprisonment for up to two years or 100 penalty units (or 500 penalty units for corporations).[23] The justification given in the explanatory memorandum for this substantial increase is that '[t]his aligns the penalty under section 155 with the penalty for non-compliance with similar notice-based evidence-gathering powers of other regulators'.[24] It also notes that the Harper Review into

21 Explanatory memorandum, pp 90-91 (emphasis added).

22 Schedule 11, item 4.

23 As a result of subsection 4B(3) of the *Crimes Act 1914* which provides that generally the maximum pecuniary penalty for a corporation is five times that of individuals.

24 Explanatory memorandum, p. 91.

competition policy recommended that the maximum penalty for an offence under section 155 be increased.[25]

1.30 However, it is not clear that a significant penalty of up to two years imprisonment or 100 penalty units for a failure to comply with a notice is a comparable penalty to other similar offences. The committee notes that the *Guide to Framing Commonwealth Offences* provides that a 'notice to produce or attend' provision, being a provision that allows an enforcement or regulatory agency to require a person to produce information or documents, or to appear at a hearing to answer questions, should, if this is to be an offence, generally be subject to six months imprisonment and/or a fine of 30 penalty units.[26]

1.31 The committee also notes that while some offences relating to the Australian Security and Investment Commission's (ASIC) investigation powers subject a person to imprisonment for up to two years or 100 penalty units (or both), for a failure to appear for examination, answer a question or produce documents,[27] other provisions appear to provide for lower penalties. For example, an offence of failing to attend a hearing conducted by ASIC, or to take an oath or an affirmation or answer a question or produce a document at the hearing, is subject to three months imprisonment or 10 penalty units.[28] Similarly, a failure to attend, be sworn or make an affirmation, furnish or publish information, answer a question or produce a document before the Commonwealth Ombudsman is subject to imprisonment for three months or 10 penalty units.[29]

1.32 It is also noted that the explanatory memorandum states that these amendments are a result of recommendations of the Harper Review. However, the Harper Review noted that '[i]n relation to public enforcement by the ACCC, there appears to be general approval of the severity of the sanctions for contravention of the competition law' but that 'the current sanction for a *corporation* failing to comply with section 155 of the CCA is inadequate'.[30] It therefore does not necessarily appear to provide support for the marked increase in penalties applicable to individuals (particularly the doubling of the maximum period of imprisonment, which only applies to individuals and not corporations).

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25 Explanatory memorandum, p. 87.

26 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 89 and 93.

27 See section 63(1) of the *Australian Securities and Investments Commission Act 2001*.

28 See section 63(3) of the *Australian Securities and Investments Commission Act 2001* (relating to contraventions of section 58).

29 See section 36 of the *Ombudsman Act 1976*.

30 Harper, Anderson, McCluskey and O'Bryan, *Competition Policy Review*, Final Report, March 2015, p. 71 (emphasis added).

1.33 It is therefore not apparent to the committee that increasing the penalty to up to two years imprisonment or 100 penalty units (or both) for individuals for a failure to comply with a notice issued by the ACCC is an appropriate penalty by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.

1.34 The committee therefore seeks the Minister's detailed advice as to what is the level of penalty applicable to all comparable Commonwealth offence provisions and what is the justification for the proposed increase in penalties for individuals in this instance.

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

Retrospective commencement[31]

1.35 Schedule 12 of the bill seeks to make amendments to the National Access Regime, which provides a regulatory framework for third parties to seek access to nationally significant infrastructure services that are owned and operated by others. Part 2 of Schedule 12 seeks to amend the Regime to ensure it better promotes effective competition in dependent markets. Item 37 states that the amendments made by Part 2 of Schedule 12 apply in relation to decisions made by the Minister under section 44N of the *Competition and Consumer Act 2010*, 'on or after 1 January 2017'.

1.36 The explanatory memorandum simply restates the terms of this provision, without explaining why the commencement date for this Part is proposed to be retrospective.

1.37 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.38 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.39 The committee therefore seeks the Minister's advice as to why 1 January 2017 was chosen as the date for the commencement of the amendments made by Part 2 of Schedule 12 and whether this retrospective application may

31 Schedule 12, item 37.

cause disadvantage to any individual (and if so, what is the justification for doing so).

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

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

Purpose	This bill seeks to amend the *Australian Federal Police Act 1979*, *Crimes Act 1914*, and the *Criminal Code Act 1995* to: • clarify the functions of the Australian Federal Police; • clarify the custody notification obligations of investigating officials when they intend to question an Aboriginal person or Torres Strait Islander; • create separate offence regimes for 'insiders' and 'outsiders' for the disclosure of information relating to controlled operations; • increase the maximum applicable penalties for breach of the general dishonesty offences; • remove an obsolete reference to the death penalty; • amend protections for vulnerable witnesses and complainants in Commonwealth criminal proceedings; • authorise collection, use and disclosure of information for the purposes of preventing, detecting, investigating, or dealing with fraud or corruption against the Commonwealth and establish safeguards to ensure these measures do not unduly interfere with privacy; and • permit the New South Wales Law Enforcement Conduct Commission to use and disclose spent conviction information under the Commonwealth spent convictions scheme
Portfolio	Justice
Introduced	House of Representatives on 30 March 2017

The committee has no comment on this bill.

Criminal Code Amendment (Protecting Minors Online) Bill 2017

Purpose	This bill seeks to amend the *Criminal Code Act 1995* to introduce an offence to criminalise acts to prepare or plan to cause harm to, procure, or engage in sexual activity with, a person under the age of 16
Portfolio	Attorney-General
Introduced	House of Representatives on 30 March 2017

Reversal of legal burden of proof[32]

1.40 The bill seeks to make it an offence for a person to do any act in preparation for doing or planning to do certain harmful acts to persons under 16 years of age, where the offender is at least 18 years of age and the act is done using a carriage service. This is subject to a penalty of up to 10 years imprisonment.

1.41 The offence provision is proposed to be inserted into Subdivision F of Division 474 of the *Criminal Code Act 1995*. As such, the presumption in existing section 475.1B of the Criminal Code will apply. This provision provides that if a physical element of a relevant offence consists of a person using a carriage service to engage in particular conduct and the prosecution proves beyond reasonable doubt that the person engaged in that conduct, it is presumed, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct. A defendant bears a legal burden of proof in relation to this matter.

1.42 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove one or more elements of an offence, interferes with this common law right.

1.43 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of people affected being the paramount consideration.

1.44 The explanatory memorandum states that the requirement that a carriage service was used provides the relevant connection to the Commonwealth's telecommunications power under the Australian Constitution.[33] The statement of

32 Schedule 1, item 2.

33 Explanatory memorandum p. 12.

compatibility gives a justification for imposing a presumption which reverses the legal burden of proof:

> The purpose of this presumption is to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct. Often evidence that a carriage service was used to engage in the criminal conduct is entirely circumstantial, consisting of evidence, for example, that the defendant's computer had chat logs or social media profile information saved on the hard drive, that the computer was connected to the internet, and that records show the computer accessed particular websites that suggest an association with the material saved on the hard drive.
>
> The Bill relies on the Commonwealth's telecommunications power under the Australian Constitution. Therefore, the requirement in the offence that the relevant criminal conduct be engaged in using a carriage service is a jurisdictional requirement. A jurisdictional element of the offence is an element that does not relate to the substance of the offence, or the defendant's culpability, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth than those that do not.[34]

1.45 The committee notes that the presumption is intended to address problems regarding evidence that a carriage service was used, and notes that this appears to provide a justification as to why the evidential burden of proof needs to be reversed, but not necessarily why the legal burden of proof needs to be reversed. However, the committee also notes that the relevant requirement (that the conduct engaged in uses a carriage service) is a jurisdictional requirement that does not relate to the substance of the offence.

1.46 Noting the importance of the right to be presumed innocent until proven guilty and the impact reversing the legal burden of proof has on this right, but also noting that the reversal applies to a jurisdictional element of the offence (rather than the substance of the offence), the committee draws this matter to the attention of Senators and leaves to the Senate as a whole the appropriateness of reversing the legal burden of proof.

> *The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.*

34 Statement of compatibility, p. 6.

Defence Legislation Amendment (2017 Measures No. 1) Bill 2017

Purpose	This bill seeks to amend several Acts relating to defence to: • allow a positive test for prohibited substances to be disregarded under certain circumstances; • simplify termination provisions to align with the new Defence Regulation 2016; • ensure greater protections for all Reservists in relation to their employment and education; • include the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy to the Australian Geospatial-Intelligence Organisation; • align a small number of provisions in the *Australian Defence Force Cover Act 2015* with other military superannuation schemes and provide clarity in definitions
Portfolio	Defence
Introduced	House of Representatives on 29 March 2017

Significant matters in delegated legislation[35]

1.47 Proposed section 72B specifies that the regulations may provide processes for making and investigating complaints about alleged contraventions of the *Defence Reserve Service (Protection) Act 2001* (the Act) and mediating disputes between persons whose interests are affected by the Act. The Office of Reserve Service Protection, which is currently responsible for receiving, mediating and investigating complaints is already established under the Defence Reserve Service (Protection) Regulations 2001 (the DRS (Protection) Regulations). The current DRS (Protection) Regulations already provide for obtaining documents and information from employers and others, among other things.

1.48 It appears that the intent of proposed section 72B is to ensure that there is clear legislative authority to make the DRS (Protection) Regulations. This is demonstrated by the application provisions in subitem 72(4) which are designed to ensure that 'complaints made or actions taken under the regulations prior to commencement…are taken to be complaints made or actions taken under the regulations made for the purposes of new subparagraph 72B(1)(a)'.[36]

35 Schedule 2, items 65, proposed section 72B of the *Defence Reserve Service (Protection) Act 2001*.

36 Explanatory memorandum, p. 31.

1.49 Importantly, item 71 also seeks to amend subsection 81(2) of the Act to allow the regulations to prescribe penalties of up to 50 penalty units and civil penalties of up to 60 penalty units for offences against and contraventions of the regulations. Currently, the maximum penalty is 10 penalty units. The explanatory memorandum notes that current offences in the DRS (Protection) Regulations include failure to provide information to the Director of the Office of Reserve Service Protection and that a higher penalty is required because a failure to provide information can significantly hamper the enforcement of the Act.[37]

1.50 The committee's view is that significant matters, such as complaints and mediation processes (compliance with which can be enforced through offence and civil penalty provisions), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.51 In this case, no explanation is given as to why it is appropriate to provide for the complaints and mediation scheme in delegated legislation other than there are currently regulations in place covering these matters (which may not be supported by an effective authorising provision). The committee notes that rather than amending the Act to provide clear legislative authority to make the DRS (Protection) Regulations, it would instead be possible to remake the relevant provisions of the DRS (Protection) Regulations in the primary legislation. This would ensure that the complaints and mediation scheme is subject to the full range of parliamentary scrutiny inherent in bringing proposed changes to the scheme in the form of an amending bill.

1.52 In light of the above comments, the committee requests the Minister's advice as to why it is appropriate for the complaints and mediation scheme relating to the defence reserve service to be specified in delegated legislation rather than in primary legislation.

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

37 Explanatory memorandum, p. 31.

Electoral and Other Legislation Amendment Bill 2017

Purpose	This bill seeks to amend various Acts in relation to electoral, broadcasting and criminal matters to: • amend authorisation requirements in relation to political, electoral and referendum communications; • replace the current criminal non-compliance regime with a civil penalty regime to be administered by the Australian Electoral Commission; • amend the Criminal Code to criminalise conduct amounting to persons falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body; and • create a new aggravated offence where a person engages in false representation
Portfolio	Special Minister of State
Introduced	House of Representatives on 30 March 2017

Significant matters in delegated legislation[38]

1.53 Proposed section 321D specifies the requirements for what constitutes an 'electoral matter', which is defined in the *Commonwealth Electoral Act 1918* as matter which is intended or likely to affect voting in an election. Proposed subsections (3)–(4) specify exceptions to the requirement for particulars to be notified. Proposed subsection 321D(7) empowers the Electoral Commissioner to determine, by legislative instrument, further exceptions to the operation of the provision. These exceptions appear to raise significant policy matters for inclusion in delegated legislation.

1.54 The committee's view is that significant matters should generally be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.55 The explanatory memorandum, in justifying these powers, states that in making an instrument, the Electoral Commissioner is 'required' to exercise the power in light of the objects of the new Part as set out in section 321C, but later notes that the Commissioner is 'expected' to take into account the consistency of the instrument with the objects specified in section 321C.[39] There does not appear to be

38 Schedule 1, item 10, proposed section 321D(7).

39 Explanatory memorandum, pp 26-27.

anything in the legislation that would require the Electoral Commissioner to take into account the objects of the Part when making the instrument.

1.56 The explanatory memorandum also states that the Electoral Commissioner, in making the instrument, 'is expected to consult with relevant agencies, as required by section 17 of the Legislation Act'.[40] However, the committee notes that section 17 of the *Legislation Act 2003* does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.[41]

1.57 Where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

1.58 The committee requests the Minister's advice as to whether the bill could be amended to include a specific obligation on the Electoral Commissioner:

- **to consult before making an instrument under proposed subsection 321D(7), with compliance with the consultation obligations a condition of the validity of the legislative instrument; and**
- **to expressly require the Electoral Commissioner to ensure the requirements or particulars prescribed are consistent with the objects stated in proposed section 321C.**

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

Reversal of evidential burden of proof[42]

1.59 Proposed section 150.1 of the Criminal Code would make it offence for a person to falsely represent that the person is, or is acting on behalf of, or with the authority of, a Commonwealth body (and makes it a higher level offence to do so with the intention of obtaining a gain, causing a loss, or influencing the exercise of a

40 Explanatory memorandum, p. 27.

41 See sections 18 and 19 of the *Legislation Act 2003*.

42 Schedule 2, item 2, proposed section 150.1(4).

public duty or function). Subsection 150.1(4) provides that if the Commonwealth body is fictitious, these offence provisions do not apply unless a person would reasonably believe that the Commonwealth body exists. This would appear to provide an exception to the relevant offences.

1.60 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.

1.61 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.62 In this instance it appears that the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), and as such the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed section 150.1(4) has not been addressed in the explanatory materials.

1.63 The committee notes that in this instance this provision appears to require the defendant to raise evidence that suggests a reasonable possibility that 'a person would reasonably believe that the Commonwealth body exists'. This seems to be an objective fact and not one that is peculiarly within the knowledge of the defendant.

1.64 As the explanatory materials do not address this issue, the committee requests the Minister's advice as to why it is proposed to use what appears to be an offence-specific defence (which reverses the evidential burden of proof) in this instance, and what is the justification for doing so. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[43]

> *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.*

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

Fair Work Amendment (Pay Protection) Bill 2017

Purpose	This bill seeks to amends the *Fair Work Act 2009* to extend protections for employees covered by an enterprise agreement to require employers to pay a base rate of pay, full rate of pay and any casual loading that is no less than the relevant award or national minimum wage order
Sponsor	Senator Lee Rhiannon
Introduced	Senate on 29 March 2017

Retrospective application[44]

1.65 The bill seeks to amend the *Fair Work Act 2009* relating to enterprise agreements. Proposed subsection 30(1) provides that the amendments apply to enterprise agreements 'whether made before, on or after the commencement' of the relevant amendments. This appears to provide for the retrospective application of the amendments to enterprise agreements made before commencement. However, subsection 30(2) provides that:

> However, the amendment made by that Schedule also have the effect they would have if they were, by express provision, confined to enterprise agreements made on or after the commencement of that Schedule.

1.66 It is unclear how these two provisions interact, and whether the measure is, in fact, retrospective.

1.67 The committee therefore requests the Senator's advice as to whether it is intended that the amendments apply to enterprise agreements made before commencement of the relevant provisions of the bill, and if so, why this is necessary and whether this would have any detrimental impact on any person.

> *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.*

44 Schedule 1, item 10.

National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017

Purpose	This bill seeks to amend the *National Vocational Education and Training Regulator (Charges) Act 2012* to impose a National VET Regulator annual registration charge as a tax
Portfolio	Education and Training
Introduced	House of Representatives on 30 March 2017

Significant matters in delegated legislation[45]

1.68 The purpose of this bill is to impose a National VET Regulator (NVR) annual registration charge as a tax. The explanatory memorandum states that because the Australian Skills Quality Authority's (ASQA's) regulatory activities have broadened, there is a risk that the annual registration fees it has been collecting may now be characterised as a tax and therefore, to comply with section 55 of the Constitution, they need to be collected under separate tax legislation.[46]

1.69 Proposed section 6B provides that the amount of the charge is to be determined by the Minister in a legislative instrument. No guidance is provided in the bill as to the method of calculation nor is a maximum charge specified. However, before determining a charge the Minister must get the Ministerial Council's agreement to the amount of the charge.[47] The explanatory memorandum justifies this approach as follows:

> As the NVETR legislative framework is based on a constitutional referral of power from the states and territories, the amount of the National VET Regulator annual registration charge must be agreed by the states and territories in accordance with Ministerial Council processes. For this reason, the method of calculating the amount of the National VET Regulator annual registration charge is not specified in the NVETR (Charges) Act as this would restrict the ability of the states and territories to provide agreement to the amount of the charge at a particular time. This approach provides the necessary flexibility for states and territories to have the authority to provide genuine and considered agreement which takes into account ASQA's regulatory priorities and what may be

45 Schedule 1, proposed section 6B of the *National Vocational Education and Training Regulator (Charges) Act 2012*.

46 Explanatory memorandum, p. 2.

47 Proposed subsection 6B(2).

appropriate for ASQA to perform its functions and enhance the transparency and accountability of the VET sector.[48]

1.70 The committee notes this explanation, however, the committee emphasises that one of the most fundamental functions of the Parliament is to levy taxation.[49] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The fact that the amount of taxation in this instance is to be agreed between Commonwealth and State and Territory executive governments does not negate the fact that this provision represents a very significant delegation of the Parliament's legislative powers.

1.71 In order to address these scrutiny concerns, the committee's preferred option would be for the bill not to proceed in its current form and instead a bill imposing the NVR annual registration charge as a tax should be introduced into the Parliament each year following agreement by the Ministerial Council.

1.72 However, if this is not agreed, the committee at least considers that some guidance in relation to the method of calculation of the charge and a maximum charge should be provided on the face of the primary legislation.[50]

1.73 In addition, the committee notes that it would be possible to provide for increased parliamentary oversight of the levying of the NVR annual registration charge as a tax by:

- **requiring the positive approval of each House of the Parliament before a new instrument comes into effect;[51]**
- **providing that the instruments do not come into effect until the relevant disallowance period has expired;[52] or**
- **a combination of these processes.[53]**

48 Explanatory memorandum, pp 9–10.

49 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the Bill of Rights 1688: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

50 Should this need to be amended following discussions with the States and Territories another bill can be brought before the Parliament to consider the necessary amendments.

51 See, for example, section 10B of the *Health Insurance Act 1973*.

52 See, for example, section 79 of the *Public Governance, Performance and Accountability Act 2013.*

53 See, for example, section 198AB of the *Migration Act 1958* and sections 45–20 and 50–20 of the *Australian Charities and Not-for-profits Commission Act 2012*.

1.74 The committee requests the Minister's advice in relation to:

- **whether consideration can be given to amending the bill in line with the committee's comments above; and**
- **other examples of Commonwealth legislation which allow the method and amount of taxation to be determined by legislative instrument (without any guidance as to the method of calculation and/or a maximum limit).**

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

Retrospective validation[54]

1.75 In order to mitigate any constitutional risk (arising as a result of the charges potentially being characterised as a tax) the bill also seeks to validate any annual registration fees collected by ASQA prior to the commencement of the bill.[55] The explanatory memorandum states that this is 'a proactive legislative measure to mitigate legal and constitutional risk and validate annual registration fees already levied against registered providers by imposing an amount equivalent to the annual registration fees collected as a tax'.[56]

1.76 It is a fundamental principle that no pecuniary burden can be imposed on individuals without clear and distinct legal authority. Retrospective validation of the imposition of fees, charges and taxes undermines this principle. As a result, significant scrutiny concerns arise in relation to proactive measures to retrospectively validate the potentially unlawful collection of a fee, charge or tax. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the retrospective validation of annual registration monies collected by ASQA that may have been invalidly levied.

> *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.*

54 Schedule 1, proposed section 6C of the *National Vocational Education and Training Regulator (Charges) Act 2012*.

55 Explanatory memorandum, p. 2.

56 Explanatory memorandum, p. 11.

National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017

Purpose	This bill seeks to amend the *National Vocational Education and Training Regulator Act 2011* (the Act) to replace the current annual registration fees collected by the Australian Skills Quality Authority under the Act with an annual registration charge collected by National Vocational Education and Training Regulator
Portfolio	Education and Training
Introduced	House of Representatives on 30 March 2017

The committee has no comment on this bill.

Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017

Purpose	This bill seeks to amend various Acts relating to ozone protection and synthetic greenhouse gas management to: • phase-down import, export and production of hydrofluorocarbons from 2018 under the Montreal Protocol, as amended by the Kigali Amendment; • prohibit the use of new hydrochlorofluorocarbons from 1 January 2020 other than for permitted uses; • implement Australia's international obligations under the Kyoto Protocol to regulate two newly listed synthetic greenhouse gases; • ensure that the provisions relating to equipment bans apply consistently to all entities regulated under the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*; • introduce measures which enable licence renewals, reduce the frequency by which licence holders are required to report their activities and introduce a threshold below which the cost recovery levy is not payable
Portfolio	Environment and Energy
Introduced	House of Representatives on 30 March 2017

Reversal of evidential burden of proof[57]

1.77 The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the OPSGGM Act) prohibits the manufacture, import and export of ozone depleting substances and synthetic greenhouse gases unless a person has a licence which allows these activities.

1.78 Item 20 of Schedule 1 to the bill seeks to repeal and replace section 13 of the OPSGGM Act (which sets out an offence and civil penalty provision relating to unlicensed manufacture, import or export). The explanatory memorandum states that 'new section 13 would retain existing prohibitions and exemptions, but would be structured more clearly, with prohibited activities listed under new subsection 13(1), and exemptions to the prohibitions set out in new subsections

57 Schedule 1, item 20, proposed section 13 of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

13(2), (3), (5) and (6)'.[58] The committee notes that the revised structure of the provision (by providing for exceptions to the unlicensed manufacture, import or export offence) raises scrutiny concerns in relation to reversing the evidential burden of proof. In a prosecution for the unlicensed manufacture, import or export offence the defendant would bear an evidential burden in relation to establishing one of the exceptions to the offence in proposed subsections 13(2), (3), (5) or (6). This reversal of the evidential burden of proof is a result of the proposed new structure of the offence.

1.79 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right. The explanatory memorandum suggests that the reverse burden is justified in this instance because 'the matters to be proved under these subsections (namely, that the defendant held a licence or that the circumstances of the activity meant the defendant was subject to an exemption) are particularly within the defendant's knowledge'.[59]

1.80 While the committee notes this explanation, it is not clear from the information provided that each of the matters outlined in the exceptions is, in fact, particularly within the defendant's knowledge. It is also noted that the *Guide to Framing Commonwealth Offences*[60] states that in general it is expected that provisions which reverse the onus of proof will be *peculiarly* within the knowledge of the defendant rather than within their particular knowledge (which is a more stringent standard).

1.81 In order to assess the appropriateness of the reversal of the evidential burden in each of these exceptions, the committee requests the Minister's advice as to how each of the matters outlined in the exceptions are peculiarly within the knowledge of the defendant and how it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[61]

58 Explanatory memorandum, p. 14.

59 Explanatory memorandum, p. 50.

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

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

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.

Significant matters in delegated legislation[62]

1.82 Some of the exceptions to the offence (offence-specific defences) in proposed section 13 rely on certain circumstances,[63] types of equipment,[64] amounts of relevant substances,[65] and conditions[66] being prescribed in the regulations, rather than these details being included on the face of the bill. The committee acknowledges that some of these matters may be technical in nature and therefore potentially appropriate for inclusion in delegated legislation (e.g. details relating to types of equipment and amounts of relevant substances). However, in circumstances where elements of an offence (or exceptions to an offence) are to be provided for in regulations, the committee still expects that the explanatory material should provide details as to why it is appropriate for these matters to be included in delegated, rather than primary, legislation. In this case, the explanatory memorandum does not provide a justification for this approach.

1.83 In addition, where the Parliament delegates its legislative power in relation to significant regulatory matters the committee generally considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

1.84 The committee requests the Minister's advice in relation to:

- **why it is considered appropriate for the exceptions in proposed section 13 to rely on matters to be specified in regulations (rather than these matters being included on the face of the primary legislation); and**
- **the type of consultation that it is envisaged will be undertaken prior to prescribing these matters in the regulations, and whether specific consultation requirements (compliance with which is a condition of the validity of the regulations) can be included on the face of the bill.**

62 Schedule 1, item 20, proposed section 13 of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

63 Proposed subsection 13(3).

64 Proposed paragraph 13(5)(b).

65 Proposed paragraphs 13(6)(a) and (b).

66 Proposed paragraphs 13(5)(c) and 13(6)(c).

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

Strict liability offence[67]

1.85 Proposed subsection 13(7) provides that a person commits an offence of strict liability if the person contravenes proposed subsection 13(1) (unlicensed manufacture, import or export). The offence is subject to a maximum penalty of 500 penalty units.

1.86 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[68]

1.87 In this case, the explanatory memorandum simply states that the item does not introduce a new offence or penalty as it reproduces the offences and penalties in existing section 13.[69] The committee notes this explanation, however, the fact that a provision is only restructuring an existing provision does not mean that the Parliament should not fully scrutinise legislation that is currently before it.

1.88 The committee therefore requests a detailed justification from the Minister for this strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[70]

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67 Schedule 1, item 20, proposed subsection 13(7) of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

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

69 Explanatory memorandum, p. 14.

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

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.

Reversal of evidential burden of proof[71]

1.89 Proposed section 45C of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the OPSGGM Act) introduces a new offence in relation to the use of hydrochlorofluorocarbons (HCFCs) that are manufactured or imported on or after 1 January 2020.

1.90 Proposed subsection 45C(2) provides for an exemption to that offence if the purpose of the prohibited use is for a purpose prescribed in the regulations. This provision includes a note to clarify that a defendant would bear the evidential burden of proof in relation to proving that their use of a HCFC was for a purpose prescribed by the regulations. The explanatory memorandum suggests that the reverse burden is justified in this instance because 'the matters to be proved (namely that the use of the HCFC was for an exempted purpose prescribed by the OPSGGM Regulations) are matters that would be in the particular knowledge of the defendant' and that it is 'expected that is would not be unreasonably difficult for the defendant to discharge the evidentiary burden'.[72]

1.91 Given that no examples are given as to the purposes that are likely or expected to be included in the regulations, it is not possible to evaluate the strength of this justification. It is also noted that the *Guide to Framing Commonwealth Offences* states that in general it is expected that provisions which reverse the onus of proof will be *peculiarly* within the knowledge of the defendant rather than within their particular knowledge (which is a more stringent standard).

1.92 In order to assess the appropriateness of the reversal of the evidential burden in this instance, the committee requests the Minister's advice in relation to the types of exempted purposes that it is envisaged may be prescribed in the regulations for the purpose of proposed subsection 45C(2). The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[73]

71 Schedule 3, item 2, proposed subsection 45C(2) of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

72 Explanatory memorandum, p. 50.

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

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.

Significant matters in delegated legislation[74]

1.93 Proposed subsection 45C(2) provides for an exemption to the offence in proposed section 45C if the purpose of the prohibited use is for a purpose prescribed in the regulations.

1.94 As previously noted, the committee will have scrutiny concerns where significant elements of an offence (or exceptions to an offence) are provided for in regulations rather than primary legislation. In this case, the explanatory memorandum provides a justification for this approach, namely, that it is 'necessary to ensure that the OPSGGM Act reflects any allowable uses that may be agreed under the Montreal Protocol before 2020'. The explanation also notes that it 'is envisaged that the prescribed uses would align with those prescribed under the Montreal Protocol'.[75]

1.95 The committee notes this explanation in relation to why it is proposed to include these matters in the regulations rather than primary legislation. However, as noted above, where the Parliament delegates its legislative power in relation to significant regulatory matters the committee generally considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

1.96 The committee therefore requests the Minister's advice in relation to the type of consultation that it is envisaged will be undertaken prior to prescribing allowable purposes under proposed subsection 45C(2), and whether specific consultation requirements (compliance with which is a condition of the validity of the regulations) can be included on the face of the bill.

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

74 Schedule 3, item 2, proposed subsection 45C(2) of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

75 Explanatory memorandum, p. 50.

Strict liability offence[76]

1.97 Contravention of proposed subsection 45C(1) (relating to the use of HCFCs) would be an offence of strict liability subject to a maximum penalty of 300 penalty units.

1.98 As previously noted, under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[77]

1.99 In this case, the explanatory memorandum states that the application of strict liability to this offence has been set with consideration given to the guidelines for this matter set out in the *Guide to Framing Commonwealth Offences*. Specifically, it is also noted that strict liability offences are used throughout the legislation on the basis that they are necessary to ensure the integrity of the established regulatory regime to prevent environmental harm. Moreover, it is suggested that 'there are legitimate grounds for penalising a person lacking fault, as the offence will not come into force until 1 January 2020' and that substantial efforts will be made to inform members of industries where HCFCs are used and the public in general about the new offence coming into effect.[78]

1.100 The committee notes that delayed commencement and an education program does not, in itself, provide a justification for strict liability, though it may ameliorate concerns which are based on whether or not it may be said that affected persons have been adequately placed on notice so they may guard against the possibility of any contravention.

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76 Schedule 3, item 2, proposed subsection 45C(3) of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

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

78 Explanatory memorandum, p. 50.

1.101 The committee therefore requests a more detailed justification from the Minister for the proposed strict liability offence that refers more precisely to the principles set out in the *Guide to Framing Commonwealth Offences*.[79]

> *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.*

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

Parliamentary Business Resources Bill 2017

Purpose	This bill seeks to establish new rules governing parliamentary work expenses
Portfolio	Finance
Introduced	House of Representatives on 30 March 2017

Significant matters in non-disallowable delegated legislation[80]

1.102 This bill seeks to replace the current parliamentary work expenses framework based on recommendations from the Independent Parliamentary Entitlements System review[81] (the Review).

1.103 Much of the proposed new framework is not set out in the bill and is instead left to delegated legislation. While some of the matters left to delegated legislation are subject to disallowance, others are exempt from disallowance. Subclause 6(6) provides that ministerial determinations in relation to specific activities that fall within, and those that fall outside, the meaning of 'parliamentary business' of a member are not subject to disallowance.[82] As a result, much of the definition of what will (and will not) constitute 'parliamentary business' (and therefore be claimable as a parliamentary expense) is left to be determined by non-disallowable legislative instruments.

1.104 The explanatory memorandum notes that one of the objectives of the Review was that the new work expenses framework would define the concept of 'parliamentary business' by which members could access certain work expenses, allowances and other public resources:

> The concept of parliamentary business is therefore central to the new work expenses framework and the operation of many of the provisions in the Bill is dependent on the definition.[83]

1.105 The explanatory memorandum suggests that it is appropriate to delegate much of the definition of 'parliamentary business' to the Minister so 'the definition has the necessary flexibility to account for the changing and future nature needs of members' roles'.[84]

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80 Clause 6.

81 February 2016.

82 Paragraph 6(2)(b) and subclauses 6(3), 6(5) and 6(6).

83 Explanatory memorandum, p. 12.

84 Explanatory memorandum, p. 12.

1.106 The explanatory memorandum further suggests that 'as a central concept to the Bill, it is also appropriate that such an instrument is not subject to disallowance so as to provide members with certainty about what activities are covered at any particular time'.[85]

1.107 The committee notes this explanation, however, the committee's consistent position is that central concepts relating to a legislative scheme should be defined in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.108 Noting the importance of appropriate parliamentary scrutiny, the committee requests the Minister's justification as to why the detail of what constitutes 'parliamentary business' is to be included in delegated legislation rather than on the face of the bill, noting that its meaning is a central concept of the bill.

1.109 The committee also seeks the Minister's advice as to whether, if such matters are to remain in delegated legislation, the bill could be amended to provide that any relevant ministerial determinations are subject to parliamentary disallowance. The committee notes that certainty could be provided in relation to what activities are covered at any particular time by increasing parliamentary oversight of the determinations, rather than exempting them from disallowance altogether. The committee notes that it would be possible to provide for such increased scrutiny in ways that would ensure the definition was not subject to unexpected change, for example by:

- **requiring the positive approval of each House of the Parliament before new determinations come into effect;[86]**
- **providing that the determinations do not come into effect until the relevant disallowance period has expired;[87] or**
- **a combination of these processes.[88]**

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

85 Explanatory memorandum, p. 12.

86 See, for example, section 10B of the *Health Insurance Act 1973*.

87 See, for example, section 79 of the *Public Governance, Performance and Accountability Act 2013*.

88 See, for example, section 198AB of the *Migration Act 1958* and sections 45-20 and 50-20 of the *Australian Charities and Not-for-profits Commission Act 2012*.

Exemption from disallowance[89]

Goods and services for former Prime Ministers

1.110 Subclause 16(1) of the bill provides that former Prime Ministers are to be provided with any goods, services, premises, equipment or any other facility determined from time to time by the current Prime Minister.

1.111 The explanatory memorandum notes that 'goods, services, premises, equipment and facilities were provided through executive power to an outgoing Prime Minister upon the decision of the incoming Prime Minister' and that 'clause 16 provides a statutory basis for this arrangement'.[90]

1.112 Subclause 16(3) provides that a determination under subclause 16(1) is not subject to disallowance. The explanatory memorandum suggests that 'this is considered appropriate given the power typically resided in the realm of executive power and should remain under executive control rather than being subject to the political process'.

Remuneration Tribunal determinations

1.113 Part 6 of the bill sets out the functions of the Remuneration Tribunal. One of the functions of the Tribunal is to determine the remuneration to be paid to members, the rates of travel allowances for domestic travel, and the allowances and expenses to be paid to former members, at least once each year.

1.114 Subclause 47(7) provides that such determinations are not subject to disallowance. The explanatory memorandum notes that this continues current arrangements and that:

> It ensures that determinations of the Remuneration Tribunal in respect of the remuneration of members remain independent of government and the Parliament. It is appropriate that members are unable to disallow instruments that directly affect their own remuneration, as this would otherwise undermine the independence of the Remuneration Tribunal in determining such matters.[91]

1.115 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues current arrangements does not, of itself, provide an adequate justification. However, in this instance, the committee notes the limited category of persons to whom such determinations will relate, and the rationale provided in

89 Subclauses 16(3) and 47(7).

90 Explanatory memorandum, p. 17.

91 Explanatory memorandum, p. 40.

the explanatory memorandum, and therefore leaves to the Senate as a whole the appropriateness of exempting these determinations from disallowance.

> *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.*

Broad delegation of legislative power

Power for delegated legislation to amend primary legislation (Henry VIII clause)[92]

1.116 Part 5 of the bill provides that the Minister may determine a parliamentary injury compensation scheme, to provide coverage for injuries, diseases, aggravation or loss or damage to members of Parliament (and the spouse of the Prime Minister) occurring on or after 1 January 2016. All aspects of the compensation scheme are left to be set out in a legislative instrument.

1.117 The committee's view is that significant matters, such as the establishment of a compensation scheme, should generally be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.118 The explanatory memorandum notes that an injury compensation scheme is already established by an existing instrument[93] and the bill ensures continuity of coverage for the scheme. It also notes that it mirrors the scheme applying to Commonwealth public servants under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) to the extent it is appropriate.[94]

1.119 Clause 41 provides that the Minister may, by legislative instrument, determine the injury compensation scheme, including providing for review of decisions made under the scheme, and providing for the *Administrative Appeals Tribunal Act 1975* (AAT Act) to apply to decisions made under the scheme 'with the modifications specified in the scheme'. This enables the instrument to effectively amend the AAT Act as it applies to the scheme.

1.120 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. As

92 Clause 41.

93 See the Parliamentary Injury Compensation Scheme Instrument 2016 (empowered by section 9A of the *Parliamentary Entitlements Act 1990*)

94 Explanatory memorandum pp 33 and 36

such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.121 The explanatory memorandum notes that this power is consistent with the rights available to Commonwealth employees under the SRC Act, which makes some modifications to the AAT Act to assist in the efficient administration of claims and provide costs to applicants in certain circumstances.[95] It states that it is considered appropriate that this scheme 'is capable of providing the same benefits and obligations available to claimants under the SRC Act scheme'.[96] However, the committee notes that the SRC Act, in amending the operation of the AAT Act, is primary legislation amending the application of the Act, whereas in this instance, it would be delegated legislation amending the application of primary legislation (and no limits are included in the bill to ensure the amendments are limited to the same amendments made by the SRC Act).

1.122 The committee notes it has long-standing scrutiny concerns about significant matters, such as the establishment of an injury compensation scheme, being left to delegated legislation, and clauses that enable delegated legislation to amend primary legislation (Henry VIII clauses). Noting that the legislative instrument would be subject to disallowance, the committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of these provisions.

> *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.*

95 Explanatory memorandum p. 35.

96 Explanatory memorandum p. 35.

Parliamentary Business Resources (Consequential and Transitional Provisions) Bill 2017

Purpose	This bill seeks to make minor consequential and transitional amendments arising from the new parliamentary work expenses framework set out in the Parliamentary Business Resources Bill 2017
Portfolio	Finance
Introduced	House of Representatives on 30 March 2017

The committee has no comment on this bill.

People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017

Purpose	This bill seeks to establish a Commission of Inquiry to inquire into the conduct of banking, financial services and related sectors
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives on 27 March 2017

The committee has no comment on this bill.

Petroleum and Other Fuels Reporting Bill 2017

Purpose	This bill seeks to establish a mandatory reporting regime for fuel information
Portfolio	Environment and Energy
Introduced	House of Representatives on 30 March 2017

Broad delegation of coercive powers[97]

1.123 This bill seeks to establish a mandatory reporting regime for fuel information. Clause 34 empowers the Secretary to appoint any APS employee in the department and private consultants and contractors to exercise coercive powers in order to review, audit and verify information provided under the regime. The coercive powers include entering premises with the consent of the occupier or under warrant and other compliance monitoring powers.

1.124 The committee has consistently drawn attention to legislation that allows the delegation of coercive 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 or, where relevant, to persons with specific training. 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.

1.125 The committee's scrutiny concerns in relation to the broad delegation of coercive powers is heightened when the delegation is extended to non-APS persons, as such decision-makers may not be subject to the same level of accountability and oversight that apply to members of the public service. For example, the APS Code of Conduct applies only to employees of the Australian Public Service. The justification for delegating these powers to consultants and contractors in this instance is addressed in the explanatory memorandum in some detail:

> The Secretary could engage consultants and contractors as authorised persons as the necessary expertise to review and audit information received under clause 11 may not be available within the Department. Authorised persons would need skills and experience in one or more of auditing, engineering, geology and the fuel market to be effective. It is envisioned that the Department may need to engage more than one

97 Clause 34.

contractor or consultant in the future as different issues may require different skills and experience. It is envisioned that if a consultant or contractor was engaged by the Secretary as an authorised person that:

- the authorised person would be subject to a contractual relationship with the Department;
- the authorised person would maintain the appropriate professional qualification/s and membership/s associated with their relevant expertise;
- the authorised person would be sufficiently senior and experienced to perform the functions they are expected to perform; and
- the Secretary would issue directions to ensure the authorised person used their powers appropriately. For example, a requirement that the contracted auditor not use, record or disclose protected information they obtain through their position except in accordance with their role and function as an auditor would be expected to be a common condition.[98]

1.126 A general limitation on the delegation of these coercive powers is provided in subclause 34(2) which provides that the Secretary must not appoint a person as an authorised person unless the Secretary is satisfied that the person has the knowledge or experience necessary to properly exercise the relevant powers. In addition, the explanatory memorandum states that 'it is envisioned that relevant factors for the Secretary's consideration would include any training or experience as an inspector or auditor, experience in fuel or fuel-related markets and any experience exercising monitoring powers'.[99]

1.127 While the committee welcomes the general limitation in subclause 34(2) regarding the appointment of persons as authorised persons, the committee still requests the Minister's advice as to:

- **why it is necessary to allow these coercive powers to be delegated to an APS employee at any level (and whether the bill can be amended to limit the delegation of these powers to SES-level employees, or at least Executive level employees, or employees with specific training); and**
- **whether the bill can be amended to provide more specific legislative guidance on the face of the bill as to the circumstances and conditions under which the Secretary may appoint a person as an authorised person, for example, to provide that a person can only be appointed as an authorised person if they have training or experience as an inspector or auditor or in exercising monitoring powers, and to provide that a**

98 Explanatory memorandum, p. 31.

99 Explanatory memorandum, p. 30.

contracted auditor must not use, record or disclose protected information they obtain through their position except in accordance with their role and function as an auditor.

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

Petroleum and Other Fuels Reporting (Consequential Amendments and Transitional Provisions) Bill 2017

Purpose	This bill seeks to enable the Australian Competition and Consumer Commission and the Australian Taxation Office to share information with the Department of Environment and Energy
Portfolio	Environment and Energy
Introduced	House of Representatives on 30 March 2017

The committee has no comment on this bill.

Primary Industries Research and Development Amendment Bill 2017

Purpose	This bill seeks to amend the *Primary Industries Research and Development Act 1989* (the Act) to: • allow statutory research and development corporations (R&D Corporations) governed by the Act to undertake marketing activities funded by voluntary contributions; • remove the requirement that the statutory R&D Corporations can undertake marketing only where a marketing levy is attached to the corporation; and • amend the definition of 'marketing activities' to allow incidental activities such as consulting about or planning marketing activities
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 29 March 2017

The committee has no comment on this bill.

Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017

Purpose	This bill seeks to amend various Acts administered by the Prime Minister to: • update outdated provisions; • repeal redundant Acts; • align annual reporting requirements of the Auditor-General with his or her responsibility to the Parliament; and • amend the *Royal Commissions Act 1902* to provide Commissioners with the power to require a person to give a written statement and increase penalties for non-compliance
Portfolio	Indigenous Affairs
Introduced	House of Representatives on 30 March 2017

Reversal of evidential burden of proof[100]

1.128 Proposed subsection 3(6A) makes it an offence, when served with a notice, not to give information or a statement in writing to a Royal Commission. Proposed subsection 3(6C) provides a defence for this offence, stating that it is a defence to a prosecution for this offence if the information or statement was not relevant to the matters into which the Commission was inquiring. The offence carries a maximum penalty of imprisonment for two years.

1.129 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.

1.130 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

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

100 Schedule 5, item 11, subsection 3(6C).

evidential burden of proof in proposed subsection 3(6C) have not been addressed in the explanatory materials.

1.132 **As the explanatory materials do not address this issue, the committee requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.**[101]

> *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.*

Privilege against self-incrimination[102]

1.133 As outlined above, proposed subsection 3(6A) makes it an offence not to give information or a statement in writing to a Royal Commission when served with a notice to do so. Proposed subsection 3(6B) states that this subsection does not apply if a person has a reasonable excuse. Proposed subsection 6A(1A) provides that it is not a reasonable excuse for the purposes of subsection 3(6B) for a natural person to refuse or fail to give information or a statement that the person is required to give under subsection 2(3C) on the ground that giving information or a statement might tend to incriminate the person or make the person liable to a penalty.

1.134 The explanatory memorandum explains that subsection 6A(1A) would override the privilege against self-incrimination for a person required to give information or a statement.[103] It notes that this is consistent with the abrogation of the privilege in the existing legislative provisions and the abrogation of the privilege 'supports a Commission's function to inquire into and report on matters of public importance'.[104]

1.135 In addition, item 28 amends existing section 6DD to ensure that a statement or disclosure made by a person in response to a notice by the Commission is not admissible in evidence against the person (except in relation to proceedings for an offence against the *Royal Commission Act 1902*). This provides a use immunity (but not a derivative use immunity).

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

102 Schedule 5, items 19-25 and 28.

103 Explanatory memorandum, p. 19.

104 Explanatory memorandum, p. 19.

1.136 The committee recognises there may be circumstances in which the privilege against self-incrimination can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. In determining the appropriateness of abrogating the privilege against self-incrimination the committee also looks to whether the legislation includes a use and derivative use immunity; which provides that the information or documents produced, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings against the person.

1.137 In this case a use immunity is included by the amendments in item 28 but there is no derivative use immunity. As such, evidence obtained as an indirect result of the person being required to give information or make a statement can be used against that person in criminal proceedings. This is made clear by existing section 6P of the *Royal Commissions Act 1902*, which provides that where, in the course of inquiring into a matter, a Commission obtains information that relates to the contravention of the law, it may communicate that information to certain persons, including the police and the Director of Public Prosecutions. The explanatory memorandum states that, in this way, 'the evidence cannot be used against the person in any proceeding but may be used to obtain further evidence against the person'.[105] No explanation is given as to why no derivative use immunity is included in the Act. Generally the committee would expect information to be included explaining whether providing such immunity would significantly undermine investigatory functions. Additionally, limited information is given as to why it is considered necessary to abrogate the privilege against self-incrimination, other than the general statement that this supports the Commission's functions.

1.138 The committee requests the Minister's detailed justification for the proposed abrogation of the privilege against self-incrimination, in particular why no derivative use immunity is provided, by reference to the matters outlined in the *Guide to Framing Commonwealth Offences*.[106]

> *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.*

105 Explanatory memorandum, p. 19.

106 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 94–99.

Significant penalties[107]

1.139 A number of provisions in Schedule 5 of the bill propose to substantially increase the penalties relevant to offences in relation to royal commissions. Currently under the *Royal Commissions Act 1902* the following offences are subject to a penalty of up to 6 months imprisonment or a $1000 fine:

- failure to attend as a witness before a Royal Commission, or to attend from day to day;[108]
- failure of a witness or a person served with a notice to produce a document or other thing;[109]
- failure of a witness to be sworn or to make an affirmation;[110]
- failure of a witness to answer any question relevant to the inquiry.[111]

1.140 It is proposed that this be amended to a penalty of imprisonment for two years (without the option of the imposition of a fine). The explanatory memorandum states that the purpose of these amendments is to implement recommendation 78 of the final report of the Royal Commission into Trade Union Governance and Corruption.[112] No further explanation is given for the substantial increase in penalties for these offences.

1.141 The Hon John Dyson Heydon AC QC stated in the Royal Commission into Trade Union Governance and Corruption that there was a marked inadequacy of existing penalties for a number of offences in the *Royal Commissions Act 1902*. Recommendation 78 recommended that the penalty for the offence be increased to at least a maximum of two years imprisonment or a fine of 120 penalty units or both. The report noted that the reason for selecting two years imprisonment was that 'this is consistent with the penalties available for failure to comply with notices issued by the Australian Securities and Investment Commission [ASIC] and the Australian Competition and Consumer Commission [ACCC]'.[113]

1.142 However, it is not clear that a significant penalty of up to two years imprisonment for a failure to attend as a witness; produce documents or things; be sworn in; or answer questions, is a comparable penalty to other similar offences. In

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107 Schedule 5, items 4, 7, 10, 11, 13, 15 and 16.

108 Subsection 3(1) of the *Royal Commissions Act 1902*.

109 Subsections 3(2) and (4) and 6AB(1) and (2) of the *Royal Commissions Act 1902*.

110 Section 6 of the *Royal Commissions Act 1902*.

111 Section 6 of the *Royal Commissions Act 1902*.

112 Explanatory memorandum, p. 15.

113 See paragraph 27 of Chapter 10, Reform of the Royal Commissions Act 1902, Volume 5 of the Final Report, Royal Commission into Trade Union Governance and Corruption, 2015.

particular, under the *Competition and Consumer Act 2010* it appears that a failure to furnish information or produce documents to the ACCC or appear before the ACCC is subject to imprisonment up to 12 months or a fine not exceeding 20 penalty units.[114] Additionally, a failure to attend, be sworn or make an affirmation, answer a question or produce a document before the Australian Competition Tribunal is subject to up to 12 months imprisonment or a fine not exceeding 20 penalty units.[115]

1.143 Additionally, while some offences relating to ASIC's investigation powers subject a person to up to two years imprisonment or 100 penalty units (or both), for a failure to appear for examination, answer a question or produce documents,[116] other provisions appear to provide for lower penalties. For example, an offence of failing to attend a hearing conducted by ASIC, or to take an oath or an affirmation or answer a question or produce a document at the hearing, is subject to up to three months imprisonment or 10 penalty units.[117] Similarly, a failure to attend, be sworn or make an affirmation, furnish or publish information, answer a question or produce a document before the Commonwealth Ombudsman is subject to up to three months imprisonment or 10 penalty units.[118]

1.144 The committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of a similar seriousness'.[119] In addition, the Guide provides that a 'notice to produce or attend' provision, being a provision that allows an enforcement or regulatory agency to require a person to produce information or documents, or to appear at a hearing to answer questions, should, if this is to be an offence, generally be subject to six months imprisonment and/or a fine of 30 penalty units.[120]

1.145 It is therefore not apparent to the committee that increasing the penalty to two years imprisonment (without the option of a fine) for a failure to attend as a witness, produce documents or things, be sworn in or answer questions before a Royal Commission is an appropriate penalty by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.

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114 See section 155 of the *Competition and Consumer Act 2010*.

115 See sections 160 and 161 of the *Competition and Consumer Act 2010*.

116 See section 63(1) of the *Australian Securities and Investments Commission Act 2001*.

117 See section 63(3) of the *Australian Securities and Investments Commission Act 2001* (relating to contraventions of section 58).

118 See section 36 of the *Ombudsman Act 1976*.

119 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 39.

120 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 89 and 93.

1.146 The committee therefore seeks the Minister's detailed advice as to what is the level of penalty applicable to all comparable Commonwealth offence provisions relating to a failure of a person to attend or be sworn in or affirmed as a witness, answer questions or produce documents. If such comparable provisions are not subject to two years imprisonment (and without the possibility of a fine), the committee requests the Minister's detailed justification for the proposed increase in penalties in relation to offences relating to royal commissions (noting that the powers under the *Royal Commissions Act 1902* could apply to any person in Australia relating to any matter for which the executive has established a Royal Commission).

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.

Renew Australia Bill 2017

Purpose	This bill seeks to establish an independent public authority charged with planning and driving the transition to a new clean energy system
Sponsor	Senator Richard Di Natale
Introduced	Senate on 28 March 2017

The committee has no comment on this bill.

Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Bill 2017

Purpose	This bill seeks to amend the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* to: • supplement the same business test with a more flexible similar business test; and • provide taxpayers with the choice to self-assess the effective life of certain intangible depreciating assets they start to hold on or after 1 July 2016
Portfolio	Treasury
Introduced	House of Representatives on 30 March 2017

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017

Purpose	This bill seeks to amend various Acts relating to veterans' entitlements and military rehabilitation and compensation to: • amend the Veterans' Review Board's operations; • amend the Specialist Medical Review Council operation by: o simplifying the nomination and appointment process for councillors; o enabling online lodgement of claims; o amending the notice of investigation requirements; and o providing for reimbursement of certain travel expenses; • enable the Minister for Veterans' Affairs to enter into arrangements with a broader range of countries; • clarify the vocational rehabilitation assistance under the Employer Incentive Scheme; • allow information sharing between the Military Rehabilitation and Compensation Commission and the Commonwealth Superannuation Corporation with respect to certain service related compensation claims; • amend the *Military Rehabilitation and Compensation Act 2004 to* provide for the delegation of the Minister for Veterans' Affairs' powers and functions; • exempt certain legislative instruments from subsection 14(2) of the *Legislation Act 2003*; and • make a number of minor amendments
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 30 March 2017

Broad delegation of administrative powers[121]

1.147 Item 1 of Schedule 6 seeks to provide the Minister with the power to delegate any of his or her powers and functions under the *Military Rehabilitation and Compensation Act 2004* (MRCA) to a commissioner of the Military Rehabilitation and Compensation Commission (MRCC) or to a person appointed or engaged under the

121 Schedule 6, item 1.

Public Service Act 1999. This would enable the delegation of any power or function to a public servant at any level and in any government department.

1.148 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.

1.149 The explanatory materials do not explain why it is necessary to provide for such a broad delegation to a person of any level of the public service. The explanatory memorandum sets out the powers and functions that may be delegated, which includes the approval of determinations by the MRCC concerning variations to and the revocation of the MRCA Education and Training Scheme; Treatment Principles; and the MRCA Pharmaceutical Benefits Scheme.[122] It states that it is proposed that the delegation of these powers is to be on the basis that only the Chief Operating Officer in the Department can approve these instruments.[123] However, there is nothing in the bill that would limit it in this way. The explanatory memorandum also states that the other functions or powers contain 'relatively minor matters' that may need to be exercised by the employees of other departments.[124] However, no justification is provided as to why these matters could be delegated to an APS employee at any level.

1.150 It is noted that 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.

1.151 The committee requests the Minister's advice as to why it is necessary to allow all of the Minister's powers and functions to be delegated to any APS employee at any level and seeks the Minister's advice as to whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

122 Explanatory memorandum, p. 25.

123 Explanatory memorandum, p. 26.

124 Explanatory memorandum p. 26.

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

Incorporation of external material into the law[125]

1.152 Schedule 7 makes a number of amendments to Veteran's Affairs portfolio legislation to enable certain legislative instruments to incorporate matters contained in other instruments or written materials as in force from time to time. This is achieved by exempting these instruments from subsection 14(2) of the *Legislation Act 2003* which provides that unless specific legislative instruments are exempted they 'may not 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'.

1.153 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).

1.154 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[126] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

1.155 In explaining why it is proposed to allow these particular instruments to incorporate external material, the explanatory memorandum states that the restriction on incorporation in subsection 14(2) of the Legislation Act 'causes

125 Schedule 7.

126 *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

significant administrative issues for the Department'. For example, where there is a change in an incorporated document as a result of a policy imperative:

> The policy change that arises because of the availability of a new rehabilitation appliance will delay the availability of the appliance because the legislative instrument (the 'Treatment Principles') that incorporates the document under which the appliance may be provided will need to be amended to refer to the changed date of that document.[127]

1.156 There are two categories of documents as in force from time to time which it is envisaged will be incorporated if these legislative instruments are exempted from the restriction in subsection 14(2) of the Legislation Act.

1.157 First, non-legislative documents prepared by the Department, such as Fee Schedules. The explanatory memorandum states that all of these documents 'can be easily accessed on-line via the Department's website or via links on the Department's website', although there is no legislative requirement for this to occur.[128]

1.158 The second category of documents are 'well known publications such as the Diagnostic and Statistical Manual of Mental Disorders made by the American Psychiatric Association and the Pharmacopoeia published by the UK and US governments and the European Union'. The explanatory memorandum states that these are 'reference documents that are widely available'.[129] It is not clear whether all documents in the second category will be freely available.

1.159 The committee requests the Minister's advice as to:

- **whether a legislative requirement could be included that each document incorporated which has been prepared by the Department must be made freely available on the Department's website; and**
- **what is the availability of documents which fall into the second category of well-known reference publications, including whether arrangements can be made so that these documents are freely and readily available to the public.**

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

127 Explanatory memorandum, p. 27.

128 Explanatory memorandum, p. 28.

129 Explanatory memorandum, p. 28.

Commentary on amendments and explanatory materials

Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017

[Scrutiny Digests 3 & 4 of 2017]

1.160 On 28 March 2017 the House of Representatives agreed to one Government amendment, the Assistant Minister to the Deputy Prime Minister (Mr Hartsuyker) presented a supplementary explanatory memorandum and the bill was read a third time.

1.161 The committee has no comment on this amendment or the supplementary explanatory memorandum.

Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

[Scrutiny Digest 1 of 2017 no comment]

1.162 On 27 March 2017 the Treasurer (Mr Morrison) presented a supplementary explanatory memorandum.

1.163 On 28 March 2017 the House of Representatives agreed to three Government amendments and the bill was read a third time.

1.164 The committee has no comment on these amendments or the supplementary explanatory memorandum.

Health Insurance Amendment (National Rural Health Commissioner) Bill 2017

[Scrutiny Digest 2 of 2017 no comment]

1.165 On 20 March 2017 the House of Representatives agreed to one Independent amendment.

1.166 The committee has no comment on this amendment.

Human Rights Legislation Amendment Bill 2017

[Scrutiny Digest 4 of 2017 awaiting response]

1.167 On 30 March 2017 the Senate agreed to nine Government amendments and one Opposition amendment and the Attorney-General tabled two supplementary explanatory memoranda.

1.168 On 31 March 2017 the Senate agreed to two Government amendments. On the same day in the House of Representatives the Leader of the House (Mr Pyne) presented a revised explanatory memorandum and the bill was read a third time.

1.169 The committee has no comment on these amendments or the supplementary explanatory memoranda.

Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016

[Scrutiny Digests 1 & 3 of 2017]

1.170 On 28 March 2017 the Assistant Minister for Social Services and Disability Services (Mrs Prentice) presented a replacement explanatory memorandum in the House of Representatives.

1.171 The committee thanks the Minister for Health for including additional key information in the replacement explanatory memorandum as previously requested by the committee.[130]

Transport Security Amendment (Serious Crime) Bill 2016

Previous citation: Transport Security Amendment (Serious or Organised Crime) Bill 2016

[Alert Digest 6 of 2016 no response required]

1.172 On 27 March 2017 the Senate agreed to 12 Opposition and two Liberal Democratic Party amendments and the bill was read a third time.

1.173 On 30 March 2017 the House of Representatives disagreed to Senate amendments 7, 8, 13 and 14. The House also disagreed to amendments 1–6 and 9–12, however ten Government amendments were made in their place. The Minister for Infrastructure and Transport (Mr Chester) also presented a supplementary explanatory memorandum.

1.174 Amendments 8 and 14 agreed to by the Senate, but disagreed to by the House of Representatives, seek to provide that the regulations must include provisions allowing a person, in relation to whom a security check has been carried out, to be able to seek reconsideration or merits review of a decision in relation to an aviation security identification card (ASIC) or maritime security identification card (MSIC).

1.175 On 30 March 2017 the Minister for Infrastructure and Transport presented reasons, which were subsequently adopted by the House of Representatives, for disagreeing to the Senate's amendments. The reasons note that there is currently a comprehensive appeals process in the Aviation Transport Security Regulation 2005 (Aviation Regulations) and Maritime Transport and Offshore Facilities Security Regulations 2003 (Maritime Regulations) and that these appeal processes have existed in the respective Aviation and Maritime Regulations since the inception of these schemes.

1.176 The reasons further state that the 'Office of Parliamentary Counsel has advised that introducing ASIC and MSIC appeals mechanisms into primary legislation

130 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 3 of 2017*, 22 March 2017, pp 103–123.

would not create any additional practical protection against future changes to the Aviation and Maritime Regulations'.

1.177 The committee requests the Minister's advice as to how inserting a positive requirement in primary legislation that the regulations *must* provide for an appeals process would not create any additional protection against future changes to the Aviation and Maritime Regulations.

Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016

[Alert Digest 6 of 2016 no response required]

1.178 On 31 March 2017 the Senate agreed to six Government amendments, the Minister for Finance tabled a supplementary explanatory memorandum and the bill was read a third time.

1.179 The committee has no comment on these amendments or the supplementary explanatory memorandum.

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2017

[Alert Digest 10 of 2016 and Scrutiny Digest 1 of 2017]

1.180 On 27 March 2017 the Senate agreed to seven Government and three Opposition amendments and Senator McGrath tabled a supplementary explanatory memorandum.

1.181 On 29 March 2017 the House of Representatives agreed to the Senate amendments, the Minister for Veterans' Affairs (Mr Tehan) presented a further supplementary explanatory memorandum and the bill was passed.

1.182 In *Scrutiny Digest No. 1 of 2017*, the committee commented on a proposed public interest disclosure power in this bill. At that time, the committee noted that it considered that the disclosure of *any* information obtained in the course of the performance of a Secretary's duties under legislation to *any* person for *any* purpose, is a significant matter that should be appropriately defined or limited in primary legislation.[131]

1.183 In *Scrutiny Digest No. 3 of 2017*, the committee welcomed earlier government amendments (passed on 2 March 2017) which imposed a positive duty on the Minister for Veterans' Affairs to make rules regulating the exercise of the public interest disclosure power by the Secretary. However, the committee noted that it remained of the view that, from a scrutiny perspective, it would still be appropriate for at least high-level guidance about the exercise of the Secretary's disclosure power to be included in the primary legislation.

131 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 1 of 2017*, 8 February 2017, pp 94–98.

1.184 Further government amendments agreed to on 27 March 2017 remove all of the public interest disclosure provisions from the bill. The committee notes that, by removing these provisions, the committee's remaining scrutiny concerns in relation to this matter have been addressed.

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 2.**

Civil Law and Justice Legislation Amendment Bill 2017

Purpose	This bill seeks to make minor and technical amendments to various pieces of civil justice legislation
Portfolio/Sponsor	Attorney-General
Introduced	22 March 2017
Bill status	Before Senate
Scrutiny principles	Standing Order 24(1)(a)(i) and (ii)

2.3 The committee dealt with this bill in *Scrutiny Digest No. 4 of 2017*. The Attorney-General responded to the committee's comments in a letter dated 4 May 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Attorney-General's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Broad delegation of administrative powers[1]

Initial scrutiny – extract

2.4 Currently section 122A of the *Family Law Act 1975* sets out the powers of entry and search for the purposes of arresting a person pursuant to that Act. The existing provision provides for any person to be authorised to exercise these coercive powers. This bill proposes inserting a new section 122A and 122AA to provide 'a more modern framework for arrests, with substantially improved safeguards'.[2] The committee welcomes the introduction of additional safeguards regarding the exercise of these coercive powers.

2.5 Proposed paragraph 122A(1)(i) sets out who is authorised to make an arrest. In addition to persons such as a Marshal, Deputy Marshal, Sheriff or Deputy Sheriff,

1 Schedule 6, item 35, proposed paragraph 122A(1)(i) of the *Family Law Act 1975*.

2 Explanatory memorandum, p. 44.

police officer or the Australian Border Force Commissioner, the bill provides that the power to arrest another person is conferred on 'an APS employee' in the Department of Immigration and Border Protection.

2.6 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. In relation to the exercise of coercive powers such as the power to arrest another person, use force, and enter and search premises, the committee expects the person authorised to use such powers should have received appropriate training. 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.

2.7 In this instance, the explanatory memorandum explains:

> New subsection 122A(1) would explicitly set out the categories of persons, who are authorised by the Act or by a warrant issued under the Act to arrest another person, to whom the section applies. This would limit the persons who may exercise arrest powers to only appropriate people. This reflects the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, which provides that 'arrest powers should only be granted to sworn police officers unless there are exceptional circumstances which clearly justify extending these powers to non-police'.
>
> The list of arresters in new subsection 122A(1) would reflect the list of authorised persons in rule 21.17 of the Family Law Rules and Rule 25B.74 of the Federal Circuit Court Rules, except that it would not provide for 'any other person' to be authorised. To ensure that all the relevant officers would be authorised to exercise arrest powers under the Act, the list would also include the Australian Border Force Commissioner and an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*. This is intended to cover Australian Border Force officers who may be required to exercise powers of arrest in relation to, for example, a parent attempting to abduct their child overseas. The urgency of ensuring children are not abducted internationally warrants the extension of these powers to officers of the Australian Border Force.[3]

2.8 The committee is concerned that while it is intended that the reference to 'an APS employee' would only cover Australian Border Force officers who may be required to exercise powers of arrest, there is nothing in the legislation to limit it in this way. There is also nothing in the legislation that requires the relevant APS

3 Explanatory memorandum, pp 44-45.

employee to have appropriate police-like training in order to exercise those powers of arrest, the use of force and search and entry powers.

2.9 The committee requests the Attorney-General's advice as to the appropriateness of enabling any APS employee within the Department of Immigration and Border Protection to exercise coercive powers and whether the bill can be amended to require a certain level of relevant training be undertaken by those APS employees authorised to exercise these coercive powers.

Attorney-General's response

2.10 The Attorney-General advised:

> I note that the Committee is concerned about the broad delegation of administrative powers by the proposed new sections 122A and 122AA of the *Family Law Act 1975.* Specifically, my advice is requested as to:
>
> > *"...the appropriateness of enabling any APS employee within the Department of Immigration and Border Protection [DIEP] to exercise coercive powers and whether the bill can be amended to require a certain level of relevant training be undertaken by those AP S employees authorised to exercise these coercive powers".*
>
> As you are aware, under the Family Law Act, where the court authorises any person to arrest another person, existing sections 122AA and 122A provide the authorised person with powers related to the use of reasonable force in making the arrest, and powers of entry and search for the purposes of arresting persons. These existing provisions apply to any person authorised by the Act, or by a warrant issued under a provision of the Act, to arrest another person.
>
> The proposed new sections 122A and 122AA would, as well as modernising these arrest powers, narrow the classes of people who would be authorised to use reasonable force and the powers of entry and search for the purpose of arresting a person. Consultations with stakeholders confirmed the importance of retaining the ability for officers of the Australian Border Force (ABF) (which forms part of DIBP) to be authorised to use force and exercise powers of entry and search under these provisions. Maintaining these powers with ABF officers would be of particular utility in preventing international parental child abductions.
>
> The current formulation, which refers to "an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*", would include ABF officers.
>
> This is not a change in policy position in relation to DIBP officers. Under the existing legislation, when authorised to make an arrest by the Family Law Act, a DIBP officer may exercise the existing powers relating to use of force and entry and search. APS employees of DIBP also have other arrest powers under other legislation. While ABF officers are only a subset of the APS employees of DIBP, the Government intends to discuss with the courts practical measures (such as design of the court's precedent warrant) that

> could assist in limiting warrants so that they would only be addressed to ABF officers rather than all DIBP staff.
>
> [The Committee] has also noted that the Committee expects the person authorised to use such powers should have received appropriate training. As mentioned, the power of arrest, in practical terms, would only be exercised by officers in the ABF.
>
> Specific training in relation to the power and its limitations would be provided to those who are authorised to exercise it. Powers of arrest are already covered in a number of ABF operational training courses, with training comprising face-to-face learning with legal officers on the parameters surrounding the use of the power, discussions with experienced ABF officers who have used these powers, and practical scenarios to assess an officer's understanding of the use of the power in an operational ABF context.
>
> The potential officers who may be authorised to execute arrests must do so under prescribed conditions. The framework attached to this power, found in proposed new section 122A, includes limits on entering premises, use of force and how the arrest must take place.

Committee comment

2.11 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the proposed new provisions would narrow the classes of persons who would be authorised to use reasonable force and the powers of entry and search. The committee also notes the Attorney-General's advice that in practical terms the powers of arrest would only be exercised by officers in the Australian Border Force (ABF) and that the government intends to discuss with the courts, practical measures to assist in limiting warrants so they would only be addressed to ABF officers, rather than all staff employed by the Department of Immigration and Border Protection.

2.12 The committee welcomes the government's commitment to seek avenues to ensure warrants are addressed to ABF officers and not all departmental employees.

2.13 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.14 The committee reiterates its general preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or those with specific training or qualifications. While the committee notes the Attorney-General's advice as to who it is intended, in practical terms, will exercise the power, there is nothing on the face of the bill to limit it in this way.

2.15 The committee considers it would be appropriate if proposed paragraph 122A(1)(i) of the bill were amended to ensure that the power to use reasonable force and the powers of entry and search for the purpose of arresting a person were confined to apply to ABF officers (rather than all APS employees in the Department of Immigration and Border Protection).

Retrospective application[4]

Initial scrutiny – extract

2.16 Schedule 7 seeks to make a number of amendments to section 8 of the *International Arbitration Act 1974* to clarify that a foreign award is binding between the 'parties to the award' rather than between the 'parties to the agreement'.[5] Item 5 provides that these amendments apply in relation to any arbitral proceedings 'whether commenced before or after this item commences'. The explanatory memorandum simply restates the provision without providing any explanation. Applying the amendments to proceedings which commenced before the commencement of the amending legislation has a retrospective application.

2.17 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.6 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

2.18 The committee therefore seeks the Attorney-General's advice as to why it is proposed to apply the amendments to section 8 of the *International Arbitration Act 1974* to arbitral proceedings that commenced before the commencement of this item of the bill and whether it is possible that any party to such proceedings may suffer any detriment due to this retrospective application.

Attorney-General's response

2.19 The Attorney-General advised:

> The Committee has also requested that I provide advice on the potential retrospective application of the amendments to section 8 of the

4 Schedule 7, item 5.

5 See explanatory memorandum, p. 59.

International Arbitration Act 1974. Specifically, my advice is requested as to:

> *"... why it is proposed to apply the amendments to section 8 of the International Arbitration Act 1974 to arbitral proceedings that commence before the commencement of this item to the bill, and whether it is possible that any party to such proceedings may suffer any detriment due to this retrospective application".*

Arbitral proceedings are distinct from enforcement proceedings. Arbitration is a consensual dispute resolution mechanism by contractual agreement. It is binding upon the parties to a dispute to adhere *to* the award or final decision of the arbitral tribunal. This means that if the unsuccessful party in the arbitration (award debtor) does not voluntarily meet its contractual obligation to comply with the terms of the award, the successful party (award creditor) may need to commence proceedings, known as enforcement proceedings, seeking orders from a court to enforce the award.

This Bill would simplify the procedure for applying to a court for enforcement of an arbitral award. The application provision in question refers to arbitral proceedings commenced prior to commencement of the Bill. It does not refer to enforcement proceedings commenced prior to the commencement of the Bill. This wording was chosen to make it clear that the simplified procedure would be available in all enforcement proceedings commenced after commencement of the Bill, even where the related arbitral proceedings had commenced prior to the Bill. Proceedings for the enforcement of an existing award sometimes occur shortly after the conclusion of the arbitration, but may also be delayed by many years. Accordingly, for the benefit of the procedural reform to be realised it is important that they be available in enforcement proceedings which commence after the commencement of the Bill, -but which may relate to arbitral proceedings commenced prior to the Bill's commencement.

This effect is not a retrospective application of law. The substantive rights of the parties which are determined by the arbitral tribunal and expressed in the arbitral- award would not be impacted by this Bill. The Bill would only alter procedural aspects of enforcement proceedings which commence after the Bill, which would only come into existence once the enforcement proceedings are commenced.

To be clear, enforcement proceedings which commence prior to the commencement of the Bill would be run according to the procedural requirements of the Act in its current form. The amended provisions would not apply to enforcement proceedings which commence prior to the Bill but continue after its commencement.

Committee comment

2.20 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the bill does not refer to

enforcement proceedings commenced prior to the commencement of the bill, which would be run according to the procedural requirements of the Act in its current form. As the bill refers only to arbitral proceedings commenced prior to commencement (and not enforcement proceedings commenced prior to commencement), the advice notes that this is not a retrospective application of the law.

2.21 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Education and Other Legislation Amendment Bill (No. 1) 2017

Purpose	This bill seeks to amend various Acts relating to tertiary education and research to: • insert a new Part IIE establishing the office of the VET Student Loans Ombudsman and make consequential amendments; • update indexation against appropriation funding caps for existing legislated amounts and includes an additional forward estimate amount
Portfolio	Education and Training
Introduced	House of Representatives on 16 February 2017
Bill status	The bill received Royal Assent on 12 April 2017
Scrutiny principles	Standing Order 24(1)(a)(i) and (ii)

2.23 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2017*. The Minister responded to the committee's comments in a letter dated 8 May 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.

General comment made by the Minister

> The standing committee for the Scrutiny of Bills has made comments on the Education and Other Legislation Amendment Bill (No. 1) 2017 (the Bill) in its *Scrutiny Digest No. 3 of 2017*. These comments mainly relate to the justifications of including some powers already contained in the *Ombudsman Act 1976* (Ombudsman Act).
>
> A number of existing provisions under the Ombudsman Act were included into the Bill to take advantage of already established powers the Commonwealth Ombudsman possesses. This is important especially in consideration to the Committee's first two comments as the Bill does not create any new powers, rather it relies on already existing provisions.
>
> The VET Student Loans Ombudsman is being established due to the widespread unscrupulous behaviour that occurred under the VET FEE-HELP scheme, particularly in relation to student recruitment practices. This unscrupulous behaviour by some providers and their agents led to students being signed up to debts that they were not aware existed and to courses that they had no prospect of completing. The VET Student Loans

> Ombudsman will investigate VET Student Loans and VET FEEHELP student complaints and provide recommendations.
>
> Throughout the Parliamentary debate, all sides of Parliament commented on the need to ensure the Bill contained strong powers for the VET Student Loans Ombudsman and the Department of Education and Training to rely on to achieve positive outcomes for students. This is particularly necessary given the imbalance of power between vulnerable students and the training providers about whom the complaints will be made.

Privilege against self-incrimination[6]

Initial scrutiny – extract

2.24 Proposed section 20ZS applies certain provisions of the *Ombudsman Act 1976* to the VET Student Loans Ombudsman, including section 9 (relating to the power to obtain information and documents). Paragraph 9(4)(aa) of the Ombudsman Act provides that a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under the Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question might tend to incriminate the person or make the person liable to a penalty. This provision therefore overrides the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.[7]

2.25 A use immunity is included in subsection 9(4) as the information or documents produced, or answers given, are not admissible in evidence in most proceedings. Although the committee welcomes the inclusion of the use immunity, the explanatory memorandum does not provide a justification for removing the privilege against self-incrimination or for not also providing a derivative use immunity.

2.26 The committee therefore requests the Minister's advice as to why it is proposed to abrogate the privilege against self-incrimination, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[8]

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6 Schedule 1, item 4, proposed section 20ZS (application of section 9 of the *Ombudsman Act 1976*).

7 *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

8 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 94–99.

Minister's response

2.27 The Minister advised:

> The power requiring a person to produce a document or answer a question when required by the VET Student Loans Ombudsman was included under the already existing subsection 9(4) of the Ombudsman Act. I am advised that the abrogation of the privilege against self-incrimination when required to provide information to the Ombudsman has been a feature of the Ombudsman Act since 1976.
>
> According to the Attorney-General Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide), the privilege against self-incrimination may be overridden by legislation where there is a clear justification for doing so.[9]
>
> As indicated in the background information above, any justification for inclusion of this provision should be considered in light of the context of the behaviour that resulted in negative outcomes for vulnerable students which occurred under the previous VET FEE-HELP scheme. The justification for overriding the privilege includes:
>
> - Vulnerable students were signed up to significant debts (tens of thousands of dollars) which have not only imposed a significant financial burden on these students but also a heavy emotional toll on them whilst they try to seek redress.
> - A number of providers and their agents engaged in false and misleading behaviour highlighted in the Guide as one of the three main circumstances in which the privilege against self-incrimination does not apply. The behaviour included enrolling many students by indicating they would not incur a debt.
> - The collection of all relevant information relating to a student's debt is a necessary process in order for the VET Student Loans Ombudsman to make an assessment which leads to a recommendation about the complaint, and the VET Student Loans Ombudsman will be a key mechanism offering redress for a large number of these students.
> - It is also important that paragraph 9(4)(aa) be read in the context of the whole of section 9, which provides significant protections to a person who provides information to the Ombudsman that might tend to incriminate that person. The rest of subsection 9(4) states that any such information is not admissible in evidence against the person. Furthermore, all information, including information that might tend to incriminate a person, is collected in private (section 8) and is

9 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p 95.

subject to strict confidentiality provisions (section 35). Due to subsection 35(8), Ombudsman staff also cannot be compelled by a court to provide any information, including information that might tend to incriminate a person.

Committee comment

2.28 The committee thanks the Minister for this response. The committee notes the background information provided by the Minister in relation to the unscrupulous behaviour in the VET sector that the bill is designed to address. The committee also notes the Minister's advice that the collection of all relevant information is necessary in order for the VET Student Loans Ombudsman to make a proper assessment, and the VET Student Loans Ombudsman will be a key mechanism offering redress against unscrupulous providers for a large number of students. The committee further notes that a use immunity is provided in subsection 9(4) of the *Ombudsman Act 1976* (Ombudsman Act) and that all information, including information that might tend to incriminate a person, is collected in private and is subject to strict confidentiality provisions. Furthermore, Ombudsman staff (or former staff) cannot be compelled by a court to provide any information, including information that might tend to incriminate a person.

2.29 The committee accepts that the privilege against self-incrimination may be overridden where there is a compelling justification for doing so. In general, however, the committee considers that any justification for abrogating the privilege will be more likely to be considered appropriate if accompanied by a use and derivative use immunity (providing that the information or documents produced or answers given, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings). In this case, the committee notes that the Ombudsman Act includes a use immunity but not a derivative use immunity (meaning anything obtained as an indirect consequence of the requirement to produce a document or answer a question can be used against the person in criminal proceedings). The committee considers it would have been helpful had the information provided by the Minister directly addressed the absence of a derivative use immunity in the Ombudsman Act.

2.30 The committee notes that it would have been useful had the information provided by the Minister been included in the explanatory memorandum. In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Reversal of evidential burden of proof[10]

Initial scrutiny – extract

2.31 Proposed section 20ZS applies certain provisions of the *Ombudsman Act 1976* to the VET Student Loans Ombudsman, including section 36 (relating to offences). Subsection 36(1) of the Ombudsman Act makes it an offence to refuse or fail to attend before the Ombudsman, to be sworn or make an affirmation, to furnish or publish information, answer a question or produce a document or record, or to give a report when so under the Act. Subsection 32(2A) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the person has a reasonable excuse. The offence carries a maximum penalty of imprisonment for 3 months or 10 penalty units.

2.32 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.

2.33 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The explanatory materials do not provide reasons for applying the reversal of the evidential burden of proof in subsection 32(2A) of the Ombudsman Act to the VET Student Loans Ombudsman scheme.

2.34 As the explanatory materials do not directly address this issue, the committee requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[11]

Minister's response

2.35 The Minister advised:

> The inclusion of section 36 of the Ombudsman Act strengthens this Bill by making it a criminal offence where a person refuses or fails to do the following when required to do so in pursuance of the Ombudsman Act:
>
> - to attend before the VET Student Loans Ombudsman;
> - to be sworn or make an affirmation;

10 Schedule 1, item 4, proposed section 20ZS (application of section 36 of the *Ombudsman Act 1976*).

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

- to furnish or publish information;
- to answer a question or produce a document or record; and
- to give a report.

As per subsection 36(2A) of the Ombudsman Act, a person does not commit the offence if the person has a reasonable excuse. This subsection was inserted in 2001, when section 36 of the Ombudsman Act was amended to clarify the elements of the offence as a consequence of the enactment of the *Criminal Code Act 1995.* As the Committee notes, subsection 36(2A) imposes an evidential burden on the defendant to establish the reasonable excuse.

According to the Guide, the reversal of evidential burden of proofs may be appropriate in certain circumstances. This includes where the facts in relation to the defence might be said to be peculiarly within the knowledge of the defendant, or where proof by the prosecution of a particular matter would be extremely difficult whereas it could be readily provided by the accused.[12]

Consistent with the treatment of reasonable excuse defences in Commonwealth law generally, as the grounds on which any claim of reasonable excuse would be made are within the knowledge of the defendant—for example, that documents requested do not exist or have been destroyed, or that a person required to attend cannot because of illness—it is appropriate that the defendant establish these matters. Further the scope of possible reasonable excuses is very broad, and it would be a practical impossibility for the prosecution to establish the absence of every possible reasonable excuse.

Committee comment

2.36 The committee thanks the Minister for this response. The committee notes the Minister's advice that the reversal of the evidential burden of proof is appropriate in this instance because the grounds on which any claim of reasonable excuse would be made are within the knowledge of the defendant and that the scope of possible reasonable excuses is very broad (and therefore it would be a practical impossibility for the prosecution to establish the absence of every possible reasonable excuse).

2.37 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

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12 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 51.

Broad delegation of administrative powers[13]

Initial scrutiny – extract

2.38 Proposed subsection 34(4) will give the VET Student Loans Ombudsman the power to delegate to a person generally any or all of his or her powers under the Ombudsman Act with some exceptions.[14]

2.39 While the bill provides for these limited exclusions to the broad general power of the Ombudsman to delegate his or her powers under the Ombudsman Act, many significant powers will still be able to be delegated to any person under this provision. These powers include the power to examine witnesses and the power to enter premises.[15]

2.40 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.

2.41 The committee therefore requests the Minister's advice as to why it is considered necessary to allow for the delegation of almost all of the Ombudsman's powers to any person (including significant powers such as the power to examine witnesses and the power to enter premises) and whether the bill can be amended to provide further legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

Minister's response

2.42 The Minister advised:

> The Ombudsman Act currently allows the Ombudsman to delegate to a person all or his or her powers under the Act with some exceptions (refer to section 34). The exceptions generally relate to reports of the Ombudsman.

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13 Schedule 1, item 6, proposed subsection 34(3).

14 This does not apply to his or her powers under section 20ZV (reports to VET student loan scheme provides), section 20ZW (Minister to table reports about VET student loan scheme provides in Parliament), and section 20ZX (annual and other reports by the VET Student Loans Ombudsman.

15 See sections 13 and 14 of the *Ombudsman Act 1976*.

Similarly, subsections 34(2) to (2B) of the Ombudsman Act also allow the Defence Force Ombudsman, the Overseas Students Ombudsman and the Postal Industry Ombudsman powers to delegate all of their powers under the Act to a person, with some exceptions.

Subsection 34(4) of the Bill similarly gives the VET Student Loans Ombudsman the same powers to delegate to a person generally any or all of his or her powers under the Ombudsman Act with exceptions.

I note the Committee's specific concerns about the delegation of powers relating to examining witnesses (section 13) and entering premises (section 14). Other Ombudsmen under the Act have retained the power to delegate the provisions under sections 13 and 14. Therefore the proposed amendments to the Ombudsman Act are consistent with these other subsections allowing the VET Student Loans Ombudsman these same powers.

The broad intent of this section is included to allow for the occasions where the Commonwealth Ombudsman might need or prefer to use an external investigation service. The external investigation service may be required due to a conflict of interest or some other sensitivity that cannot be resolved in another way; the need for some very specialist skills; or perhaps because of a joint investigation with some other body. One example of this is Australian Federal Police (AFP) investigations, where section 8(12) of the Ombudsman Act requires the Commonwealth Ombudsman to use an AFP appointee with police training to assist if that would be necessary or desirable. There is also scope for joint investigations with the AFP under s 8D of the Ombudsman Act. If either of these were to occur, it might be preferable to delegate Ombudsman Act powers to the AFP investigator.

Section 35 of the Ombudsman Act, states that once a person is delegated powers, they become an 'officer' for the purposes of the Act, and are subject to all the safeguards and controls that follow, such as confidentiality provisions.

Committee comment

2.43 The committee thanks the Minister for this response. The committee notes the Minister's advice that the provisions allowing for the broad delegation of administrative powers in this bill are consistent with other ombudsmen schemes in Commonwealth legislation. The committee also notes the Minister's advice in relation to examples of the circumstances in which it may be desirable for the VET Student Loans Ombudsman to delegate his or her powers, such as if an external investigation service is engaged, specialist skills are required or a joint investigation is conducted. The committee further notes that where a person is delegated powers under the Act, they become an 'officer' for the purposes of the Act, and are subject to all the safeguards and controls that follow, such as confidentiality provisions.

2.44 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 examples of how it is envisaged 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. For example, there is no guidance in the primary legislation as to when it would be appropriate to delegate the Ombudsman's powers to an external investigation service.

2.45 The committee notes that it would have been useful had the information provided by the Minister been included in the explanatory memorandum. In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Fair Work Amendment (Corrupting Benefits) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to: • make it a criminal offence to give a registered organisation, or a person associated with a registered organisation a corrupting benefit; • make it a criminal offence to receive or solicit a corrupting benefit; • make it a criminal offence for a national system employer other than an employee organisation to provide, offer or promise to provide any cash or in kind payment, other than certain legitimate payments to an employee organisation or its prohibited beneficiaries; • make it a criminal offence to solicit, receive, obtain or agree or obtain any such prohibited payment; • require full disclosure by employers and unions of financial benefits they stand to gain under an enterprise agreement before employee vote on the agreement
Portfolio	Employment
Introduced	House of Representatives on 22 March 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i) and (iv)

2.46 The committee dealt with this bill in *Scrutiny Digest No. 4 of 2017*. The Minister responded to the committee's comments in a letter dated 21 April 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.

General comment made by the Minister

> The Australian Government made an election commitment to adopt the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission), led by Commissioner John Dyson Heydon AC QC. The Bill responds to Recommendations 40, 41 and 48 of the Royal Commission.
>
> The Royal Commission indicated that the payment of corrupting benefits increases the cost of doing business and is anti-competitive. These payments 'corrupt' union officials by causing them to perform their duties, powers or functions improperly and unlawfully. This in turn reinforces a culture of lawlessness amongst unions which can adversely impact the

broader Australian society (Final Report, Volume 5, pp 244-5). The Royal Commission found that the criminal laws dealing with secret commissions differ across state and territory jurisdictions and are difficult to apply to officers of registered organisations (Final Report, Volume 5, p 256).

In addition, the Royal Commission noted that the income derived from the terms of enterprise agreements creates an actual or potential conflict of interest and can lead to a breach of a union official's fiduciary duties (Final Report, Volume 5, p 330). The Royal Commission noted that disclosure is a basic first step to avoid such conflicts of interest (Final Report, Volume 5, p 336).

Right not to be tried or punished twice (double jeopardy)[16]

Initial scrutiny – extract

2.47 The bill proposes introducing a number of offence provisions, including in relation to the giving, receiving or soliciting of corrupting benefits or making certain payments. Proposed section 536C provides that the new Part introducing these offences does not exclude or limit the concurrent operation of a State or Territory law. It states that even if an act or omission (or similar act or omission) would constitute an offence under this proposed Part and would constitute an offence or be subject to a civil penalty under State or Territory law, these offence provisions can operate concurrently. In effect this appears to mean that a person could be liable to be tried and punished for an act or omission under a State or Territory law as well under this proposed Commonwealth law.

2.48 The explanatory memorandum explains the constitutional need for this provision, noting that this provision indicates 'the Parliament's intention that the Commonwealth law should not operate to the exclusion of state or territory laws to the extent that the laws are capable of operating concurrently'.[17] It gives an example of a relevant state or territory law in this context as including 'laws criminalising secret or corrupt commissions, corrupt benefits or rewards or bribes'.[18]

2.49 Under the common law, a person who has been finally convicted or acquitted of an offence has a right not to be tried or punished again for the same offence. It is not clear if any state or territory offences (for example, criminalising corrupt benefits) may be the same or substantially the same offences as the new offences proposed (for example, the corrupting benefits offences), and if so, what effect proposed section 536C may have on the right not to be tried or punished again for the same offence.

16 Schedule 1, item 3, proposed section 536C of the *Fair Work Act 2009*.

17 Explanatory memorandum, p. 3.

18 Explanatory memorandum, p. 3.

2.50 The committee seeks the Minister's advice as to whether proposed section 536C would have the effect of limiting an individual's right not to be tried or punished for the same offence (and in particular whether there are State or Territory laws that provide for the same or substantially the same offences as those contained in this bill).

Minister's response

2.51 The Minister advised:

> The Committee has sought advice as to whether proposed section 536C of the Bill would have the effect of limiting an individual's right not to be tried or punished for the same offence (and in particular whether there are State or Territory laws that provide for the same or substantially the same offences as those contained in the bill).
>
> As noted in the covering letter, while there are criminal laws at the state and territory level dealing with secret commissions, they differ across the jurisdictions and are difficult to apply to officers of registered organisations.
>
> Proposed section 536C is a standard concurrent operation clause that is used to indicate Parliament's intention that the Commonwealth law should not operate to the exclusion of State or Territory law to the extent that the laws are capable of operating concurrently. It is necessary to ensure that section 109 of the Constitution does not operate to invalidate the state laws. While section 109 of the Constitution does not apply to territory laws, similar principles apply in relation to the inconsistency or repugnancy of territory laws with Commonwealth laws.
>
> Subsection 4C(2) of the *Crimes Act 1914* (Cth) (Crimes Act) guarantees that a person cannot be punished for the same conduct under both a State or Territory law and the offences provided for in proposed Part 3-7 of the Bill. Section 536C does not displace or otherwise affect the operation of subsection 4C(2) of the Crimes Act.

Committee comment

2.52 The committee thanks the Minister for this response. The committee notes the Minister's advice that proposed section 536 is a standard concurrent operation clause and subsection 4C(2) of the *Crimes Act 1914* guarantees that a person cannot be punished for the same conduct under both a Commonwealth and a State or Territory law.

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

Reversal of evidential burden of proof[19]

Initial scrutiny – extract

2.54 Proposed section 536F makes it an offence for a national system employer to give cash or an in kind payment to an employee organisation or prohibited beneficiary in circumstances where the defendant (or certain related persons) employs a person who is (or is entitled to be) a member of that organisation and whose industrial interests the organisation is entitled to represent. Proposed subsection (3) lists a number of exceptions (offence specific defences) to this offence, stating that the offence does not apply if a number of conditions are met. The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

2.55 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.

2.56 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

2.57 While in this instance 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 adequately justified.

2.58 The explanatory memorandum justifies the reversal of the evidential burden of proof in respect of all of the defences:

> Whether the benefit was provided for one of the permitted purposes can be expected to be within the peculiar knowledge of the defendant. As such, it is reasonable for the defendant to bring evidence (which is most likely easily and readily available to them) to demonstrate that one of the exceptions applies, rather than requiring the prosecution to locate evidence (which is likely to be significantly more difficult and costly), to prove that the benefit was provided for a permitted purpose.[20]

2.59 However, no detail is given as to how each of the defences would be peculiarly within the knowledge of the defendant and significantly more costly and difficult for the prosecution to prove. For example, it is not clear to the committee how the following matters would be peculiarly within the knowledge of the

19 Schedule 1, item 3, proposed subsection 536FC(3) of the *Fair Work Act 2009*.

20 Explanatory memorandum, p. 9. See also, statement of compatibility, p. viii.

defendant and therefore significantly more difficult for the prosecution to prove, that the cash or in kind payments were:

- gifts or contributions that are deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law (paragraph 536F(3)(c));
- payments made under or in accordance with a law of the Commonwealth or a law of a State or Territory (paragraph 536F(3)(e));
- benefits provided in accordance with an order, judgment or award of a court or tribunal (paragraph 536F(3)(f)).

2.60 It is also not clear how many of the other exceptions, while within the knowledge of the defendant, would be *peculiarly* within the defendant's knowledge.

2.61 As the explanatory materials do not adequately address this issue, the committee requests the Minister's detailed advice as to why it is appropriate to use offence-specific defences (which reverse the evidential burden of proof) in each specific instance. The committee's consideration of this would be assisted if an explanation was provided in relation to each paragraph in subsection 536F(3) as to how each matter is peculiarly within the defendant's knowledge and how it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter (in line with the relevant principles as set out in the *Guide to Framing Commonwealth Offences*).[21]

Minister's response

2.62 The Minister advised:

> The Committee has sought advice as to why it is appropriate to use offence-specific defences (which reverse the evidential onus of proof) in each instance in paragraph in subsection 536F(3). Proposed section 536F makes it an offence for a national system employer (the defendant) to give a cash or in kind payment to an employee organisation or its prohibited beneficiaries in certain circumstances. There are a number of exceptions to this offence for legitimate payments (proposed subsection 536F(3)) and the defendant bears the evidential burden to point to evidence that suggest a reasonable possibility that one of the exceptions applies to the payment.
>
> The Committee's attention is drawn to the fact that the imposition of an evidential burden does not impose a legal burden of proof upon the defendant and is consistent with the common law and the *Criminal Code Act 1995* (Cth) (Criminal Code), which codifies the common law on this and other points. When a defendant wishes to take advantage of a defence it is

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

always the case at common law and under the Criminal Code that the defendant has the burden of adducing or pointing to some evidence that suggests a reasonable possibility that the matter exists or does not exist. When the defendant discharges this burden, the prosecution then has the legal burden of proof to disprove the matter beyond a reasonable doubt.

The Committee is also concerned that the Explanatory Memorandum to the Bill does not adequately address the issue of why the exceptions in proposed subsection 536F(3) are peculiarly within the defendant's knowledge and why it would be significantly more difficult for the prosecution to disprove. I make the following observations in relation to each exception:

- Paragraph (a) refers to deductions from wages made for the purpose of paying an employee's membership fee for an employee organisation. While the prosecution will be able to establish that the payment was made, it will not readily be able to establish that it was not made for the permitted purpose. The purpose of the payment is peculiarly within the knowledge of a limited number of people such as the defendant, the employee and the employee organisation. A defendant relying upon paragraph (a) can easily adduce evidence to discharge the burden, simply by establishing a correlation between the wage deduction and the membership fees due.
- Paragraph (b) refers to benefits provided and used for the sole or dominant purpose of benefiting the defendant's employees. Ordinarily the purpose of a benefit is a matter peculiarly within the knowledge of the persons who give and receive it, and not the prosecution. It is appropriate for the prosecution to bear the burden of adducing evidence as to the fact of a benefit, but not as to the absence of a permitted purpose. Instead, it is appropriate for the defendant to point to evidence to suggest a reasonable possibility that the payment was made for the purpose that paragraph (b) permits.
- Paragraph (c) refers to deductible gifts or contributions. The question whether a gift or contribution is deductible is ordinarily determined by looking at the nature and purpose of the gift or contribution tested against often complex provisions of the income tax legislation. A defendant who makes a deductible gift or contribution can adduce evidence as to the deductibility easily and cheaply as they would have been required to do so to establish deductibility for taxation purposes. By contrast, the prosecution will often have no way of knowing what the nature or purpose of a payment was, let alone whether it was intended to, and did in fact, meet the criteria for deductibility under income tax legislation.
- Paragraph (d) refers to market value payments for goods or services provided by an employee organisation to a defendant. Once again, the prosecution will be able to adduce evidence as to the fact of a

payment, but the question of the payment's purpose, as well as the question of whether it was for market value, are likely to be peculiarly within the knowledge of the defendant and the employee organisation. A defendant relying on paragraph (d) should be able to easily adduce evidence to demonstrate that the goods or services were actually received and paid for at market value.

- Paragraph (e) refers to payments made under the authority of law. If a defendant asserts that an otherwise unlawful payment is made pursuant to lawful authority, which the prosecution will ordinarily have no way of knowing, it is appropriate for the defendant to be required to adduce evidence to that effect.
- Payments to which paragraph (f) refers to benefits provided in accordance with an order, judgement or award of a court or tribunal. Similar to paragraph (e) above, the prosecution will not necessarily have any way of knowing of the existence or otherwise of a relevant court or tribunal order, judgment or award in relation to a payment. On the other hand, evidence of such an order, judgment or award will be readily available for the defendant to adduce as evidence.

Committee comment

2.63 The committee thanks the Minister for this response. The committee notes the Minister's advice regarding each offence-specific defence and the advice that in each instance the purpose of the payment would be peculiarly within the knowledge of the defendant or the prosecution would have no way of knowing what the nature or purpose of the payment was.

2.64 The committee considers that the response has established that each of the matters are either likely to be peculiarly within the defendant's knowledge or the prosecution could have no way of knowing the purpose of the payment. However, the committee considers that the breadth of the offence—in that it applies to the making of any cash or in kind payment from certain employers to certain employee organisations or beneficiaries—makes it likely that an offence will be committed purely on the making of a payment, unless a defence can be established. The offence does not require the prosecution to prove any intention on the part of the employer to act corruptly in making the payment (with the only intention required being an intention to make or offer to make the payment). As the offence is drafted so broadly the defences are also necessarily broad, which puts the evidential burden on the defendant to raise evidence demonstrating that the payment was made for a legitimate purpose.

2.65 **From a scrutiny perspective, the committee considers that the offence as currently drafted is overly broad, relying heavily on defences to carve out legitimate transactions, and so may unduly trespass on personal rights and liberties.**

2.66 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*).

2.67 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the breadth of the offence and the subsequent reversal of the evidential burden of proof for the offence-specific defences.

Strict liability offences[22]

Initial scrutiny – extract

2.68 Proposed section 536F makes it an offence for a national system employer to give cash or an in kind payment to an employee organisation or prohibited beneficiary in circumstances where the defendant (or certain related persons) employs a person who is (or is entitled to be) a member of that organisation and whose industrial interests the organisation is entitled to represent. Proposed subsection (2) states that strict liability applies to paragraphs (1)(a), (c) and (d) of the offence, namely:

- that the defendant is a national system employer other than an employee organisation;
- that the other person (to whom cash or in kind payments are made) is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and
- that the defendant, a spouse, or associated entity of the defendant or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

2.69 The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

2.70 In addition, proposed section 536G makes it an offence to receive or solicit a cash or in kind payment. Proposed subsection (2) states that strict liability applies to paragraph 1(c) which provides that the offence occurs if the provider of the cash or in kind payment were to provide the benefit to the defendant or another person, the provider or another person would commit an offence against subsection 536F(1).

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22 Schedule 1, item 3, proposed subsection 536FC(2) and 536G(2) of the *Fair Work Act 2009*.

The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

2.71 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[23]

2.72 The explanatory memorandum and statement of compatibility state that the elements attracting strict liability are jurisdictional in nature.[24] They also say that the attachment of strict liability is necessary to pursue the legitimate objective of eliminating illegitimate cash or in kind payments.

2.73 The *Guide to Framing Commonwealth Offences* provides guidance in relation to the framing of offences. It defines a jurisdictional element of an offence as follows:

> A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but instead links the offence to the relevant legislative power of the Commonwealth. For example, in the case of theft of Commonwealth property, the act of theft is the substantive element of the offence, while the circumstance that the property belongs to the Commonwealth is a jurisdictional element.[25]

2.74 Whether a person is an employee organisation or prohibited beneficiary in relation to the employee organisation; whether the employment of person who is, or is entitled to be, a member of an organisation and whose industrial interests the organisation is entitled to represent; and whether an offence would otherwise be committed, are not matters obviously designed to connect the offence to a head of Commonwealth legislative power. It is therefore not clear to the committee that the provisions stated as being jurisdictional in nature meet the definition in the *Guide to Framing Commonwealth Offences*.

2.75 The committee requests the Minister's advice as to how each element of the offences in proposed sections 536F and 536G to which strict liability applies are jurisdictional in nature, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[26]

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

24 Explanatory memorandum, p. 8 and statement of compatibility, p. vii.

25 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 21 (footnote 19).

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

Minister's response

2.76 The Minister advised:

The Committee has sought advice as to how each element of the offences in proposed sections 536F and 536G to which strict liability applies are jurisdictional in nature.

As outlined above, section 536F makes it an offence for a national system employer (the defendant) to give cash or an in kind payment to an employee organisation or its prohibited beneficiaries in certain circumstances. Proposed section 536G provides that a person who receives or solicits a corrupting benefit will also commit an offence in circumstances where an offence against section 536F would be made out.

These offence provisions follow very closely the draft provisions Commissioner Heydon set out in Volume 5 of the Royal Commission's Final Report, including the elements of strict liability.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) published by the Attorney-General's Department, states that elements of offences that provide for strict liability can be justified by virtue of being jurisdictional in nature and/or are necessary to provide the required deterrent effect.

As identified by the Committee, strict liability applies to proposed paragraphs 536F(1)(a),(c) and (d) and 536G(1)(c). Strict liability offences remove the requirement to prove fault (ie. no mental element is required).

Paragraph 536F(1)(a) limits the offence to the defendant being a national system employer who is not an employee organisation. As explained in the Explanatory Memorandum, this element is jurisdictional in nature, in that it attaches the offence to the relevant Commonwealth head of power to legislate.

Paragraphs 53 6F(1)(c) and (d) limit the offence to circumstances where the recipient of a payment is an employee organisation or associate, and the defendant or associated person employs a member of that organisation. In broad terms, section 536F is prohibiting certain kinds of payments by employers to employee associations. It would not be appropriate to apply a fault element to the physical elements of the offence in paragraphs 536F(1)(c) and (d). A defendant national system employer should have sufficiently robust internal governance and accounting mechanisms in place so as to ensure that they are aware of whether the recipient of a payment is a person to whom the circumstances in sections 536F(1)(c) and (d) apply.

While the Explanatory Memorandum states that the elements of the relevant offences attracting strict liability are jurisdictional in nature, the additional justification for these elements is the requisite deterrent effect as provided for in the Guide.

> Applying a fault element, whether intention, knowledge, recklessness or negligence, would substantially weaken both the deterrent effect of section 536F and the legitimate policy imperative of ensuring that national system employers take sufficient care to ensure that illegitimate payments are not made to employee organisations or their associates. The defence of reasonable mistake of fact will still be available and provides an appropriate excuse for a national system employer who acts under a mistaken but reasonable belief as to the identity of the recipient of a particular payment.
>
> Similarly, the justification for making the whole of the element in paragraph 536G(1)(c) subject to strict liability is that an employee organisation and its officers should properly be aware of the circumstances in which the payment by an employer would be an offence under section 536G. As with section 536F, applying a fault element, whether intention, knowledge, recklessness or negligence, to the offence would substantially weaken both the deterrent effect of section 536G and the legitimate policy imperative of ensuring that employee organisations take sufficient care not to solicit payments from national system employers that would contravene section 536F. Again, the defence of reasonable mistake of fact will be available.

Committee comment

2.77 The committee thanks the Minister for this response. The committee notes the Minister's advice that in relation to one element of the offence to which strict liability applies the issue (whether the defendant is a national system employer who is not an employee organisation) is jurisdictional in nature, being that it attaches the offence to the relevant Commonwealth head of power. However, in relation to the other three elements to which strict liability applies, the committee notes the Minister's advice that it is considered that it would not be appropriate to apply a fault element to the physical elements of the offence because there should be sufficiently robust internal governance and accounting mechanisms in place, or the defendant should be properly aware of the relevant circumstances, and applying a fault element would weaken the deterrent effect of the provision.

2.78 The committee notes that a person found guilty of an offence under these provisions may be subject to a maximum period of two years imprisonment and/or 500 penalty units.

2.79 The committee's consistent scrutiny view is that strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties at 60 penalty units (in this case a period of 2 years imprisonment and/or 500 penalty units is proposed).

2.80 Although the committee accepts strict liability may be warranted where a person will be placed on notice to guard against the possibility of a contravention of the law, and where there is a case that applying a fault element would weaken the deterrent effect of the provision, these justifications are less compelling where

the offence attracts significant penalties. The committee notes that no evidence is provided for the conclusion that a fault element would weaken the deterrent effect of the provision given the significant penalties to be imposed. In this instance, from a scrutiny perspective, the committee does not consider it is appropriate to penalise persons lacking fault and suggests that the application of strict liability be restricted to elements which are jurisdictional in nature.

2.81 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*).

2.82 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the application of strict liability.

Significant matters in delegated legislation[27]

Initial scrutiny – extract

2.83 A number of provisions of the bill leave significant detail to be prescribed in the regulations, including detail such as:

- that a person will commit an offence or be subject to a civil penalty where certain actions are taken, or benefits given, to persons with a 'prescribed connection' with the person or who are persons or bodies prescribed by the regulations;[28]
- a defence which provides that the provision of cash or in kind payments to certain persons will not constitute an offence if the cash or in kind payment is 'a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations';[29]

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27 Schedule 1, item 3, proposed subparagraph 536D(1)(b)(iii); subparagraph 536D(2)(b)(iii); paragraph 536F(1)(d); paragraph 536F(3)(g); subsection 536F(3); paragraph 536F(4)(c); and paragraph 536F(5)(e) of the *Fair Work Act 2009*. Schedule 2, item 2, proposed paragraph 179(2)(b); paragraph 179(6)(c); paragraphs 179A(2)(a) and (b); paragraph 179A(4)(b).

28 Schedule 1, item 3, proposed subparagraphs 536D(1)(b)(iii) and 536D(2)(b)(iii); paragraph 536F(1)(d); Schedule 2, item 2, proposed paragraph 179(2)(b); and paragraphs 179A(2)(a) and (b).

29 Schedule 1, item 3, proposed paragraph 536F(3)(g).

- where exceptions are provided to an offence, the regulations can nonetheless prescribe a cash or in kind payment that would be captured by the offence provision;[30]
- the meaning of a cash or in kind payment (the payment of which results in an offence) can be prescribed by regulations;[31]
- the definition of a 'prohibited beneficiary' (payment to whom may be an offence) includes a person who has a prescribed connection with the relevant organisation.[32]

2.84 The explanatory memorandum provides limited detail as to why significant matters that set out aspects of the content of offences or civil penalty provisions are left to delegated legislation. In one instance the explanatory memorandum provides the following explanation:

> Including offence content in regulations as provided by subsection 536F(3) is necessary in this instance as the Royal Commission did not deal comprehensively with the categories of legitimate payments. It is important and appropriate to provide scope to add to or remove certain types of payments as the need arises. The regulation making power is only available to exclude those benefits that are non-corrupting.[33]

2.85 In addition, the explanatory memorandum provides:

> A regulation making power to prescribe additional persons who have a connection with the organisation or a prohibited beneficiary is a necessary anti-avoidance measure to address any attempts to circumvent the application of the prohibition.[34]

2.86 The committee's view is that significant matters, such as matters that form part of an offence or civil penalty provision, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. It is particularly important, from a scrutiny perspective, 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.

2.87 In this regard, the committee requests the Minister's advice as to:

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30 Schedule 1, item 3, proposed subsection 536F(3).

31 Schedule 1, item 3, proposed paragraph 536F(4)(c).

32 Schedule 1, item 3, proposed paragraph 536F(5)(e).

33 Explanatory memorandum, pp 8–9.

34 Explanatory memorandum, p. 9.

- why it is considered necessary and appropriate to leave many of the elements of these offence or civil penalty provisions to delegated legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of these regulations (which set out the details to be prescribed) and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Minister's response

2.88 The Minister advised:

> The Committee has requested advice as to why it was considered necessary and appropriate to leave elements of the offence and civil remedy provisions contained in the Bill to delegated legislation. The Committee has also requested advice on the type of consultation that will be undertaken prior to the making of any such regulations.
>
> As identified by the Committee, the Bill contains a number of regulation making powers. Given the potential for new arrangements to arise that are not currently contemplated by the Bill, I consider it both necessary and appropriate to include regulation making powers to allow the Government to deal with these circumstances. For example, the regulation making power could be utilised to ensure that any new form of legitimate payments that may be made by an employer to a union is excluded under proposed subsection 536F(3).
>
> The Government does not consider that it is necessary or desirable to include additional consultation requirements in the Bill and notes that any regulations made would be subject to tabling and disallowance requirements and to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

Committee comment

2.89 The committee thanks the Minister for this response. The committee notes the Minister's advice that there is a potential for new arrangements to arise that are not currently contemplated by the bill, including the possibility of new forms of legitimate payments that may be made by an employer to a union which need to be included as a defence to the offences in this bill. The committee also notes the Minister's advice that the government does not consider it necessary or desirable to include additional consultation requirements in the bill.

2.90 The committee reiterates its general view that it is important 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. From a scrutiny perspective, the committee does not consider in these circumstances that it is appropriate to include elements of

offence or civil penalty provisions in delegated legislation. The committee considers that the possibility of unforeseen arrangements for the making of legitimate payments arises because of the breadth of the offence provision, and reiterates its scrutiny concerns about the broad scope of the offence (as set out above at paragraphs [2.64] to [2.65]).

2.91 The committee also reiterates its general view that where the Parliament delegates its legislative power in relation to significant matters (such as the elements of offence or civil penalty provisions) it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that although the instrument may be disallowable, it may be difficult for parliamentarians to know whether appropriate consultation has taken place within the timeframe for disallowance.

2.92 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving such significant matters to delegated legislation.

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

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to: • introduce higher penalties for 'serious contraventions' of prescribed workplace laws; • increase penalties for record-keeping failures; • prohibit employers asking for 'cash back' from their employees; • clarify the accessorial liability provisions relating to underpayments by franchisees or subsidiaries; • provide the Fair Work Ombudsman with new formal evidence-gathering powers; and • prohibit anyone from hindering or obstructing an investigator, or giving the Fair Work Ombudsman false or misleading information or documents
Portfolio	Employment
Introduced	House of Representatives on 1 March 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.94 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2017*. The Minister responded to the committee's comments in a letter dated 2 May 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.

Reversal of evidential burden of proof[35]

Initial scrutiny – extract

2.95 Proposed section 707A(1) introduces a civil penalty provision in relation to intentionally hindering or obstructing the Fair Work Ombudsman or an inspector. Proposed subsection 707A(2) provides two exceptions to this civil penalty provision, stating that it does not apply if the person has a reasonable excuse or the person was not shown the Ombudsman or inspector's identity card or they were not told about the effect of this section. The maximum penalty for contravention of the provision is 60 penalty units.

35 Schedule 1, item 48, proposed paragraph 707A(2)(b) of the *Fair Work Act 2009*.

2.96 The explanatory memorandum indicates that a person wishing to make a 'reasonable excuse' bears an evidential burden (requiring that person to raise evidence about the matter), but not a legal burden (requiring the person to positively prove the matter).[36] While the explanatory memorandum provides reasons for reversing the burden of proof in relation to this 'reasonable excuse' exception, no reasons are provided for reversing the burden of proof in relation to the exception where the person was not shown the relevant identity card or told about the effect of the section. The committee expects any such reversal of the evidential burden of proof to be justified, particularly as it is not clear to the committee why such matters would be peculiarly within the knowledge of the person who may be subject to the penalty.

2.97 As the explanatory materials do not address this issue, the committee requests the Minister's advice as to why it is proposed to place an evidential burden on a person seeking to rely on the exception in proposed paragraph 707A(2)(b) (i.e. where the person was not shown the inspector's identity card or told about the effect of the section).

Minister's response

2.98 The Minister advised:

> Consistent with general legislative policy, the respondent must raise evidence if they wish to claim a 'reasonable excuse', whether under proposed paragraph 707A(2)(a) or (b). See for example the *Work Health and Safety Act 2011,* s 188; *Navigation Act 2012,* s 321; *Fisheries Management Act 1991,* s 108(1)(f); *Aviation Transport Security Act 2004,* s 79(5), (6); *Biosecurity Act 2015,* s 440.
>
> Proposed paragraph 702A(2)(b) is different from these schemes as it gives a very specific example of a reasonable excuse. It is intended to be a beneficial provision which clarifies that a person has a reasonable excuse for hindering or obstructing a Fair Work Inspector if they did not see their identity card, and were not advised about the consequences of contravening the section. (Please note that identity card requirements only apply to Fair Work Inspectors while exercising their power to enter premises under the *Fair Work Act 2009* (Fair Work Act)).
>
> The provision simply emphasises an important reasonable excuse which may be available to a person facing proceedings for hindering or obstructing a Fair Work Inspector. Like any other reasonable excuse, the respondent has the evidential burden.
>
> The provision does not unduly trespass on personal rights and liberties for these reasons and because:

36 Explanatory memorandum, p. 24.

- In any proceedings brought under proposed section 707A the applicant would need to prove the Inspector had been lawfully exercising their powers at the time, including by proving the Inspector had properly identified themselves upon entry by showing their identity card (s 708(3)).
- The applicant must still disprove the matters on the balance of probabilities if the respondent discharges the evidential burden.
- The maximum penalty is a civil penalty of 60 penalty units for individuals, and there is no possibility of imprisonment.

Committee comment

2.99 The committee thanks the Minister for this response. The committee notes the Minister's advice that the exception where a person was not shown the relevant identity card or told about the effect of the section is intended to give a specific example of what would constitute a reasonable excuse. The committee also notes the advice that in any proceedings the applicant would need to prove the Inspector had been lawfully exercising their powers at the time, including by proving the Inspector had shown their identity card and the maximum penalty is a civil penalty of 60 penalty units for individuals, and there is no possibility of imprisonment.

2.100 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*).

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

Human Rights Legislation Amendment Bill 2017

Purpose	This bill seeks to amend various Acts relating to human rights to: • reform section 18C of the *Racial Discrimination Act 1975*; • amend the complaints handling processes of the Australian Human Rights Commission; and • make minor amendments to the *Australian Human Rights Commission Act 1986*
Portfolio	Attorney-General
Introduced	Senate on 22 March 2017
Bill status	Received Royal Assent on 12 April 2017
Scrutiny principles	Standing Order 24(1)(a)(i) and (v)

2.102 The committee dealt with this bill in *Scrutiny Digest No. 4 of 2017*. The Attorney-General responded to the committee's comments in a letter received on 24 April 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Attorney-General's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Parliamentary scrutiny—removing requirements to table certain documents[37]

2.103 This bill seeks to amend the mandatory obligations of the Australian Human Rights Commission (Commission) and commissioners under the *Australian Human Rights Commission Act 1986* (AHRC Act) to report certain matters to the Minister.[38] In particular, it is proposed to enable the Commission to report, on a discretionary basis, to the Minister in relation to an inquiry it has undertaken into an act or practice inconsistent with or contrary to human rights or any act or practice that may constitute discrimination.[39] Item 17 provides that any report provided to the Minister on this new discretionary basis is not required to be tabled in Parliament.

2.104 The committee notes that removing the requirement for certain reports to be tabled in Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are either

37 Schedule 2, item 17.

38 See Schedule 2, items 6, 11, 12, 16, 19, 20 and 24 and Schedule 3, item 1.

39 Schedule 2, items 6, 11, 12 and 16.

not made public or only published online. As such, the committee expects there to be appropriate justification for removing a tabling requirement.

2.105 The explanatory memorandum explains the basis for this proposed amendment:

> It is intended that the President will publish any reports provided to the Minister as he or she sees fit. This amendment is not intended to reduce public scrutiny of Commission reports. Rather, it is intended to reduce the administrative and resource cost of producing reports for tabling for the Commission.[40]

2.106 The committee generally does not consider the costs involved in tabling the documents to be a sufficient basis for removing the requirement to table in Parliament.

2.107 The committee seeks the Attorney-General's detailed justification as to why it is considered appropriate to remove the requirement to table reports provided to the Minister from the Australian Human Rights Commission and if a report is not tabled whether it will otherwise be made publicly available.

Attorney-General's response

2.108 The Attorney-General advised:

> As noted by the Committee, Item 17 of Schedule 2 of the Bill provides that discretionary reports furnished by the Commission to the Minister in relation to human rights and equal opportunity in employment inquiries are not required to be tabled. This amendment was requested by the President of the Commission, Professor Gillian Triggs.
>
> Under the Act as it currently stands, the Commission is required to provide a report to the Minister in situations where the Commission found that an act or practice constitutes a breach of human rights, or constituted discrimination in employment, and attempting to settle the matter was not appropriate or was unsuccessful. This results in a situation whereby reports which did not raise significant issues were required to be tabled in Parliament.
>
> This amendment maintains the requirement for major and systemic reports produced by the Commission to be tabled in Parliament, such as reports about actions that must be taken by Australia to comply with its international obligations, or reports which examine the consistency of Australian laws with human rights.
>
> Discretionary reports which relate solely to individual circumstances, and not broader issues, are not required to be tabled. Discretionary reports provided to the Minister in relation to human rights or equal opportunity in employment inquiries will be made publically available. As noted in the

40 Explanatory memorandum, p. 27.

> Explanatory Memorandum, as is current practice, reports will be published on the Commission's website and hard copies will be available. The Commission's website is public-facing and accessible, with the Commission reporting over 4.7 million website views in 2015-16.

Committee comment

2.109 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the amendment maintains the requirement for major and systemic reports produced by the Commission to be tabled in Parliament but that discretionary reports which relate solely to individual circumstances, and not broader issues, are not required to be tabled. The committee also notes that these reports will continue to be made available online.

2.110 The committee thanks the Attorney-General for providing this further information and notes that it would have been useful had this information been included in the explanatory memorandum. In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Strict liability offence[41]

Initial scrutiny – extract

2.111 Proposed section 46PJ provides that the President of the Australian Human Rights Commission may require a person, by written notice, to attend a conciliation conference. Subsection (5) provides a person commits an offence if they have been given written notice requiring attendance and the person refuses or fails to comply with the requirement. Subsection (6) makes this an offence of strict liability. The offence is subject to 10 penalty units.

2.112 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[42]

2.113 The statement of compatibility sets out the reason for the imposition of strict liability:

> The application of strict liability is necessary to ensure that, when the Commission exercises its compulsory powers to conciliate a complaint, a

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41 Schedule 2, item 49, proposed subsection 46PJ(6) of the *Australian Human Rights Commission Act 1986*.

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

> person may not frustrate that compulsory conciliation... It is reasonable not to require the prosecution to prove a fault element in circumstances where the individual had been given reasonable notice to attend a conference and did not attend, particularly in circumstances where Item 29 of the Bill requires the Commonwealth to pay a reasonable sum for the individual's expenses of attendance. Strict liability is therefore only used where the individual is clearly aware of his or her duties and obligations. This offence is proportionate as it only applies to individuals who have received notice that they are required to attend a conference, and do not, in fact, attend. It would not apply in circumstances where a person had a reasonable and mistaken understanding of circumstances (for example, where a person did not receive the notice of the requirement to attend).[43]

2.114 Additionally, the explanatory memorandum says that the general defences under the *Criminal Code Act 1995* (Criminal Code) would apply to such an offence:

> For example, if a person who is given notice to attend a compulsory conference in person cannot attend the conference because an earthquake occurs in Sydney at the time of the conference, that person could rely upon the defence of sudden or extraordinary emergency under Division 10 of the Criminal Code.[44]

2.115 The committee notes that the general defences under the Criminal Code are extremely limited. Division 10 of Part 2.1 of the Criminal Code relevantly provides that a person will not be criminally liable for an offence that has a physical element to which strict liability applies if the person had no control over the events or there is a sudden or extraordinary emergency.

2.116 The committee notes the existing strict liability offence in the AHRC Act makes it of an offence to fail to attend as required by the direction or to fail to continue to attend 'unless excused, or released from further attendance, by the person presiding at the conference'. There is also a defence if the person had a reasonable excuse for not attending. These qualifications are no longer included in the proposed new offence provision. As such, there are very limited circumstances (such as an earthquake) which would be accepted for a failure to attend and otherwise strict liability attaches, with no requirement to prove fault.

2.117 The committee requests a detailed justification from the Attorney-General for the strict liability offence in proposed section 46PJ(6), including:

- why the proposed provision removes the existing defence of reasonable excuse;
- why the proposed provision removes the existing ability of the President to excuse or release a person from further attendance;

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43 Statement of compatibility, p. 17.

44 Explanatory memorandum, p. 36.

- why having an offence subject to 10 penalty units for failure to attend the conference is not sufficient deterrence in itself and why the imposition of strict liability (and the punishment of a person lacking 'fault') is therefore necessary.

Attorney-General's response

2.118 The Attorney-General advised:

> Item 49 of Schedule 2 of the Bill applies the current provisions in sections 46PJ and 46PK in the Act, which regulate the exercise of compulsory conciliation conferences by the Commission, to both voluntary and compulsory conciliation conferences. This amendment was requested by the President of the Commission, Professor Gillian Triggs. New subsections 46PJ(5) and (6) provide for a strict liability offence for failure to comply with a notice from the Commission requiring attendance at a compulsory conciliation conference.
>
> It is my view that the strict liability offence in proposed section 46PJ is appropriate and consistent with the *Guide to Framing Commonwealth Offences* (the Guide).
>
> As noted by the Committee, this amendment does not create a new offence but transfers the current strict liability offence from section 46PL of the Act into the new section 46PJ. There are legitimate grounds for penalising persons lacking fault in these circumstances. The Commission rarely conducts compulsory conciliation conferences, and would do so only in the most serious of cases, after a failure of voluntary conciliation. An individual must be provided with a written notice outlining their obligations to appear and that individual is entitled to a reasonable sum for the expenses of attendance. In these circumstances, an individual is placed on notice to guard against the possibility of any contravention, and is supported by the Commonwealth to comply with the requirement to attend the conference.
>
> As noted in the Guide, strict liability is only appropriate where the offence is punishable by a fine of up to 60 penalty units. The offence under subsection 46PJ(5) carries the relatively low penalty of 10 penalty units.
>
> The amendments to the current strict liability offence under section 46PL of the Act, as noted by the Committee, bring the offence into line with the Guide by removing the defence of no reasonable excuse. As stated at paragraph 4.3.3 of the Guide, the defence of 'reasonable excuse' should be generally avoided. This is because the defence is too open-ended, and the conduct intended to be covered may also be covered by the defences of general application in the *Criminal Code Act 1995* (the Criminal Code).
>
> Although in the opinion of the Committee, the general defences under the Criminal Code may be limited, the scope of these defences is appropriate in this context. The general Criminal Code defences would exempt an individual from liability for the majority of situations in which they did not

comply with a notice to attend, but had intended to do so. For example, if the person did not attend because they had not received the notice or external circumstances had prevented the individual from attending.

The ability of the President (or other person presiding) to excuse or release a person from further attendance at a compulsory conference only applied to a failure to attend *and report from day to day* under former paragraph 46PL(1)(b) of the Act. The excuse provision did not apply in relation to former paragraph 46PL(1)(a) of the Act. As the offence in Item 49 does not include a 'report from day to day' aspect, there is no requirement for an excuse provision.

Committee comment

2.119 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that there are legitimate grounds for penalising persons lacking fault in circumstances where the Commission conducts compulsory conciliation conferences. The committee notes the advice that the offence carries a relatively low penalty, the individual is placed on notice to guard against the possibility of any contravention, and the amendment brings the offence in line with the *Guide to Framing Commonwealth Offences*.[45]

2.120 The committee thanks the Attorney-General for providing this further information and notes that it would have been useful had this information been included in the explanatory memorandum. In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

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

Live Animal Export Prohibition (Ending Cruelty) Bill 2017

Purpose	This bill seeks to permanently ban the export of live animals for slaughter from 1 July 2020, and puts in place steps to ensure that, in the interim, live animals are treated humanely after they are exported
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 20 March 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)

2.121 The committee dealt with this bill in *Scrutiny Digest No. 4 of 2017*. The Member responded to the committee's comments in a letter dated 31 March 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Member's response followed by the committee's comments on the response. A copy of the letter is at Appendix 2.

Incorporation of external material into the law[46]

Initial scrutiny – extract

2.122 Item 4 seeks to insert a new section 9N into the *Export Control Act 1982*. Proposed subsection 9N(4) provides that live-stock for slaughter may not be exported and a permission or other consent may not be granted under the regulations unless the Secretary is satisfied that the 'live-stock will be treated satisfactorily in the country of destination'.

2.123 Proposed subsection 9N(5) provides that 'live-stock for slaughter will be treated satisfactorily in the country of destination' if they will be:

- kept in holding premises that comply with the 'Holding Standards';
- transported to slaughter, unloaded, kept in lairage and slaughtered in accordance with the 'OIE Guidelines'; and
- stunned using appropriate humane restraints immediately before slaughter.

2.124 Proposed subsection 9N(8) defines 'Holding Standards' to mean certain standards (with some modifications) drawn from version 2.3 of the *Australian Standards for the Export of Livestock*, published by the Department of Agriculture, Fisheries and Forestry. 'OIE Guidelines' is defined to mean the 'relevant sections of

46 Schedule 1, item 4, proposed subsections 9N(5) and (8) of the *Export Control Act 1982*.

the current version of the *Terrestrial Animal Health Code* published by the OIE (the World Organisation for Animal Health)'.

2.125 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).

2.126 In relation to the incorporation of the Holding Standards, the committee notes that the incorporation relates to a specific version of the Standards and therefore the incorporated material will not change over time. The committee also notes that the Standards are currently published on the website of the Department of Agriculture and Water Resources. However, it remains the case that persons interested in the law must access an external document in order to understand the full terms of the law, and there is no legislative requirement that the Standards be made readily and freely available on the internet.

2.127 In relation to the incorporation of the OIE Guidelines, the committee notes that it is not clear on the face of the legislation which sections of the Code are being incorporated into the law. In addition, it appears that the incorporated material will change over time as the Code is updated. The provision therefore introduces uncertainty into the law and raises the prospect of changes being made to the law in the absence of parliamentary scrutiny.

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

2.129 Noting the above comments, the committee requests the Member's advice as to whether the relevant sections of the Holding Standards and the OIE Guidelines can be included on the face of the bill (for example, as a Schedule to the *Export Control Act 1982*).

Member's response

2.130 The Member advised:

> If it would assist with achieving the intent of this bill, the relevant sections of the Holding Standards and the OIE Guidelines could be included as a schedule or otherwise incorporated into the legislation.

Committee comment

2.131 The committee thanks the Member for this response. The committee notes the Member's advice that the relevant sections could be included as a schedule or incorporated into the legislation. However, the committee is unsure whether this constitutes a commitment by the Member to amend the legislation accordingly.

2.132 The committee will consider any amendments that may be made to the bill in a future Scrutiny Digest.

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Purpose	This bill seeks to amend the *Migration Act 1958* (the Act) to: • harmonise and streamline Part 5 and Part 7 of the Act relating to merits review of certain decisions; • make amendments to certain provisions in Part 5 of the Act to clarify the operation of those provisions; • clarify the requirements relating to notification of oral review decisions; and • make technical amendments to Part 7AA of the Act
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 30 November 2016
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)

2.133 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 3 March 2017. The committee sought further information in the *Scrutiny Digest 3 of 2017* and the Minister responded in a letter dated 2 May 2017.

2.134 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.

Limitation on merits review[47]

Initial scrutiny – extract

2.135 Item 34 seeks to insert a new section 338A into the Migration Act. The proposed section contains a definition of 'reviewable refugee decision'. This new section largely mirrors the provisions contained in existing section 411 of the Act.

2.136 Proposed subsection 338A(2) defines what is a 'reviewable refugee decision', which includes a decision to refuse to grant or to cancel a protection visa. However, a decision to refuse to grant or to cancel a protection visa is not classified as a reviewable decision if it was made on a number of specified grounds, relating to criminal convictions or security risk assessments. As such, decisions made on such grounds are not reviewable by the Administrative Appeals Tribunal (AAT). In addition,

47 Schedule 1, item 34, proposed section 338A of the *Migration Act 1958*.

subsection 338A(1) provides that a number of reviewable refugee decisions are excluded from review on specified grounds:

- that the Minister has issued a conclusive certificate in relation to the decision, on the basis that the Minister believes it would be contrary to the national interest to change or review the decision;
- that the decision to cancel a protection visa was made by the Minister personally;
- the decision is made in relation to a non-citizen who is not physically present in the migration zone when the decision is made; or
- that the decision is a fast track decision. A 'fast track decision' is a decision to refuse to grant a protection visa to certain applicants,[48] for which a very limited form of review is available under Part 7AA of the Act.

2.137 As such, there are a wide number of decisions relating to the grant or cancellation of protection visas that are either not subject to any merits review or which are subject to very limited review (in the case of fast track decisions).

2.138 Although the committee notes that this provision largely mirrors an existing provision of the Act, the committee still expects that any provisions which have the effect of limiting the availability of merits review will be comprehensively justified in the explanatory memorandum. The committee therefore requests the Minister's detailed justification for the limitation on merits review in proposed subsection 338A.

Minister's first response

2.139 The Minister advised:

> New section 338A reflects the current definition of 'Part 7-reviewable decision' in section 411 of the Migration Act, and thus does not introduce any new limitations on the availability of merits review. Section 411 was enacted in 1992 and has since been amended numerous times. These amendments have been passed by both Houses of Parliament and therefore have been subject to the Parliamentary scrutiny processes required for all legislative amendments. It would be inappropriate to revisit the merits of previous amendments that have been passed by Parliament.

Committee's first comment

2.140 The committee thanks the Minister for this response. The committee notes the Minister's advice that new section 338A reflects the current definition in section 411 of the Migration Act and all amendments to this provision have already

48 These include unauthorised maritime arrivals who entered Australia on or after 13 August 2012 but before 1 January 2014 and who have not been taken to a regional processing country.

been subject to parliamentary scrutiny and so it would be inappropriate to revisit the merits of previous amendments passed by the Parliament.

2.141 The committee does not consider that it would be inappropriate for this Parliament to fully scrutinise legislation currently before it. The fact that the amendment mirrors an existing provision that previous Parliaments have examined does not prevent this committee from examining the legislation to consider whether it meets its scrutiny principles.

2.142 The committee therefore restates its request for the Minister to provide a detailed justification for the limitation on merits review in proposed subsection 338A.

Minister's further response

2.143 The Minister advised:

> I acknowledge the role of the Committee requires it to examine proposed legislation to consider whether it meets the Committee's scrutiny principles. As previously advised, proposed section 338A of the Act imports the existing exhaustive list in section 411 of the Act, which provides for merits review in respect of protection visa decisions, and places it under the new heading of 'definition of reviewable refugee decision'. This amendment does not introduce any new limitations on the availability of merits review in respect of protection visa decisions. The Committee may be interested to know that while current section 411 of the Act provides for some protection visa decisions to be excluded from merits review by the Migration and Refugee Division of the Administrative Appeals Tribunal (AAT), those decisions are still subject to some form of review by the AAT or the Immigration Assessment Authority, as provided by statute.

Committee's further comment

2.144 The committee thanks the Minister for this response. The committee notes the response does not address the committee's request for a detailed justification for the limitation on merits review. The committee notes the Minister's advice that while current section 411 of the Act provides for some protection visa decisions to be excluded from merits review by the Migration and Refugee Division of the Administrative Appeals Tribunal (AAT), those decisions are still subject to some form of review by the AAT or the Immigration Assessment Authority (though no detail has been provided about this review).

2.145 The committee notes that proposed section 338A provides that a wide number of decisions relating to the grant or cancellation of protection visas are either not subject to any merits review by the AAT or are subject to very limited review. While this provision largely mirrors an existing provision of the Act, the committee still expects that any provisions which have the effect of limiting the availability of merits review will be comprehensively justified in the explanatory memorandum.

2.146 Given that some of the decisions exempted from review or subject to limited review involve the exercise of very broadly framed discretionary powers by the Minister and the significance of the exercise of these powers on an individual's interests, the committee retains significant scrutiny concerns that adequate accountability mechanisms have not been included in the legislation. The committee notes that judicial review is often of limited efficacy when sought in relation to broadly framed discretionary powers.

2.147 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of limiting merits review in proposed section 338A.

Provision of written statements to merits review applicants[49]

Initial scrutiny – extract

2.148 Proposed subsections 368E(3) and (4) provide mechanisms that allow a merits review applicant or the Minister to request that the Tribunal provide a written version of an oral statement. While the committee notes that these provisions are similar to current subsections 368D(4) and (5) (which are proposed to be repealed by item 75), the committee has two related scrutiny concerns in relation to these provisions.

2.149 First, proposed subsection 368E(3) provides than an applicant may only make a request that the Tribunal provide an oral statement in writing 'within the period prescribed by the regulations'. On the other hand, the Minister may make such a request at any time. The explanatory materials do not explain why the time in which an applicant may make the request is limited.

2.150 Second, the explanatory materials do not explain why it is necessary to prescribe in the regulations the time period in which applicants may make a request, rather than including this time period on the face of the primary legislation.

2.151 Noting this proposed delegation of legislative power and the potential impact on the effectiveness of applicants' review rights, the committee requests the Minister's advice as to why:

- the period of time in which an applicant may make a request that the Tribunal provide an oral statement in writing is limited; and
- the relevant time period is to be included in regulations, rather than on the face of the legislation.

Minister's first response

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49 Schedule 1, item 77, proposed subsections 368E(3) and (4) of the *Migration Act 1958*.

2.152 The Minister advised:

> New subsections 368E(3) and (4) reflect current subsections 368D(4) and (5). Specifically, it is noted that current subsection 368D(4) provides for a period prescribed by regulation within which the applicant can request the statement to be provided in writing. The new subsections thus do not introduce any new limitations on applicants seeking a statement to be provided in writing.
>
> Current subsections 368D(4) and (5) have been passed by both Houses of Parliament and therefore have been subject to the Parliamentary scrutiny processes required for all legislative amendments.

Committee's first comment

2.153 The committee thanks the Minister for this response. The committee notes the Minister's advice that the relevant provisions reflect the current law, which has been previously subject to parliamentary scrutiny.

2.154 The committee reiterates that the fact that the amendments mirror existing provisions which previous Parliaments have examined does not prevent this committee from examining the legislation to consider whether it meets its scrutiny principles. The committee is concerned to understand the reasons as to why the legislation currently before this Parliament limits the period of time in which an applicant can make a request for written statements and why the relevant time period is to be prescribed in regulations.

2.155 The committee therefore restates its request for the Minister's advice as to why:

- the period of time in which an applicant may make a request that the Tribunal provide an oral statement in writing is limited; and
- the relevant time period is to be included in regulations, rather than on the face of the legislation.

Minister's further response

2.156 The Minister advised:

> As previously advised, proposed subsections 368E(3) and (4) of the Act reflect the requirements set out in current subsections 368D(4) and (5) of the Act. Subsection 368D(4) provides for a period prescribed by regulation within which the applicant can request the statement to be provided in writing. This requirement that the applicant make a request within a prescribed period has been carried over into the restatement of the requirements as set out in proposed subsection 368E(3). The Committee has noted the potential impact of the proposed subsections on the effectiveness of applicants' review rights. The subsections in question relate to the provision, in writing, of an oral statement about a decision on a review that has already been delivered. Given that the applicant will have already received an oral statement of the decision – the provisions

currently (and as proposed) have no impact on the effectiveness of an applicant's review rights.

Committee's further comment

2.157 The committee thanks the Minister for this response. The committee notes the response does not address the committee's queries in relation to the time period for making a request for an oral statement to be provided in writing. The committee notes the Minister's advice that as the applicant will have already received an oral statement about a decision the provisions have no impact on the effectiveness of an applicant's review rights.

2.158 However, the committee notes that the provision of a written statement setting out the reason why the Tribunal made a particular decision may be central to the effectiveness of an applicant's review rights. The applicant may not have been legally represented when the oral statement was delivered and without the statement in writing may not be able to properly instruct counsel in relation to any review of the original decision.

2.159 The committee therefore considers that the timeframe for making such a request for a statement to be in writing may be key to exercising review rights, and as such, the committee would expect such detail to be included in primary legislation unless a justification is provided as to why it is appropriate to include this in delegated legislation.

2.160 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of limiting the timeframe for a request for an oral statement to be provided in writing and including this requirement in delegated legislation.

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

Limitation on judicial review[50]

Initial scrutiny – extract

2.162 Proposed paragraph 476(2)(e) seeks to provide that a decision of the Tribunal to dismiss an application under paragraph 362B(1A)(b) of the Migration Act will not be reviewable by the Federal Circuit Court. Decisions of the Tribunal under section 362B relate to circumstances where an applicant fails to appear before the Tribunal. Where an application is dismissed under paragraph 362B(1A)(b) it is possible for an applicant (within 14 days of receiving the notice of decision) to apply for reinstatement of the application. The Tribunal may then decide to reinstate the

50 Schedule 1, item 101, proposed paragraph 476(2)(e) of the *Migration Act 1958*.

application (and it is taken never to have been dismissed) or to confirm the decision to dismiss. If the applicant does not, within 14 days of receiving the notice of decision, apply for reinstatement, the Tribunal must confirm the decision to dismiss the application.

2.163 The explanatory memorandum states that 'it would be an inappropriate use of the Federal Circuit Court's time and resources to determine whether the dismissal decision has been correctly made under paragraph 362(1A)(b) prior to one of the three possible outcomes above' (i.e. prior to possible reinstatement or confirmation to dismiss) and that an applicant may still seek review of the decision to dismiss in the ordinary jurisdiction of the High Court.[51]

2.164 The committee notes this explanation, although it generally does not consider the potential impact of review on a court's time and resources or the fact that the constitutionally entrenched minimal level of judicial review is still available in the High Court, to be sufficient justification for limiting the availability of judicial review in the lower courts (which is more accessible and less costly for review applicants).

2.165 While the committee appreciates it may be inappropriate to provide for review of a decision where the Tribunal may still have a chance to reinstate the application, it is unclear to the committee whether, where the Tribunal confirms a decision to dismiss an application, these changes will mean that such a decision will not be reviewable.

2.166 In order to assist the committee in determining whether this limitation on the availability of judicial review is appropriate, the committee seeks the Minister's advice as to whether judicial review in the Federal Circuit Court will be available where a decision to dismiss an application is confirmed under paragraph 362B(1C)(b) or subsection 362B(1E) of the Migration Act.

Minister's first response

2.167 The Minister advised:

> If an applicant fails to appear before the Tribunal, current paragraph 362B(1A)(b) allows the Tribunal to dismiss the application. The applicant may apply for reinstatement of the application within 14 days after receiving the notice of the decision to dismiss. If the applicant fails to apply for reinstatement, or applies for reinstatement and the Tribunal does not consider it appropriate to reinstate the application, subsection 362B(1E) and paragraph 362B(1C)(b) respectively require the Tribunal to confirm the decision to dismiss the application. The effect of this is that the decision under review is taken to be affirmed.

51 Explanatory memorandum, p. 24.

> The purpose of new paragraph 476(2)(e) is to ensure that the original decision to dismiss the application (the decision taken under paragraph 362B(1A)(b)) is not reviewable by the Federal Circuit Court. It does not change the jurisdiction of the Federal Circuit Court in relation to a latter decision of the Tribunal to confirm the dismissal. In reviewing the latter decision to confirm the dismissal, the Federal Circuit Court can consider whether there were any errors with the original dismissal decision. This is the case whether or not the applicant applies for reinstatement before the Tribunal confirms the dismissal.

Committee's first comment

2.168 The committee thanks the Minister for this response. The committee notes the Minister's advice that the purpose of the new paragraph is to ensure the original decision to dismiss the application is not reviewable by the Federal Circuit Court, but that this does not change the jurisdiction of the Court in relation to a latter decision of the Tribunal to confirm the decision to dismiss. The committee notes the Minister's advice that in reviewing this latter decision to confirm the dismissal the Federal Circuit Court can consider whether there were any errors with the original dismissal decision.

2.169 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*).

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

Minister's further response

2.171 The Minister advised:

> I agree that the explanatory memorandum could benefit from further clarification as to the purpose of this amendment and will arrange for this change to be made.

Committee's further comment

2.172 The committee thanks the Minister for this response and welcomes his commitment to amend the explanatory memorandum to provide further clarification in relation to the scrutiny concerns raised by the committee.

Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017

Purpose	This bill seeks to amend the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement amendments of the *International Convention for the Prevention of Pollution from Ships 1973,* to ensure that there are strict discharge restrictions for oil, noxious liquid substances, sewage and garbage for certain ships operating in polar waters
Portfolio	Infrastructure and Regional Development
Introduced	House of Representatives on 16 February 2017
Bill status	Before Senate
Scrutiny principle	Standing Order 24(1)(a)(i)

2.173 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2017*. The Minister responded to the committee's comments in a letter dated 28 March 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.

Strict liability[52]

Initial scrutiny – extract

2.174 Proposed subsection 26BCC(3) and (4) make it an offence of strict liability if the master and the owner of a ship discharge sewage from the ship in the Antarctic Area and Artic waters in certain circumstances. The offence carries a significant penalty of 500 penalty units. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability offences are generally only considered appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate).[53]

2.175 The explanatory memorandum provides the following justification as to why the offences are subject to strict liability:

> The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to the pristine natural environments of the Antarctic Area and Arctic waters. Further, the

52 Item 14, subsection 26BCC(3) and (4).

53 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p 23.

> offences do not include imprisonment as a penalty and this approach ensures drafting consistency with the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.[54]

2.176 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. The committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. In particular, the committee expects clear justification where the proposed penalty for a strict liability offence exceeds 60 penalty units. This has not been explained in the explanatory memorandum.

2.177 The committee requests 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*,[55] in particular the justification for the proposed penalty.

Minister's response

2.178 The Minister advised:

> Section 26BCC(3) creates an offence for the master and owner of an Annex IV Australian ship where sewage is discharged in the Antarctic Area outside Australia's exclusive economic zone. The purpose of this strict liability offence is to manage the risk of Australian ships discharging sewage into the pristine waters of the Antarctic. This type of discharge could have a significant adverse impact on the environment, human health, safety and other users of the sea, particularly when it is a reoccurring activity.
>
> Shipping companies are engaging in high-investment, high-return commercial activities. Stringent regulatory regimes designed to better manage safety and environment issues throughout the world's oceans are agreed internationally through the International Maritime Organization (IMO). Those ships travelling through Antarctic and Arctic waters are subject to additional internationally agreed regulatory regimes designed to protect these sensitive waters. Australia has a particular responsibility for parts of the Antarctic waters through the Antarctic Treaty system.
>
> The imposition of the strict liability offence through Section 26BCC(3) is appropriate given the importance of maintaining the integrity of the environmental regulatory regime in the remote Antarctic Area. The offence is directed at the master and owner of the ship, who have a shared responsibility and can both be expected to be fully aware of the

54 Explanatory memorandum, p. 6.

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

requirements of the legislation (and of Annex IV). Both have a responsibility to be aware of the restrictions on the discharge of sewage and to adhere to these restrictions. Therefore, if sewage is discharged contrary to the requirements of the legislation, the master and the owner of the ship should be liable without any need to prove intention or recklessness on their part with respect to the contravention of that requirement. Furthermore, it may be difficult to prove that they had the requisite mental element (ie intention or recklessness) and thus a requirement to prove a mental element would make Section 26BCC(3) harder to enforce.

The offence is consistent with offence provisions in other parts of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983.* In my view, it is also consistent with the principles relating to strict liability at 2.2.6 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, although the proposed penalty is higher than recommended in that Guide. Given the significant consequences of noncompliance for the Antarctic, it is important that the penalty for non-compliance is high enough to be a real incentive to industry. In order to ensure compliance with environmental regimes, high initial outlays by the shipping industry are sometimes required. In these circumstances, and given the very high level of expenditure routinely incurred in shipping operations, it is considered that the normal upper limit of 60 penalty units for strict liability offences is inadequate as a meaningful deterrent. The proposed 500 penalty units is necessary for that purpose.

Section 26BCC(4) creates a similar offence, being an offence for the master and the owner of an Annex IV Australian ship where sewage is discharged in Arctic waters. While Australia does not have the additional burdens of responsibilities for the Arctic area as is the case for the Antarctic under the Antarctic treaty system, the same concerns outlined above in relation to the Antarctic apply to this offence in the Arctic.

Given the above, the imposition of strict liability offences under Section 26BCC, and a higher than normal level of penalties for such offences, is considered to be justified in this instance.

Committee comment

2.179 The committee thanks the Minister for this response. The committee notes the Minister's advice that the imposition of strict liability is appropriate given the importance of maintaining the integrity of the environmental regulatory regime in the remote Antarctic Area and Artic waters. The committee also notes the Minister's advice that both the master and owner of the ship can be expected to be fully aware of the requirements of the legislation and restrictions on the discharge of sewage and if sewage is discharged contrary to the requirements of the legislation, the master and the owner of the ship should be liable without any need to prove intention or recklessness and it may be difficult to prove that they had the requisite mental element. The committee also notes the advice that it is important that the

penalty for non-compliance is high enough to be a real incentive to industry, and given the very high level of expenditure routinely incurred in shipping operations, it is considered that the normal upper limit of 60 penalty units for strict liability offences is inadequate as a meaningful deterrent.

2.180 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*).

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

Reversal of evidential burden of proof[56]

Initial scrutiny – extract

2.182 Proposed subsections 26BCC(5), (6), (7), (8) and (9) provide exceptions (offence specific defences) to the strict liability offences relating to the discharge of sewage from a ship in the Antarctic Area and Artic waters.

2.183 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.

2.184 While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed section 26BCC has not been addressed in the explanatory materials.

2.185 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 offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[57]

Minister's response

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56 Item 14, subsection 26BCC(6).

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

2.186 The Minister advised:

A number of provisions in the Bill (Sections 26BCC(5), (6), (7), (8) and (9)) provide defences to the strict liability offences proposed at Sections 26BCC(3) and (4). These provisions describe exceptions to the strict liability offences and require the defendant to raise evidence about the matters outlined in each provision.

A defendant who seeks to rely on one of the defences in Section 26BCC has an evidential burden to provide evidence of the facts which constitute the defence. This is because the defendant is the person most likely to have relevant knowledge of those facts. Once the defendant discharges an evidential burden, the prosecution must disprove those matters beyond reasonable doubt.

Section 26BCC(5) creates two exceptions. The first is an exception to the strict liability offences where safety of life at sea is endangered. Only those present during a particular incident are able to make an assessment as to what is necessary to ensure the safety of life at sea, and the master of the ship is charged with the responsibility for making this judgement. As the master of the ship is also subject to the direction of the shipowner, evidence from both parties, only knowable to those parties, may explain the assessments made at the time.

The second exception requires evidence to be presented about the precautions taken throughout a voyage to minimise damage and the decision about the need to discharge sewage. Again, the circumstances surrounding a particular incident, the precautions needed to address that situation, and the assessment undertaken in making a decision, can only be known by those present (specifically the master of the ship). As the master of the ship is also subject to the direction of the shipowner, evidence from both parties, only knowable to those parties, may explain the assessments made at the time.

Section 26BCC(6) creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the speed of the ship when the discharge occurs. Section 26BCC(7) also creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the physical nature of the discharge when the discharge occurs. Section 26BCC(8) creates an exception requiring evidence to be presented about the nature of the sewage discharged. Section 26BCC(9) creates an exception requiring evidence to be presented about the location of the discharge. The matters described in each of these exceptions is knowable only by those present and charged with decision making responsibilities, being the master of the ship in control of the ship at the time, subject to the direction of the shipowner.

The burden of proof is placed on the defendant in all of the above provisions because the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused and the defendants are

> best placed to give evidence as to their decision making at the time when a discharge occurs. This appears to be a situation in which the relevant facts are likely to be within the knowledge of the defendant, and in which it could be difficult for the prosecution to prove the defendant's state of mind. The Senate Standing Committee for the Scrutiny of Bills has previously indicated that the burden of proof may be imposed on a defendant under these circumstances. In my view, this approach is also consistent with 4.3.1 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.
>
> Given the above, I consider it to be appropriate in this instance for the Bill to include the offence-specific defences.

Committee comment

2.187 The committee thanks the Minister for this response. The committee notes the Minister's advice that the defendant is the person most likely to have relevant knowledge of the relevant facts, with much of the requisite information only knowable by those present and charged with decision making responsibilities, being the master of the ship in control of the ship at the time, subject to the direction of the shipowner, and therefore are matters peculiarly within the knowledge of the defendant.

2.188 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*).

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

Treasury Laws Amendment (2017 Measures No. 1) Bill 2017

Purpose	This bill seeks to various Acts in relation to taxation to: • make minor technical changes to the income tax law in relation to the National Innovation and Science Agenda measures; and • allow the Australian Securities and Investments Commission (ASIC) to more readily share confidential information with the Commissioner of Taxation
Portfolio	Treasury
Introduced	House of Representatives on 16 February 2017
Bill status	Received Royal Assent on 4 April 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

2.190 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2017*. The Minister responded to the committee's comments in a letter dated 6 April 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.

Privacy[58]

Initial scrutiny – extract

2.191 Item 1 of Schedule 2 proposes adding to subsection 127(2A) of the *Australian Securities and Investment Commission Act 2001*, the power for ASIC to share confidential information with the Commissioner of Taxation. Currently, section 127 requires ASIC to take all reasonable measures to protect from unauthorised use or disclosure, information given to it in confidence or that is protected information. The explanatory memorandum states that currently the confidential information cannot be shared unless the Chairperson, or their delegate, is satisfied that the information will enable or assist the Commissioner of Taxation to perform or exercise their functions or powers.[59] The proposed amendments would mean that ASIC would be authorised to share the confidential information with the Commissioner of Taxation, without the need to consider whether the sharing of such information is necessary.

58 Schedule 2, item 1.

59 Explanatory memorandum p. 16.

2.192 The explanatory memorandum states that these changes provide a simpler process for ASIC to share information with the Commissioner of Taxation (mirroring other existing information sharing provisions) and will enable 'more timely collaboration during investigations into illegal or high risk activities' and enable both ASIC and the Commissioner of Taxation to 'ensure compliance with laws and identify patterns of non-compliance'.[60] Likewise the statement of compatibility states that the amendment will streamline the process and is a 'more efficient mechanism' for sharing confidential information and that the information shared will 'remain subject to strict confidential protections'.[61]

2.193 The committee notes that the current law merely requires consideration be given before confidential information is shared that the information will enable or assist the Commissioner of Taxation to perform or exercise their functions or powers. The current approach would appear to allow for the sharing of confidential information in fairly broad terms. It is unclear, based on the explanatory material, how the current law is inefficient and not sufficiently simple.

2.194 The committee considers that enabling all confidential information held by ASIC to be shared with the Commissioner of Taxation, without any need to consider the purpose for the sharing of that information, raises privacy scrutiny concerns.

2.195 The committee requests the Minister's advice as to the steps that must currently be undertaken by ASIC before confidential information is shared with the Commissioner of Taxation (and the specific subsection of the *Australian Securities and Investment Commission Act 2001* which currently provides for this).

Minister's response

2.196 The Minister advised:

> Currently, the Australian Securities and Investments Commission (ASIC) can share confidential information with the Commissioner of Taxation (ATO) on an ad hoc basis. Subsection 127(4) of the *Australian Securities and Investments Commission Act 2001* requires the ASIC Chairperson, or their delegate, to be satisfied that sharing particular information would enable or assist the ATO to perform or exercise its functions or powers.
>
> The amendment in Schedule 2 of the Bill streamlines the process for sharing confidential information by removing the need for the ASIC Chairperson, or their delegate, to be personally involved in the process. This aligns with the arrangements in place with the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the responsible Minister.

60 Explanatory memorandum, p. 17.

61 Explanatory memorandum, statement of compatibility, pp 18-19.

> A key benefit of the change is that it will support improved machine-to-machine data matching and sharing. I also note that the Office of the Australian Information Commissioner was consulted on the measure and raised no objections.

Committee comment

2.197 The committee thanks the Minister for this response. The committee notes the Minister's advice that currently the ASIC Chairperson or their delegate needs to be satisfied that sharing particular information would enable or assist the ATO to perform or exercise its functions or powers, and the amendment would remove the need for the Chairperson or delegate to be personally involved in this process. The committee also notes the advice that the change will support improved machine-to-machine data matching and sharing.

2.198 The committee notes that the law as it was before this bill passed already allowed for the sharing of confidential information on a fairly broad basis. It considers that privacy concerns are raised by removing the need for the Chairperson or delegate to consider whether the sharing of such information is necessary. The committee considers these scrutiny concerns are heightened by enabling personal confidential information to be shared in a manner that enables data matching and sharing.

2.199 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

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 45th Parliament since the previous Scrutiny Digest was tabled:

Parliamentary Business Resources Bill 2017 — Part 7, clause 59

Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017 — Schedule 4, Part 2, item 7

Other relevant appropriation clauses in bills

Nil

Senator Helen Polley
Chair

Appendix 1
Ministerial responsiveness

Responsiveness to requests for further information

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

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

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

Ministerial responsiveness from 1 January 2017

Bill	Portfolio	Correspondence	
		Due	Received
Agriculture and Water Resources Legislation Amendment Bill 2016	Agriculture and Water Resources	22/02/17	17/02/17
Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017	Agriculture and Water Resources	06/04/17	27/03/17
Civil Law and Justice Legislation Amendment Bill 2017	Attorney-General	19/04/17	05/05/17
Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016	Justice	24/02/17*	24/02/17
Further response			
Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016	Attorney-General	15/12/16	16/02/17
Further response			
Customs and Other Legislation Amendment Bill 2016	Immigration and Border Protection	02/03/17	03/03/17
Customs Tariff Amendment Bill 2016	Immigration and Border Protection	23/02/17	02/03/17
Education and Other Legislation Amendment Bill (No. 1) 2017	Education and Training	06/04/17	08/05/17+

Bill	Portfolio	Correspondence	
		Due	Received
Fairer Paid Parental Leave Bill 2016	Social Services	01/02/17*	14/02/17
Fair Work Amendment (Corrupting Benefits) Bill 2017	Employment	19/04/17	24/04/17
Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017	Employment	06/04/17	02/05/17
Human Rights Legislation Amendment Bill 2017	Attorney-General	19/04/17	24/04/17+
Independent Parliamentary Expenses Authority Bill 2017	Finance	02/03/17	16/02/17+
Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016	Immigration and Border Protection	02/03/17*	03/03/17
Further response		10/04/17*	02/05/17
Native Title Amendment (Indigenous Land Use Agreements) Bill 2017	Attorney-General	06/04/17	29/03/17
Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017	Infrastructure and Transport	06/04/17	29/03/17
Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017	Social Services	02/03/17	02/03/17
Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017	Education and Training	07/03/17*	07/03/17
Therapeutic Good Amendment (2016 Measures No. 1) Bill 2016	Health and Aged Care	23/02/17	02/03/17
Treasury Laws Amendment (2016 Measures No. 1) 2016	Treasury	23/02/17	08/03/17
Treasury Laws Amendment (2017 Measures No. 1) Bill 2017	Treasury	06/04/17	10/04/17+
Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017	Treasury	10/03/17*	06/03/17

Bill	Portfolio	Correspondence	
		Due	Received
VET Student Loans Bill 2016 *[amendment section]*	Education and Training	23/02/17	01/03/17
Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016	Veterans' Affairs	15/12/16	12/12/16

* *Revised due date*

\+ *Response received after the bill had passed*

Members/Senators responsiveness from 1 January 2017

Bill	Member or Senator	Correspondence
		Received
Air Services Amendment Bill 2016	Mr Adam Bandt MP	15/03/17
Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017	Senator Jacqui Lambie	16/03/17

Appendix 2
Ministerial and other correspondence

ATTORNEY-GENERAL

CANBERRA

0 4 MAY 2017

MC17-003276

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

Dear Chair

I am writing in response to the letter from the Acting Committee Secretary of the Senate Scrutiny of Bills Committee, Ms Anita Coles, dated 30 March 2017. The letter seeks information about the Civil Law and Justice Legislation Amendment Bill 2017.

Broad delegation of administrative powers

I note that the Committee is concerned about the broad delegation of administrative powers by the proposed new sections 122A and 122AA of the *Family Law Act 1975.* Specifically, my advice is requested as to:

> *"...the appropriateness of enabling any APS employee within the Department of Immigration and Border Protection [DIBP] to exercise coercive powers and whether the bill can be amended to require a certain level of relevant training be undertaken by those APS employees authorised to exercise these coercive powers".*

As you are aware, under the Family Law Act, where the court authorises any person to arrest another person, existing sections 122AA and 122A provide the authorised person with powers related to the use of reasonable force in making the arrest, and powers of entry and search for the purposes of arresting persons. These existing provisions apply to any person authorised by the Act, or by a warrant issued under a provision of the Act, to arrest another person.

The proposed new sections 122A and 122AA would, as well as modernising these arrest powers, narrow the classes of people who would be authorised to use reasonable force and the powers of entry and search for the purpose of arresting a person. Consultations with stakeholders confirmed the importance of retaining the ability for officers of the Australian Border Force (ABF) (which forms part of DIBP) to be authorised to use force and exercise powers of entry and search under these provisions. Maintaining these powers with ABF officers would be of particular utility in preventing international parental child abductions.

The current formulation, which refers to "an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*", would include ABF officers.

This is not a change in policy position in relation to DIBP officers. Under the existing legislation, when authorised to make an arrest by the Family Law Act, a DIBP officer may exercise the existing powers relating to use of force and entry and search. APS employees of DIBP also have other arrest powers under other legislation. While ABF officers are only a subset of the APS employees of DIBP, the Government intends to discuss with the courts practical measures (such as design of the court's precedent warrant) that could assist in limiting warrants so that they would only be addressed to ABF officers rather than all DIBP staff.

Ms Coles has also noted that the Committee expects the person authorised to use such powers should have received appropriate training. As mentioned, the power of arrest, in practical terms, would only be exercised by officers in the ABF.

Specific training in relation to the power and its limitations would be provided to those who are authorised to exercise it. Powers of arrest are already covered in a number of ABF operational training courses, with training comprising face-to-face learning with legal officers on the parameters surrounding the use of the power, discussions with experienced ABF officers who have used these powers, and practical scenarios to assess an officer's understanding of the use of the power in an operational ABF context.

The potential officers who may be authorised to execute arrests must do so under prescribed conditions. The framework attached to this power, found in proposed new section 122A, includes limits on entering premises, use of force and how the arrest must take place.

Retrospective application of amendments

The Committee has also requested that I provide advice on the potential retrospective application of the amendments to section 8 of the *International Arbitration Act 1974*. Specifically, my advice is requested as to:

> *"...why it is proposed to apply the amendments to section 8 of the* International Arbitration Act 1974 *to arbitral proceedings that commence before the commencement of this item to the bill, and whether it is possible that any party to such proceedings may suffer any detriment due to this retrospective application".*

Arbitral proceedings are distinct from enforcement proceedings. Arbitration is a consensual dispute resolution mechanism by contractual agreement. It is binding upon the parties to a dispute to adhere to the award or final decision of the arbitral tribunal. This means that if the unsuccessful party in the arbitration (award debtor) does not voluntarily meet its contractual obligation to comply with the terms of the award, the successful party (award creditor) may need to commence proceedings, known as enforcement proceedings, seeking orders from a court to enforce the award.

This Bill would simplify the procedure for applying to a court for enforcement of an arbitral award. The application provision in question refers to arbitral proceedings commenced prior to commencement of the Bill. It does not refer to enforcement proceedings commenced prior to the commencement of the Bill. This wording was chosen to make it clear that the simplified procedure would be available in all enforcement proceedings commenced after commencement of the Bill, even where the related arbitral proceedings had commenced prior to the Bill. Proceedings for the enforcement of an existing award sometimes occur shortly after the conclusion of the arbitration, but may also be delayed by many years. Accordingly,

for the benefit of the procedural reform to be realised it is important that they be available in enforcement proceedings which commence after the commencement of the Bill, but which may relate to arbitral proceedings commenced prior to the Bill's commencement.

This effect is not a retrospective application of law. The substantive rights of the parties which are determined by the arbitral tribunal and expressed in the arbitral award would not be impacted by this Bill. The Bill would only alter procedural aspects of enforcement proceedings which commence after the Bill, which would only come into existence once the enforcement proceedings are commenced.

To be clear, enforcement proceedings which commence prior to the commencement of the Bill would be run according to the procedural requirements of the Act in its current form. The amended provisions would not apply to enforcement proceedings which commence prior to the Bill but continue after its commencement.

I trust this additional information is of assistance.

Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC17-001359

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

Dear ~~Senator~~ Helen,

I am writing in response to the letter of 23 March 2017 received from Ms Anita Coles, Acting Committee Secretary, which contained comments from the Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest No. 3 of 2017, concerning the Education and Other Legislation Amendment Bill (No .1) 2017 (the Bill).

The Committee was seeking a response in relation to three provisions contained in the Bill for consideration while the Bill was still before Parliament. As you would be aware, the Bill was considered non-controversial, meaning it was debated in both houses of Parliament and successfully passed before a formal response could be provided to the Committee.

My response to the Committee's comments is enclosed.

I thank the Committee for raising these issues and providing me with the opportunity to respond.

Simon Birmingham

Encl. 8 MAY 2017

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7350

Response to Senate Scrutiny of Bills Committee, Digest No. 3 of 2017

Education and Other Legislation Amendment Bill (No 1.) 2017

Background

The standing committee for the Scrutiny of Bills has made comments on the Education and Other Legislation Amendment Bill (No. 1) 2017 (the Bill) in its Scrutiny Digest No. 3 of 2017. These comments mainly relate to the justifications of including some powers already contained in the *Ombudsman Act 1976* (Ombudsman Act).

A number of existing provisions under the Ombudsman Act were included into the Bill to take advantage of already established powers the Commonwealth Ombudsman possesses. This is important especially in consideration to the Committee's first two comments as the Bill does not create any new powers, rather it relies on already existing provisions.

The VET Student Loans Ombudsman is being established due to the widespread unscrupulous behaviour that occurred under the VET FEE-HELP scheme, particularly in relation to student recruitment practices. This unscrupulous behaviour by some providers and their agents led to students being signed up to debts that they were not aware existed and to courses that they had no prospect of completing. The VET Student Loans Ombudsman will investigate VET Student Loans and VET FEE-HELP student complaints and provide recommendations.

Throughout the Parliamentary debate, all sides of Parliament commented on the need to ensure the Bill contained strong powers for the VET Student Loans Ombudsman and the Department of Education and Training to rely on to achieve positive outcomes for students. This is particularly necessary given the imbalance of power between vulnerable students and the training providers about whom the complaints will be made.

1. Privilege against self-incrimination

The committee therefore requests the Minister's advice as to why it is proposed to abrogate the privilege against self-incrimination, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

- The power requiring a person to produce a document or answer a question when required by the VET Student Loans Ombudsman was included under the already existing subsection 9(4) of the Ombudsman Act. I am advised that the abrogation of the privilege against self-incrimination when required to provide information to the Ombudsman has been a feature of the Ombudsman Act since 1976.

- According to the Attorney-General Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide), the privilege against self-incrimination may be overridden by legislation where there is a clear justification for doing so.[1]

- As indicated in the background information above, any justification for inclusion of this provision should be considered in light of the context of the behaviour that resulted in negative outcomes for vulnerable students which occurred under the previous VET FEE-HELP scheme. The justification for overriding the privilege includes:

[1] Attorney-General's Department, Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011, p 95.

- Vulnerable students were signed up to significant debts (tens of thousands of dollars) which have not only imposed a significant financial burden on these students but also a heavy emotional toll on them whilst they try to seek redress.
- A number of providers and their agents engaged in false and misleading behaviour highlighted in the Guide as one of the three main circumstances in which the privilege against self-incrimination does not apply. The behaviour included enrolling many students by indicating they would not incur a debt.
- The collection of all relevant information relating to a student's debt is a necessary process in order for the VET Student Loans Ombudsman to make an assessment which leads to a recommendation about the complaint, and the VET Student Loans Ombudsman will be a key mechanism offering redress for a large number of these students.
- It is also important that paragraph 9(4)(aa) be read in the context of the whole of section 9, which provides significant protections to a person who provides information to the Ombudsman that might tend to incriminate that person. The rest of subsection 9(4) states that any such information is not admissible in evidence against the person. Furthermore, all information, including information that might tend to incriminate a person, is collected in private (section 8) and is subject to strict confidentiality provisions (section 35). Due to subsection 35(8), Ombudsman staff also cannot be compelled by a court to provide any information, including information that might tend to incriminate a person.

2. Reversal of evidential burden of proof

The committee requests the Minister's advice as to why it is proposed to use offence specific defences (which reverse the evidential burden of proof) in this instance (noting the explanatory materials do not directly address this issue).

It is also noted the committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

- The inclusion of section 36 of the Ombudsman Act strengthens this Bill by making it a criminal offence where a person refuses or fails to do the following when required to do so in pursuance of the Ombudsman Act:
  - to attend before the VET Student Loans Ombudsman
  - to be sworn or make an affirmation
  - to furnish or publish information
  - to answer a question or produce a document or record
  - to give a report.

- As per subsection 36(2A) of the Ombudsman Act, a person does not commit the offence if the person has a reasonable excuse. This subsection was inserted in 2001, when section 36 of the Ombudsman Act was amended to clarify the elements of the offence as a consequence of the enactment of the *Criminal Code Act 1995*. As the Committee notes, subsection 36(2A) imposes an evidential burden on the defendant to establish the reasonable excuse.

- According to the Guide, the reversal of evidential burden of proofs may be appropriate in certain circumstances. This includes where the facts in relation to the defence might be said to be

peculiarly within the knowledge of the defendant, or where proof by the prosecution of a particular matter would be extremely difficult whereas it could be readily provided by the accused.[2]

- Consistent with the treatment of reasonable excuse defences in Commonwealth law generally, as the grounds on which any claim of reasonable excuse would be made are within the knowledge of the defendant – for example, that documents requested do not exist or have been destroyed, or that a person required to attend cannot because of illness – it is appropriate that the defendant establish these matters. Further the scope of possible reasonable excuses is very broad, and it would be a practical impossibility for the prosecution to establish the absence of every possible reasonable excuse.

3. Broad delegation of administrative powers

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

- **why it is considered necessary to allow for the delegation of almost all of the Ombudsman's powers to any person (including significant powers such as the power to examine witnesses and the power to enter premises) and whether the bill can be amended to provide further legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.**

- The Ombudsman Act currently allows the Ombudsman to delegate to a person all or his or her powers under the Act with some exceptions (refer to section 34). The exceptions generally relate to reports of the Ombudsman.

- Similarly, subsections 34(2) to (2B) of the Ombudsman Act also allow the Defence Force Ombudsman, the Overseas Students Ombudsman and the Postal Industry Ombudsman powers to delegate all of their powers under the Act to a person, with some exceptions.

- Subsection 34(4) of the Bill similarly gives the VET Student Loans Ombudsman the same powers to delegate to a person generally any or all of his or her powers under the Ombudsman Act with exceptions.

- I note the Committee's specific concerns about the delegation of powers relating to examining witnesses (section 13) and entering premises (section 14). Other Ombudsmen under the Act have retained the power to delegate the provisions under sections 13 and 14. Therefore the proposed amendments to the Ombudsman Act are consistent with these other subsections allowing the VET Student Loans Ombudsman these same powers.

- The broad intent of this section is included to allow for the occasions where the Commonwealth Ombudsman might need or prefer to use an external investigation service. The external investigation service may be required due to a conflict of interest or some other sensitivity that cannot be resolved in another way; the need for some very specialist skills; or perhaps because of a joint investigation with some other body. One example of this is Australian Federal Police (AFP) investigations, where section 8(12) of the Ombudsman Act requires the Commonwealth Ombudsman to use an AFP appointee with police training to assist if that would be necessary or desirable. There is also scope for joint investigations with the AFP under s 8D of the Ombudsman Act. If either of these were to occur, it might be preferable to delegate Ombudsman Act powers to the AFP investigator.

[2] Attorney-General's Department, Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011, p 51.

- Section 35 of the Ombudsman Act, states that once a person is delegated powers, they become an 'officer' for the purposes of the Act, and are subject to all the safeguards and controls that follow, such as confidentiality provisions.

Senator the Hon Michaelia Cash

Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB17-003330

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

Dear Chair

Fair Work Amendment (Corrupting Benefits) Bill 2017

This letter is in response to the letter of 30 March 2017 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning issues raised in the Committee's *Scrutiny Digest No. 4 of 2017* in relation to the Fair Work Amendment (Corrupting Benefits) Bill 2017 (the Bill).

The Australian Government made an election commitment to adopt the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission), led by Commissioner John Dyson Heydon AC QC. The Bill responds to Recommendations 40, 41 and 48 of the Royal Commission.

The Royal Commission indicated that the payment of corrupting benefits increases the cost of doing business and is anti-competitive. These payments 'corrupt' union officials by causing them to perform their duties, powers or functions improperly and unlawfully. This in turn reinforces a culture of lawlessness amongst unions which can adversely impact the broader Australian society (Final Report, Volume 5, pp 244-5). The Royal Commission found that the criminal laws dealing with secret commissions differ across state and territory jurisdictions and are difficult to apply to officers of registered organisations (Final Report, Volume 5, p 256).

In addition, the Royal Commission noted that the income derived from the terms of enterprise agreements creates an actual or potential conflict of interest and can lead to a breach of a union official's fiduciary duties (Final Report, Volume 5, p 330). The Royal Commission noted that disclosure is a basic first step to avoid such conflicts of interest (Final Report, Volume 5, p 336).

For these reasons, the Government considers the Bill should be progressed through the Parliament as a matter of the highest priority.

A detailed response to each of the issues raised in your correspondence with my office is at Attachment A.
I trust the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash
/ / 2017

Encl.

Attachment A

Detailed response to issues raised in *Scrutiny Digest No. 4 of 2017* in relation to the Fair Work Amendment (Corrupting Benefits) Bill 2017

Right not to be tried or punished twice (double jeopardy)

The Committee has sought advice as to whether proposed section 536C of the Bill would have the effect of limiting an individual's right not to be tried or punished for the same offence (and in particular whether there are State or Territory laws that provide for the same or substantially the same offences as those contained in the bill).

As noted in the covering letter, while there are criminal laws at the state and territory level dealing with secret commissions, they differ across the jurisdictions and are difficult to apply to officers of registered organisations.

Proposed section 536C is a standard concurrent operation clause that is used to indicate Parliament's intention that the Commonwealth law should not operate to the exclusion of State or Territory law to the extent that the laws are capable of operating concurrently. It is necessary to ensure that section 109 of the Constitution does not operate to invalidate the state laws. While section 109 of the Constitution does not apply to territory laws, similar principles apply in relation to the inconsistency or repugnancy of territory laws with Commonwealth laws.

Subsection 4C(2) of the *Crimes Act 1914* (Cth) (Crimes Act) guarantees that a person cannot be punished for the same conduct under both a State or Territory law and the offences provided for in proposed Part 3-7 of the Bill. Section 536C does not displace or otherwise affect the operation of subsection 4C(2) of the Crimes Act.

Reversal of evidential burden of proof

The Committee has sought advice as to why it is appropriate to use offence-specific defences (which reverse the evidential onus of proof) in each instance in paragraph in subsection 536F(3).

Proposed section 536F makes it an offence for a national system employer (the defendant) to give a cash or in kind payment to an employee organisation or its prohibited beneficiaries in certain circumstances. There are a number of exceptions to this offence for legitimate payments (proposed subsection 536F(3)) and the defendant bears the evidential burden to point to evidence that suggest a reasonable possibility that one of the exceptions applies to the payment.

The Committee's attention is drawn to the fact that the imposition of an evidential burden does not impose a legal burden of proof upon the defendant and is consistent with the common law and the *Criminal Code Act 1995* (Cth) (Criminal Code), which codifies the common law on this and other points. When a defendant wishes to take advantage of a defence it is always the case at common law and under the Criminal Code that the defendant has the burden of adducing or pointing to some evidence that suggests a reasonable possibility that the matter exists or does not exist. When the defendant discharges this burden, the prosecution then has the legal burden of proof to disprove the matter beyond a reasonable doubt.

The Committee is also concerned that the Explanatory Memorandum to the Bill does not adequately address the issue of why the exceptions in proposed subsection 536F(3) are peculiarly within the defendant's knowledge and why it would be significantly more difficult for the prosecution to disprove. I make the following observations in relation to each exception:

- Paragraph (a) refers to deductions from wages made for the purpose of paying an employee's membership fee for an employee organisation. While the prosecution will be able to establish that the payment was made, it will not readily be able to establish that it was not made for the permitted purpose. The purpose of the payment is peculiarly within the knowledge of a limited number of people such as the defendant, the employee and the employee organisation. A defendant relying upon paragraph (a) can easily adduce evidence to discharge the burden, simply by establishing a correlation between the wage deduction and the membership fees due.

- Paragraph (b) refers to benefits provided and used for the sole or dominant purpose of benefiting the defendant's employees. Ordinarily the purpose of a benefit is a matter peculiarly within the knowledge of the persons who give and receive it, and not the prosecution. It is appropriate for the prosecution to bear the burden of adducing evidence as to the fact of a benefit, but not as to the absence of a permitted purpose. Instead, it is appropriate for the defendant to point to evidence to suggest a reasonable possibility that the payment was made for the purpose that paragraph (b) permits.
- Paragraph (c) refers to deductible gifts or contributions. The question whether a gift or contribution is deductible is ordinarily determined by looking at the nature and purpose of the gift or contribution tested against often complex provisions of the income tax legislation. A defendant who makes a deductible gift or contribution can adduce evidence as to the deductibility easily and cheaply as they would have been required to do so to establish deductibility for taxation purposes. By contrast, the prosecution will often have no way of knowing what the nature or purpose of a payment was, let alone whether it was intended to, and did in fact, meet the criteria for deductibility under income tax legislation.
- Paragraph (d) refers to market value payments for goods or services provided by an employee organisation to a defendant. Once again, the prosecution will be able to adduce evidence as to the fact of a payment, but the question of the payment's purpose, as well as the question of whether it was for market value, are likely to be peculiarly within the knowledge of the defendant and the employee organisation. A defendant relying on paragraph (d) should be able to easily adduce evidence to demonstrate that the goods or services were actually received and paid for at market value.
- Paragraph (e) refers to payments made under the authority of law. If a defendant asserts that an otherwise unlawful payment is made pursuant to lawful authority, which the prosecution will ordinarily have no way of knowing, it is appropriate for the defendant to be required to adduce evidence to that effect.
- Payments to which paragraph (f) refers to benefits provided in accordance with an order, judgement or award of a court or tribunal. Similar to paragraph (e) above, the prosecution will not necessarily have any way of knowing of the existence or otherwise of a relevant court or tribunal order, judgment or award in relation to a payment. On the other hand, evidence of such an order, judgment or award will be readily available for the defendant to adduce as evidence.

Strict liability offences

The Committee has sought advice as to how each element of the offences in proposed sections 536F and 536G to which strict liability applies are jurisdictional in nature.

As outlined above, section 536F makes it an offence for a national system employer (the defendant) to give cash or an in kind payment to an employee organisation or its prohibited beneficiaries in certain circumstances. Proposed section 536G provides that a person who receives or solicits a corrupting benefit will also commit an offence in circumstances where an offence against section 536F would be made out.

These offence provisions follow very closely the draft provisions Commissioner Heydon set out in Volume 5 of the Royal Commission's Final Report, including the elements of strict liability.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) published by the Attorney-General's Department, states that elements of offences that provide for strict liability can be justified by virtue of being jurisdictional in nature and/or are necessary to provide the required deterrent effect.

As identified by the Committee, strict liability applies to proposed paragraphs 536F(1)(a),(c) and (d) and 536G(1)(c). Strict liability offences remove the requirement to prove fault (ie. no mental element is required).

Paragraph 536F(1)(a) limits the offence to the defendant being a national system employer who is not an employee organisation. As explained in the Explanatory Memorandum, this element is jurisdictional in nature, in that it attaches the offence to the relevant Commonwealth head of power to legislate.

Paragraphs 536F(1)(c) and (d) limit the offence to circumstances where the recipient of a payment is an employee organisation or associate, and the defendant or associated person employs a member of that organisation. In broad terms, section 536F is prohibiting certain kinds of payments by employers to employee associations. It would not be appropriate to apply a fault element to the physical elements of the offence in paragraphs 536F(1)(c) and (d). A defendant national system employer should have sufficiently robust internal governance and accounting mechanisms in place so as to ensure that they are aware of whether the recipient of a payment is a person to whom the circumstances in sections 536F(1)(c) and (d) apply.

While the Explanatory Memorandum states that the elements of the relevant offences attracting strict liability are jurisdictional in nature, the additional justification for these elements is the requisite deterrent effect as provided for in the Guide.

Applying a fault element, whether intention, knowledge, recklessness or negligence, would substantially weaken both the deterrent effect of section 536F and the legitimate policy imperative of ensuring that national system employers take sufficient care to ensure that illegitimate payments are not made to employee organisations or their associates. The defence of reasonable mistake of fact will still be available and provides an appropriate excuse for a national system employer who acts under a mistaken but reasonable belief as to the identity of the recipient of a particular payment.

Similarly, the justification for making the whole of the element in paragraph 536G(1)(c) subject to strict liability is that an employee organisation and its officers should properly be aware of the circumstances in which the payment by an employer would be an offence under section 536G. As with section 536F, applying a fault element, whether intention, knowledge, recklessness or negligence, to the offence would substantially weaken both the deterrent effect of section 536G and the legitimate policy imperative of ensuring that employee organisations take sufficient care not to solicit payments from national system employers that would contravene section 536F. Again, the defence of reasonable mistake of fact will be available.

Significant matters in delegated legislation

The Committee has requested advice as to why it was considered necessary and appropriate to leave elements of the offence and civil remedy provisions contained in the Bill to delegated legislation. The Committee has also requested advice on the type of consultation that will be undertaken prior to the making of any such regulations.

As identified by the Committee, the Bill contains a number of regulation making powers. Given the potential for new arrangements to arise that are not currently contemplated by the Bill, I consider it both necessary and appropriate to include regulation making powers to allow the Government to deal with these circumstances. For example, the regulation making power could be utilised to ensure that any new form of legitimate payments that may be made by an employer to a union is excluded under proposed subsection 536F(3).

The Government does not consider that it is necessary or desirable to include additional consultation requirements in the Bill and notes that any regulations made would be subject to tabling and disallowance requirements and to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

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

Reference: MB17-003327

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

Dear Chair

Standing Committee for the Scrutiny of Bills - Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

This letter is in response to the letter from the Standing Committee for the Scrutiny of Bills of 23 March 2017 concerning the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. You have sought my advice about issues raised in the Senate Scrutiny of Bills Committee's *Scrutiny Digest No. 3 of 2017*.

In particular you asked why it is proposed to place an evidential burden on a person seeking to rely on the exception in proposed paragraph 707A(2)(b) (that is, where the person was not shown the inspector's identity card or told about the effect of the section).

A detailed response to this question is attached to this letter.

Yours sincerely

Senator the Hon Michaelia Cash
2 / 5 / 2017

Encl.

ATTACHMENT

Trespass on personal rights and liberties - Reversal of the evidential burden of proof
Paragraph 707A(2)(b)

The Committee asks 'why it is proposed to place an evidential burden on a person seeking to rely on the exception in proposed paragraph 707A(2)(b) (i.e. where the person was not shown the inspector's identity card or told about the effect of the section').

Response:
Consistent with general legislative policy, the respondent must raise evidence if they wish to claim a 'reasonable excuse', whether under proposed paragraph 707A(2)(a) or (b). See for example the *Work Health and Safety Act 2011*, s 188; *Navigation Act 2012*, s 321; *Fisheries Management Act 1991*, s 108(1)(f); *Aviation Transport Security Act 2004*, s 79(5), (6); *Biosecurity Act 2015*, s 440.

Proposed paragraph 702A(2)(b) is different from these schemes as it gives a very specific example of a reasonable excuse. It is intended to be a beneficial provision which clarifies that a person has a reasonable excuse for hindering or obstructing a Fair Work Inspector if they did not see their identity card, and were not advised about the consequences of contravening the section. (Please note that identity card requirements only apply to Fair Work Inspectors while exercising their power to enter premises under the *Fair Work Act 2009* (Fair Work Act)).

The provision simply emphasises an important reasonable excuse which may be available to a person facing proceedings for hindering or obstructing a Fair Work Inspector. Like any other reasonable excuse, the respondent has the evidential burden.

The provision does not unduly trespass on personal rights and liberties for these reasons and because:

- In any proceedings brought under proposed section 707A the applicant would need to prove the Inspector had been lawfully exercising their powers at the time, including by proving the Inspector had properly identified themselves upon entry by showing their identity card (s 708(3)).
- The applicant must still disprove the matters on the balance of probabilities if the respondent discharges the evidential burden.
- The maximum penalty is a civil penalty of 60 penalty units for individuals, and there is no possibility of imprisonment.

ATTORNEY-GENERAL

CANBERRA

MS17-001019

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

Dear Chair

I am writing in response to the letter from the Acting Committee Secretary of the Senate Scrutiny of Bills Committee, Ms Anita Coles, dated 30 March 2017. The letter refers to the Committee's *Scrutiny Digest No. 4 of 2017* and seeks my advice on a number of identified issues related to the Human Rights Legislation Amendment Bill 2017.

The Human Rights Legislation Amendment Bill 2017 passed both Houses on 31 March 2017. The Bill amends the *Australian Human Rights Commission Act 1986* (the Act) to reform the complaints handling processes of the Australian Human Rights Commission (the Commission). The Bill makes two sets of amendments; amendments in response to recommendations of the Parliamentary Joint Committee on Human Rights' *Freedom of Speech in Australia* report, and amendments requested by the Commission. The amendments requested by the Commission reduce its regulatory and administrative burden, reform reporting requirements and clarify the Commission's conciliation process and governance arrangements.

The Committee has sought my further advice regarding:

- the removal of the requirement to table human rights and equal opportunity in employment reports provided to the Minister; and
- the strict liability offence for failure to attend a compulsory conciliation conference.

Both of these amendments were requested by the Commission itself. In response to the issues raised in the Committee's *Scrutiny Digest No.4 of 2017*, my advice is set out below.

Tabling of human rights and equal opportunity in employment reports

As noted by the Committee, Item 17 of Schedule 2 of the Bill provides that discretionary reports furnished by the Commission to the Minister in relation to human rights and equal opportunity in employment inquiries are not required to be tabled. This amendment was requested by the President of the Commission, Professor Gillian Triggs.

Under the Act as it currently stands, the Commission is required to provide a report to the Minister in situations where the Commission found that an act or practice constitutes a breach of human rights, or constituted discrimination in employment, and attempting to settle the matter was not appropriate or was unsuccessful. This results in a situation whereby reports which did not raise significant issues were required to be tabled in Parliament.

This amendment maintains the requirement for major and systemic reports produced by the Commission to be tabled in Parliament, such as reports about actions that must be taken by Australia to comply with its international obligations, or reports which examine the consistency of Australian laws with human rights.

Discretionary reports which relate solely to individual circumstances, and not broader issues, are not required to be tabled. Discretionary reports provided to the Minister in relation to human rights or equal opportunity in employment inquiries will be made publically available. As noted in the Explanatory Memorandum, as is current practice, reports will be published on the Commission's website and hard copies will be available. The Commission's website is public-facing and accessible, with the Commission reporting over 4.7 million website views in 2015-16.

Strict liability offence

Item 49 of Schedule 2 of the Bill applies the current provisions in sections 46PJ and 46PK in the Act, which regulate the exercise of compulsory conciliation conferences by the Commission, to both voluntary and compulsory conciliation conferences. This amendment was requested by the President of the Commission, Professor Gillian Triggs. New subsections 46PJ(5) and (6) provide for a strict liability offence for failure to comply with a notice from the Commission requiring attendance at a compulsory conciliation conference.

It is my view that the strict liability offence in proposed section 46PJ is appropriate and consistent with the *Guide to Framing Commonwealth Offences* (the Guide).

As noted by the Committee, this amendment does not create a new offence but transfers the current strict liability offence from section 46PL of the Act into the new section 46PJ. There are legitimate grounds for penalising persons lacking fault in these circumstances. The Commission rarely conducts compulsory conciliation conferences, and would do so only in the most serious of cases, after a failure of voluntary conciliation. An individual must be provided with a written notice outlining their obligations to appear and that individual is entitled to a reasonable sum for the expenses of attendance. In these circumstances, an individual is placed on notice to guard against the possibility of any contravention, and is supported by the Commonwealth to comply with the requirement to attend the conference.

As noted in the Guide, strict liability is only appropriate where the offence is punishable by a fine of up to 60 penalty units. The offence under subsection 46PJ(5) carries the relatively low penalty of 10 penalty units.

The amendments to the current strict liability offence under section 46PL of the Act, as noted by the Committee, bring the offence into line with the Guide by removing the defence of no reasonable excuse. As stated at paragraph 4.3.3 of the Guide, the defence of 'reasonable excuse' should be generally avoided. This is because the defence is too open-ended, and the conduct intended to be covered may also be covered by the defences of general application in the *Criminal Code Act 1995* (the Criminal Code).

Although in the opinion of the Committee, the general defences under the Criminal Code may be limited, the scope of these defences is appropriate in this context. The general Criminal Code defences would exempt an individual from liability for the majority of situations in which they did not comply with a notice to attend, but had intended to do so. For example, if the person did not attend because they had not received the notice or external circumstances had prevented the individual from attending.

The ability of the President (or other person presiding) to excuse or release a person from further attendance at a compulsory conference only applied to a failure to attend *and report from day to day* under former paragraph 46PL(1)(b) of the Act. The excuse provision did not apply in relation to former paragraph 46PL(1)(a) of the Act. As the offence in Item 49 does not include a 'report from day to day' aspect, there is no requirement for an excuse provision.

It is self-evident that the Parliament also considers these provisions in the Bill are appropriate, given the Bill has passed both Houses.

Thank you again for writing on this matter.

Andrew Wilkie MP
INDEPENDENT MEMBER FOR DENISON

31 MAR 2017

Ms Anita Coles
Acting Committee Secretary
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Secretary

Thank you for the opportunity to respond to the Committee's comments on my *Live Animal Export Prohibition (Ending Cruelty) Bill 2017*.

If it would assist with achieving the intent of this bill, the relevant sections of the Holding Standards and the OIE Guidelines could be included as a schedule or otherwise incorporated into the legislation.

Please contact me if I can be of any further assistance.

Yours sincerely

Andrew Wilkie MP
Independent Member for Denison

188 COLLINS STREET (GPO BOX 32) HOBART TASMANIA 7000 (03) 6234 5255
R -1-75 PARLIAMENT HOUSE CANBERRA ACT 2600 (02) 6277 4766
www.andrewwilkie.org andrew.wilkie.mp@aph.gov.au

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-001168

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

Dear Senator

Thank you for your letter of 23 March 2017 in relation to comments made in the Committee's *Scrutiny Digest 3 of 2017* concerning the Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (the Bill).

Please find my advice in relation to the Committee's comments on the Bill at Attachment A.

Thank you for considering this advice. The contact officer in the Department of Immigration and Border Protection is Greg Phillipson, Assistant Secretary, Legislation Branch, who can be contacted on (02) 6264 2594 and greg.phillipson@border.gov.au.

Yours sincerely

PETER DUTTON 02/05/17

ATTACHMENT A

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Limitation on merits review

Committee comment

The committee does not consider that it would be inappropriate for this Parliament to fully scrutinise legislation currently before it. The fact that the amendment mirrors an existing provision that previous Parliaments have examined does not prevent this committee from examining the legislation to consider whether it meets its scrutiny principles.

The committee therefore restates its request for the Minister to provide a detailed justification for the limitation on merits review in proposed subsection 338A.

Response

I acknowledge the role of the Committee requires it to examine proposed legislation to consider whether it meets the Committee's scrutiny principles. As previously advised, proposed section 338A of the Act imports the existing exhaustive list in section 411 of the Act, which provides for merits review in respect of protection visa decisions, and places it under the new heading of 'definition of reviewable refugee decision'. This amendment does not introduce any new limitations on the availability of merits review in respect of protection visa decisions. The Committee may be interested to know that while current section 411 of the Act provides for some protection visa decisions to be excluded from merits review by the Migration and Refugee Division of the Administrative Appeals Tribunal (AAT), those decisions are still subject to some form of review by the AAT or the Immigration Assessment Authority, as provided by statute.

Provision of written statements to merits review applicants

Committee comment

The committee reiterates that the fact that the amendment mirrors existing provisions which previous Parliaments have examined does not prevent this committee from examining the legislation to consider whether it meets its scrutiny principles. The committee is concerned to understand the reasons as to why the legislation currently before this Parliament limits the period of time in which an applicant can make a request for written statements and why the relevant time period is to be prescribed in regulations.

The committee therefore restates its request for the Minister's advice as to why:

- *the period of time in which an applicant may make a request that the Tribunal provide an oral statement in writing is limited; and*
- *the relevant time period is to be included in regulations, rather than on the face of the legislation.*

Response

As previously advised, proposed subsections 368E(3) and (4) of the Act reflect the requirements set out in current subsections 368D(4) and (5) of the Act. Subsection 368D(4) provides for a period prescribed by regulation within which the applicant can request the statement to be provided in writing. This requirement that the applicant make a request within a prescribed period has been carried over into the restatement of the requirements as set out in proposed subsection 368E(3).

The Committee has noted the potential impact of the proposed subsections on the effectiveness of applicants' review rights. The subsections in question relate to the provision, in writing, of an oral statement about a decision on a review that has already been delivered. Given that the applicant will have already received an oral statement of the decision – the provisions currently (and as proposed) have no impact on the effectiveness of an applicant's review rights.

Limitation on judicial review

Committee comment

The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the Acts Interpretation Act 1901).

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

Response

I agree that the explanatory memorandum could benefit from further clarification as to the purpose of this amendment and will arrange for this change to be made.

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

PDR ID: MC17-001358

28 MAR 2017

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
PARLIAMENT HOUSE
CANBERRA ACT 2600

Helen

Dear Senator

I refer to the letter from the Acting Committee Secretary of 23 March 2017 regarding the Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017 (the Bill).

The Committee has requested:

- a detailed justification for each proposed strict liability offence included in the Bill and, in particular, the justification for the proposed penalty; and
- advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.

Strict Liability Offences

Section 26BCC(3) creates an offence for the master and owner of an Annex IV Australian ship where sewage is discharged in the Antarctic Area outside Australia's exclusive economic zone. The purpose of this strict liability offence is to manage the risk of Australian ships discharging sewage into the pristine waters of the Antarctic. This type of discharge could have a significant adverse impact on the environment, human health, safety and other users of the sea, particularly when it is a reoccurring activity.

Shipping companies are engaging in high-investment, high-return commercial activities. Stringent regulatory regimes designed to better manage safety and environment issues throughout the world's oceans are agreed internationally through the International Maritime Organization (IMO). Those ships travelling through Antarctic and Arctic waters are subject to additional internationally agreed regulatory regimes designed to protect these sensitive waters. Australia has a particular responsibility for parts of the Antarctic waters through the Antarctic Treaty system.

The imposition of the strict liability offence through Section 26BCC(3) is appropriate given the importance of maintaining the integrity of the environmental regulatory regime in the remote Antarctic Area. The offence is directed at the master and owner of the ship, who have a shared responsibility and can both be expected to be fully aware of the requirements of the legislation (and of Annex IV). Both have a responsibility to be aware of the restrictions on the discharge of sewage and to adhere to these restrictions. Therefore, if sewage is discharged contrary to the requirements of the legislation, the master and the owner of the ship should be liable without any need to prove intention or recklessness on their part with respect to the contravention of that requirement. Furthermore, it may be difficult to prove that they had the requisite mental element (ie intention or recklessness) and thus a requirement to prove a mental element would make Section 26BCC(3) harder to enforce.

The offence is consistent with offence provisions in other parts of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. In my view, it is also consistent with the principles relating to strict liability at 2.2.6 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, although the proposed penalty is higher than recommended in that Guide. Given the significant consequences of non-compliance for the Antarctic, it is important that the penalty for non-compliance is high enough to be a real incentive to industry. In order to ensure compliance with environmental regimes, high initial outlays by the shipping industry are sometimes required. In these circumstances, and given the very high level of expenditure routinely incurred in shipping operations, it is considered that the normal upper limit of 60 penalty units for strict liability offences is inadequate as a meaningful deterrent. The proposed 500 penalty units is necessary for that purpose.

Section 26BCC(4) creates a similar offence, being an offence for the master and the owner of an Annex IV Australian ship where sewage is discharged in Arctic waters. While Australia does not have the additional burdens of responsibilities for the Arctic area as is the case for the Antarctic under the Antarctic treaty system, the same concerns outlined above in relation to the Antarctic apply to this offence in the Arctic.

Given the above, the imposition of strict liability offences under Section 26BCC, and a higher than normal level of penalties for such offences, is considered to be justified in this instance.

Offence-specific Defences

A number of provisions in the Bill (Sections 26BCC(5), (6), (7), (8) and (9)) provide defences to the strict liability offences proposed at Sections 26BCC(3) and(4). These provisions describe exceptions to the strict liability offences and require the defendant to raise evidence about the matters outlined in each provision.

A defendant who seeks to rely on one of the defences in Section 26BCC has an evidential burden to provide evidence of the facts which constitute the defence. This is because the defendant is the person most likely to have relevant knowledge of those facts. Once the defendant discharges an evidential burden, the prosecution must disprove those matters beyond reasonable doubt.

Section 26BCC(5) creates two exceptions. The first is an exception to the strict liability offences where safety of life at sea is endangered. Only those present during a particular incident are able to make an assessment as to what is necessary to ensure the safety of life at sea, and the master of the ship is charged with the responsibility for making this judgement. As the master of the ship is also subject to the direction of the shipowner, evidence from both parties, only knowable to those parties, may explain the assessments made at the time.

The second exception requires evidence to be presented about the precautions taken throughout a voyage to minimise damage and the decision about the need to discharge sewage. Again, the circumstances surrounding a particular incident, the precautions needed to address that situation, and the assessment undertaken in making a decision, can only be known by those present (specifically the master of the ship). As the master of the ship is also subject to the direction of the shipowner, evidence from both parties, only knowable to those parties, may explain the assessments made at the time.

Section 26BCC(6) creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the speed of the ship when the discharge occurs. Section 26BCC(7) also creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the physical nature of the discharge when the discharge occurs. Section 26BCC(8) creates an exception requiring evidence to be presented about the nature of the sewage discharged. Section 26BCC(9) creates an exception requiring evidence to be presented about the location of the discharge. The matters described in each of these exceptions is knowable only by those present and charged with decision making responsibilities, being the master of the ship in control of the ship at the time, subject to the direction of the shipowner.

The burden of proof is placed on the defendant in all of the above provisions because the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused and the defendants are best placed to give evidence as to their decision making at the time when a discharge occurs. This appears to be a situation in which the relevant facts are likely to be within the knowledge of the defendant, and in which it could be difficult for the prosecution to prove the defendant's state of mind. The Senate Standing Committee for the Scrutiny of Bills has previously indicated that the burden of proof may be imposed on a defendant under these circumstances. In my view, this approach is also consistent with 4.3.1 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

Given the above, I consider it to be appropriate in this instance for the Bill to include the offence-specific defences.

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

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

6 APR 2017

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

Dear Senator Helen

I refer to the letter of the Senate Scrutiny of Bills Committee of 23 March 2017 seeking my advice concerning the Treasury Laws Amendment (2017 Measures No. 1) Bill 2017.

Currently, the Australian Securities and Investments Commission (ASIC) can share confidential information with the Commissioner of Taxation (ATO) on an ad hoc basis. Subsection 127(4) of the *Australian Securities and Investments Commission Act 2001* requires the ASIC Chairperson, or their delegate, to be satisfied that sharing particular information would enable or assist the ATO to perform or exercise its functions or powers.

The amendment in Schedule 2 of the Bill streamlines the process for sharing confidential information by removing the need for the ASIC Chairperson, or their delegate, to be personally involved in the process. This aligns with the arrangements in place with the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the responsible Minister.

A key benefit of the change is that it will support improved machine-to-machine data matching and sharing. I also note that the Office of the Australian Information Commissioner was consulted on the measure and raised no objections.

I note that the Bill passed both Houses of Parliament on 27 March 2017.

Parliament House, Canberra ACT 2600, Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434