The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 6 of 2017

14 June 2017

ISSN 2207-2004 (print)
ISSN 2207-2012 (online)

This document was prepared by the Senate Standing Committee for the Scrutiny of Bills and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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TABLE OF CONTENTS

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:

- whether it unduly trespasses 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.

Appropriation Bill (No. 1) 2017-2018

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government
Portfolio	Finance
Introduced	House of Representatives on 9 May 2017
Scrutiny principles	Standing Order 24(1)(a)(vi) and (v)

Parliamentary scrutiny—ordinary annual services of the government[1]

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

1.3 The inappropriate classification of items in appropriation bills as ordinary annual services when they in fact relate to new programs or projects undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[2]

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

1 Various provisions. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(v) of the committee's terms of reference.

2 See Senate standing order 24(1)(a)(v).

appropriation. Noting these provisions, the Senate Standing Committee on Appropriations and Staffing[3] has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years.[4]

1.5 The distinction between appropriations for the ordinary annual services of the government and other appropriations is reflected in the division of proposed appropriations into pairs of bills—odd-numbered bills which should only contain appropriations for the ordinary annual services of the government, and even-numbered bills which should contain all other appropriations (and are amendable by the Senate). However, the Appropriations and Staffing Committee has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[5] The Senate has not accepted this assumption.

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

1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]

2) That appropriations for expenditure on:
    a) the construction of public works and buildings;
    b) the acquisition of sites and buildings;
    c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
    d) grants to the states under section 96 of the Constitution;
    e) new policies not previously authorised by special legislation;
    f) items regarded as equity injections and loans; and
    g) existing asset replacement (which is to be regarded as depreciation),

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

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

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

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

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

1.7 There were also two other parts to the resolution: the Senate clarified its view of the correct characterisation of payments to international organisations and, finally, the order provided that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as part of ordinary annual services.[6]

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

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.[7]

1.9 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill that is not for the ordinary annual services of the government.[8]

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

1.11 For example, it appears that the initial expenditure in relation to a number of measures, including the following measures, may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2017-2018 (which is not subject to amendment by the Senate):

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

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

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

- Cyber Security Advisory Office — establishment ($10.7 million over four years)[9]
- Industry Specialist Mentoring for Australian Apprentices — establishment ($60 million over two years)[10]
- Reducing Pressure on Housing Affordability — establishment of the National Housing Finance and Investment Corporation ($63.1 million over four years).[11]

1.12 The committee has previously written to the Minister for Finance and considered this general matter in relation to the inappropriate classification of items in other appropriation bills on a number of occasions.[12]

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

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

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

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9 Budget Paper No. 2, 2017-18, p. 139.

10 Budget Paper No. 2, 2017-18, p. 84.

11 Budget Paper No. 2, 2017-18, p. 169. It appears that the appropriation for departmental expenses for this measure ($4.828 million) may have been improperly included in Appropriation Bill (No. 1) 2017-18. However, it appears that the appropriation for capital expenses was correctly included in Appropriation Bill (No. 2) 2017-2018 ($4.75 million).

12 See Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014* at pp 402–406; *Fourth Report of 2015* at pp 267–271; *Alert Digest No. 6 of 2015* at pp 6–9, *Fourth Report of 2016* at pp 249–255; *Alert Digest No. 7 of 2016* at pp 1–4; *Scrutiny Digest No. 2 of 2017* at pp 1–5; and *Scrutiny Digest No. 3 of 2017* at pp 2–4.

therefore it appears that most new policies could therefore fall within these existing outcomes.

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

1.17 The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to some items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 1) 2017-2018 which should only contain appropriations that are not amendable by the Senate).

Appropriations for new administered outcomes

1.18 Under the current approach to the classification of items in appropriation bills, appropriations relating to 'new policies' will only be included in an even-numbered appropriation bill (which is amendable by the Senate) where the new policy requires a new administered outcome not previously authorised by the Parliament. As a result of this approach, the only appropriations for new policies included in amendable appropriation bills are those relating to new administered outcomes.

1.19 The committee notes that it appears that there are no proposed appropriations for new administered outcomes in Appropriation Bill (No. 2) 2017-2018 (and so there are no proposed appropriations relating to 'new policies' which are subject to amendment by the Senate). Noting this, the committee requests the Minister's advice as to each instance in which appropriations for new administered outcomes (which are amendable by the Senate) have been included in even-numbered appropriation bills over the past ten financial years.

Parliamentary scrutiny—appropriations determined by the Finance Minister[13]

1.20 Clause 10 seeks to enable the Finance Minister to provide additional appropriations for items when satisfied that there is an urgent need for expenditure

13 Clause 10. The committee draws Senators' attention to this provision pursuant to principles 1(a)(iv) and 1(a)(v) of the committee's terms of reference.

and the existing appropriation is inadequate. This additional appropriation is referred to as the Advance to the Finance Minister (AFM).

1.21 Subclause 10(1) establishes the criteria about which the Finance Minister must be satisfied before making a determination under the AFM provision. Specifically, the Finance Minister is required to be:

> satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1:
>
> (a) because of an erroneous omission or understatement; or
>
> (b) because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives.

1.22 Subclause 10(2) enables the Finance Minister to make a determination which has the effect of modifying the appropriations outlined in Schedule 1 to the Act. As such, this provision may be considered to be a Henry VIII clause as it allows delegated legislation to amend primary legislation. 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.

1.23 Subclause 10(4) provides that a determination under subclause 10(2) is a legislative instrument, which must therefore be registered and tabled in Parliament. However, these determinations are not subject to parliamentary disallowance. The explanatory memorandum states that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.[14]

1.24 Subclause 10(3) provides that the total amount that can be determined under the AFM provision is limited to $295 million.

1.25 The committee notes that this issue also arises in relation to other appropriation bills.[15]

1.26 Noting that one of the core functions of the Parliament is to scrutinise proposed appropriations, the committee requests the Minister's advice as to each instance in which the Advance to the Finance Minister provisions have been utilised over the past ten financial years.

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14 Explanatory memorandum, p. 9.

15 For example, see clause 12 of Appropriation Bill (No. 2) 2017-2018 (the total amount that can be determined under this AFM provision is $380 million).

Appropriation Bill (No. 2) 2017-2018

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure
Portfolio	Finance
Introduced	House of Representatives on 9 May 2017
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

Parliamentary scrutiny of section 96 grants to the States[16]

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

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

- conditions under which payments to the States, the Australian Capital Territory, the Northern Territory and local government may be made;[17] and
- the amounts and timing of those payments.[18]

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

> because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.[19]

1.30 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[20]

16 Clause 16 and Schedules 1 and 2. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and 1(a)(v) of the committee's terms of reference.

17 Paragraph 16(2)(a).

18 Paragraph 16(2)(b).

19 Explanatory memorandum, p. 13.

20 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015* (at pp 511–516), *Ninth Report of 2015* (at pp 611–614), *Fifth Report of 2016* (at pp 352–357), *Eighth Report of 2016* (at pp 457–460) and *Scrutiny Digest No. 3 of 2017* (at pp 51–54).

1.31 The committee takes this opportunity to reiterate that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their State or Territory. While some information in relation to grants to the States is publicly available, the committee has previously noted that effective parliamentary scrutiny is difficult because the information is only available in disparate sources.

1.32 The committee has previously requested that additional explanatory material be made available to Senators and others in relation to appropriations for payments to the States, Territories and local governments in the annual appropriation bills and in relation section 96 grants to the States more generally. For example, recently the committee sought the Minister's advice as to:

- whether future Budget documentation (such as Budget Paper No. 3 'Federal Financial Relations') could include general information about:
    - the statutory provisions across the Commonwealth statute book which delegate to the Executive the power to determine terms and conditions attaching to grants to the States; and
    - the general nature of terms and conditions attached to these payments (including payments made from standing and other appropriations); and
- whether the Department of Finance is able to issue guidance advising departments and agencies to include the following information in their portfolio budget statements where they are seeking appropriations for payments to the States, Territories and local government in future appropriation bills:
    - the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory);
    - the specific statutory or other provisions (for example in the *Federal Financial Relations Act 2009*, the *COAG Reform Fund Act 2008*, *Local Government (Financial Assistance) Act 1995* or special legislation or agreements) which detail how the terms and conditions to be attached to the particular payments will be determined; and
    - the nature of the terms and conditions attached to these payments.[21]

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

1.33 The committee thanks the Minister for his ongoing engagement with the committee on this matter and welcomes the significant progress that has been made in the most recent Budget to provide additional information about section 96 grants to the States in Budget documentation (as described below).

General information about section 96 grants

1.34 In relation to the committee's request for further general information about section 96 grants to the States and the terms and conditions attaching to them, the committee welcomes the inclusion of Appendix E to Budget Paper No. 3, 2017-18 which provides details of the appropriation mechanisms for all payments to the States and the terms and conditions applying to them.[22] The committee considers that this information is a useful reference and draws this document to the attention of Senators and others interested in the making of section 96 grants to the States.

1.35 The committee looks forward to this information being updated each year, and considers that it may be useful for a brief explanation of the constitutional background to section 96 grants to the States and the delegation of associated powers from the Parliament to the Executive to be included as an introduction to the technical information contained in the table. The committee also considers that further hyperlinks (linking to relevant sections of the Federal Financial Relations and agency websites) may assist in the accessibility and usefulness of this document.[23]

Section 96 grants in appropriation bills

1.36 In relation to the committee's request for further information about appropriations for payments to the States, Territories and local government in the annual appropriation bills, the committee welcomes the new mandatory requirement for the inclusion of further information in portfolio budget statements along the lines of that suggested by the committee above.[24] The committee considers that the example of the mandatory information to be included in portfolio budget statements provided in the Department of Finance's *Guide to Preparing the*

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22 Appendix E, Budget Paper No. 3 2017-18, *Federal Financial Relations*, available at http://www.budget.gov.au/2017-18/content/bp3/download/bp3_10_appendix_e_online.pdf.

23 For example, direct hyperlinks to the Intergovernmental Agreement on Federal Financial Relations, National Partnership Agreements and the National Health Reform Agreement could be added where appropriate.

24 The committee suggested that the following information should be included in portfolio budget statements: (a) the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory); (b) the specific statutory or other provisions which detail how the terms and conditions to be attached to the particular payments will be determined; and (c) the nature of the terms and conditions attached to these payments.

2017-18 Portfolio Budget Statements fully addresses the committee's request in relation to the provision of this additional information.[25]

1.37 However, the committee notes that the implementation of this new mandatory requirement by agencies has been mixed. In this appropriation bill the Attorney-General's Department, Department of Education and Training, Department of Infrastructure and Regional Development and the Department of the Prime Minister and Cabinet are all seeking appropriations for payments to or for the States, Territories or local government.[26] However, only the Department of Infrastructure and Regional Development fully implemented the new mandatory information requirement.[27]

1.38 The committee requests the Minister's advice as to whether the Department of Finance is able to draw the new mandatory information requirement regarding appropriations for payments to the States, Territories and local government to the attention of the Attorney-General's Department, the Department of Education and Training and the Department of the Prime Minister and Cabinet. The committee also requests the Minister's advice regarding the committee's suggestions at paragraph [1.35] in relation to the provision of general information in *Budget Paper No. 3* about the terms and conditions attaching to section 96 grants to the States.

1.39 In relation to this bill, the committee leaves to the Senate as a whole the appropriateness of the delegation of legislative power in clause 16 which allows the Minister to determine conditions under which payments to the States, Territories and local government may be made and the amounts and timing of those payments.

Parliamentary scrutiny of debit limits[28]

1.40 Clause 13 of the bill specifies debit limits for certain grant programs. A debit limit must be set each financial year otherwise grants under these programs cannot be made. The total amount of grants cannot exceed the relevant debit limit set each year.

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25 Department of Finance, *Guide to Preparing the 2017-18 Portfolio Budget Statements*, pp 24–25, available at http://www.finance.gov.au/sites/default/files/guidance-portfolio-budget-statements-17-18.pdf.

26 See Schedule 1 to the bill.

27 See Infrastructure and Regional Development Portfolio, *Portfolio Budget Statements 2017-18*, pp 16–17.

28 Clause 13. The committee draws Senators' attention to this provision pursuant to principle 1(a)(v) of the committee's terms of reference.

1.41 The explanatory memorandum notes that Parliament may approve annual debit limits for the following special appropriations:

- the amounts that may be debited or spent from the Education Investment Fund (EIF) special account;[29] and
- the amounts that may be spent for general purpose finance assistance or national partnership payments to the States.[30]

1.42 The explanatory memorandum explains the purpose of setting these debit limits:

> Specifying a debit limit in clause 13 is an effective mechanism to manage expenditure of public money as the official or Minister making a payment of public money cannot do so without this authority. The purpose of doing so is to provide Parliament with a transparent mechanism by which it may review the rate at which amounts are committed for expenditure.[31]

1.43 In this bill the following debit limits are proposed for 2017-18:

- Education Investment Fund—$2 million;[32]
- General purpose finance assistance to the States—$5 billion;[33] and
- National partnership payments to the States—$25 billion.[34]

1.44 In relation to the $25 billion debit limit for national partnership payments, the committee notes that the Budget papers suggest that it is expected that national partnership payments will be $13.7 billion in 2017-18.[35] Therefore, the debit limit proposed in this bill would allow an additional $11.3 billion in national partnership payments to be made without the need to seek further parliamentary approval.

1.45 Noting the intention of the debit limit regime to facilitate parliamentary oversight of these grant programs, the committee requests the Minister's confirmation as to how much it is currently expected will be spent in 2017-18 under each of the three grant programs identified above, and the reasons for appearing to set the debit limit for these programs well above the expected level of expenditure.

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29 See section 199 of the *National-building Funds Act 2008*.

30 See sections 9 and 16 of the *Federal Financial Relations Act 2009*.

31 Explanatory memorandum, p. 10.

32 Subclause 13(1).

33 Subclause 13(2).

34 Subclause 13(3).

35 *Federal Financial Relations*, Budget Paper No. 3 2017-18, p. 2.

Appropriation (Parliamentary Departments) Bill (No. 1) 2017-2018

Purpose	This bill seeks to appropriate money out of the Consolidated Revenue Fund for expenditure in relation to the parliamentary departments
Portfolio	Finance
Introduced	House of Representatives on 9 May 2017

The committee has no comment on this bill.

Australian Education Amendment Bill 2017

Purpose	This bill seeks to amend the *Australian Education Act 2013* (the Act) to: • implement a new funding arrangements for schools; • make a number of consequential and technical amendments to the Act; and • amend the *Australian Education Regulation 2013*
Portfolio	Education and Training
Introduced	House of Representatives on 11 May 2017
Scrutiny principles	Standing Order 24(1)(a)(ii), (iv)and (v)

Broad delegation of legislative power[36]

1.46 Proposed section 35A sets out the Commonwealth share of funding for government and non-government schools. However, it states that this share of funding may be amended by the regulations. This could therefore mean that the default funding share which is set out in the bill could be amended by delegated legislation. However, the share of funding payable by the Commonwealth appears to be central to the policy changes proposed to be made by this bill.

1.47 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. In this case, the explanatory memorandum justifies this delegation of legislative power by explaining that the 'regulation-making power is designed to ensure that sufficient flexibility is built into the Act for future government decisions on schools funding, while maintaining appropriate and sufficient Parliamentary oversight'.[37]

1.48 The modification of the share of funding payable by the Commonwealth to government and non-government schools could, depending on the size of the change to the Commonwealth share, be a major change to the policy intent of the bill. While any regulations would be subject to disallowance, the committee's preference from a scrutiny perspective would be that a limit be set on the adjustments to the funding share that could be made via regulations.

36 Schedule 1, item 16, proposed section 35A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference

37 Explanatory memorandum, p. 19.

1.49 The committee therefore suggests that it may be appropriate for the bill to be amended to set a limit on the extent to which the share of Commonwealth funding for government and non-government schools can be modified by the regulations, and seeks the Minister's response in relation to this matter.

Significant matters in delegated legislation[38]

1.50 Proposed section 69B provides for the establishment of transition adjustment funding for transition schools. Proposed subsection 69B(1) will enable the Minister to determine an amount of transition adjustment funding for a transition school for a transition year if the Minister is satisfied prescribed circumstances apply in relation to the school for that year.

1.51 In relation to parliamentary oversight of transition adjustment funding, the explanatory memorandum states that funding will be appropriated under annual appropriation Acts, and regulations (made under section 130 of the *Australian Education Act 2013*) can include:

- the eligibility criteria or preconditions for transition adjustment funding (the 'prescribed circumstances' for subclause 69B(1));
- matters that the Minister may or must take into account in making a funding determination under subclause 69B(1);
- the amount of funding that may be paid for a transition school for a transition year (whether a fixed amount, a capped amount, or an amount worked out by formula) (see subclauses 69B(2) and (3)); and
- the total amount of transition adjustment funding available for a transition year (which could be a fixed amount, a capped amount, or an amount worked out by formula (see subclause 69B(4)).[39]

1.52 Subclause 69B(5) provides that a funding determination under subclause 69B(1) is not a legislative instrument and therefore these transition adjustment funding determinations will not be subject to parliamentary disallowance. The explanatory memorandum states subclause 69B(5) is included to assist readers, as any determination under subclause 69B(1) is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*.

1.53 In order to ensure that legislative power is delegated to the executive appropriately, the committee's scrutiny view is that significant matters, such as

38 Schedule 1, item 40, proposed section 69B. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

39 Explanatory memorandum, p. 23.

provisions relating to transition funding for schools, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.54 Given that transition adjustment funding determinations will not be subject to parliamentary disallowance, the committee requests the Minister's advice as to:

- **why all of the details of the new transitional adjustment funding scheme are left to be worked out in delegated rather than primary legislation;**
- **whether at least some high-level eligibility criteria or preconditions for transition adjustment funding can be set out on the face of the bill (rather than the eligibility criteria and preconditions being left entirely to regulations);**
- **whether circumstances (i.e. eligibility criteria or preconditions for transition adjustment funding) must be prescribed in the regulations in order for the Minister to be able to validly exercise his or her power to make a transition adjustment funding determination under proposed subclause 69B(1) (i.e. if no circumstances are prescribed is the Minister able to exercise an unfettered power to make a non-disallowable transition adjustment funding determination); and**
- **the appropriateness of amending proposed subsection 69B(2) of the bill to:**
  - **provide that the regulations *must* (rather than may) prescribe a method for working out transitional adjustment funding amounts; and/or**
  - **provide that the regulations *must* (rather than may) prescribe a maximum amount that is payable for a school for a year under a transition adjustment funding determination or prescribe a method for working out that maximum amount.**

Parliamentary scrutiny—section 96 grants to the States[40]

1.55 Proposed sections 22 and 22A seek to impose new policy and funding requirements on States and Territories, as conditions of financial assistance provided to them under the *Australian Education Act 2013*. Specifically, these provisions provide that a payment of financial assistance will be subject to the following conditions:

- that the State or Territory implements national policy initiatives for school education agreed by the Ministerial Council from time to time;[41]

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40 Schedule 1, items 59 and 60, proposed section 22 and 22A. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(v) of the committee's terms of reference.

- that the State or Territory implements national policy initiatives for school education prescribed by regulations;[42]
- that the State or Territory is party to a national agreement relating to school education reform;[43]
- that the State or Territory is party to an agreement with the Commonwealth relating to implementation by the State or Territory of school education reform;[44]
- that the State or Territory complies with the two agreements mentioned above;[45] and
- that the State or Territory maintains funding levels for school education in accordance with the regulations.[46]

1.56 The committee makes no comment in relation the conditions of financial assistance prescribed by the regulations, as this will ensure that those conditions are subject to some level of parliamentary scrutiny and disallowance.

1.57 However, in relation to the conditions of financial assistance set out in agreements between the Commonwealth and State executive governments, the committee notes that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution. If these provisions are agreed to and the Parliament is therefore delegating this power to the Executive in this instance, the committee considers that it is appropriate that the exercise of this power be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 of the Constitution and the role of Senators in representing the people of their State or Territory.

1.58 Noting this, and the fact that the conditions of financial assistance will be of significance to setting the policy framework of the bill, the committee suggests it may be appropriate for the bill to be amended to include at least some high-level policy initiatives and school education reform priorities which States and Territories will be required to implement in order to receive payments of financial assistance. The committee seeks the Minister's response in relation to this matter.

1.59 The committee also suggests that it may be appropriate for the bill to be amended to include a legislative requirement that any relevant agreements with

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41 Proposed paragraph 22(1)(a).

42 Proposed paragraph 22(1)(b).

43 Proposed paragraph 22(2)(a).

44 Proposed paragraph 22(2)(b).

45 Proposed paragraph 22(2)(c).

46 Proposed section 22A.

the States and Territories about these grants of financial assistance are (a) tabled in the Parliament within 15 sitting days after being made, and (b) published on the internet within 30 days after being made. The committee also requests the Minister's response in relation to this matter.

Broad delegation of administrative power[47]

1.60 Item 173 proposes to amend subsection 129(3) of the *Australian Education Act 2013* to provide the Secretary with the power to delegate his or her powers under the Act to 'any APS employee'. Currently, the Secretary is restricted to delegating his or her powers to SES employees in the Department.

1.61 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.

1.62 The explanatory memorandum justifies this change by reference to two matters. First, the Minister's powers may be delegated to any APS employee, while the Secretary can only delegate to SES employees. Secondly, it is said that there are a number of powers held by the Secretary which are of a routine administrative nature and it is appropriate they be exercisable by officers below the level of SES employees. For these reasons it is concluded that the 'capacity of the Secretary to delegate his or her powers under the Act and Regulation is being aligned with the capacity of the Minister to delegate his or her powers'.[48]

1.63 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. The consistency of approach between the Minister's powers of delegation and the Secretary's powers does not appear to be a sufficient justification for broadening the Secretary's powers to delegate.

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47 Schedule 1, item 173, proposed subsection 129(3).The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

48 Explanatory memorandum, p. 35.

1.64 The committee requests the Minister's further advice as to why it is considered necessary to allow for the delegation of any or all of the Secretary's functions or powers in these provisions and the appropriateness of amending the bill 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 (for example, providing that only powers of a routine administrative nature may be delegated to non-SES employees).

Clean Energy Finance Corporation Amendment (Carbon Capture and Storage) Bill 2017

Purpose	This bill seeks to amend the *Clean Energy Finance Corporation Act 2012* to remove the prohibition on the Clean Energy Finance Corporation investing in carbon capture and storage technologies
Portfolio	Environment and Energy
Introduced	House of Representatives on 31 May 2017

The committee has no comment on this bill.

Comcare and Seacare Legislation Amendment (Pension Age and Catastrophic Injury) Bill 2017

Purpose	This bill seeks to amends the *Safety, Rehabilitation and Compensation Act 1988* and the *Seafarers Rehabilitation and Compensation Act 1992* to: • ensure there is no gap between the cessation of compensation for incapacity and eligibility for receipt of the age pension; and • align with the minimum benchmarks recommended for the National Injury Insurance Scheme
Portfolio	Employment
Introduced	House of Representatives on 11 May 2017

The committee has no comment on this bill.

Customs Tariff Amendment (Tobacco Duty Harmonisation) Bill 2017

Purpose	This bill seeks to amend the *Customs Tariff Act 1995* to increase the customs duty on roll your own tobacco to align it with the excise rate applied to cigarettes over four years commencing on 1 September 2017
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 1 June 2017

The committee has no comment on this bill.

Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017

Purpose	This bill seeks to amend a number of Acts relating to higher education and education services for overseas students to: • amend the fit and proper provisions relating to the assessment of providers seeking registration to educate international students; • expand notifiable event requirements that a provider must report to Education Services for Overseas Students (ESOS) agencies; • extend information sharing provisions by allowing the Secretary of a department to share information with the Overseas Students Ombudsman; • allow the Secretary and ESOS agencies to share and publish information about the exercise of functions of education agents; • amend late payment penalties; • introduce a requirement that all registered higher education providers must be fit and proper persons; • amend the definition of 'qualified auditor'; • clarify that the Tertiary Education Quality and Standards Agency may delegate its functions or powers to the Chief Executive Officer; • clarify the definition of 'vocational training and education course'; • increase financial viability and transparency requirements including enhancing audit requirements for providers; • introduce more stringent provider application requirements; and • provide additional student protection mechanisms to FEE-HELP students
Portfolio	Education and Training
Introduced	House of Representatives on 1 June 2017
Scrutiny principles	Standing Order 24(1)(a)(ii) and (iv)

Significant matters in delegated legislation[49]

1.65 Items 1 and 2 of Schedule 1 provide that the Minister may specify, in a legislative instrument, additional matters to which an Education Services for Overseas Students (ESOS) agency or designated State authority must have regard to in determining whether providers registered or applying to be registered are 'fit and proper persons'. The committee's view is that significant matters, such as the criteria for determining whether providers are fit and proper persons, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum suggests that this delegation of legislative power is justified:

> Including this content in a legislative instrument provides the Minister with the flexibility to supplement and refine the considerations that relevant regulatory agencies must take into account when making decisions about the suitability of persons to provide education services students. This flexibility is important to ensure that the fit and proper person requirements remain responsive to market developments and are sufficiently detailed to properly articulate the circumstances which may be relevant to such determinations. This will ensure that the individuals governing education providers are fit to deliver high quality services, preserve the integrity of the international education sector and protect students' interests.[50]

1.66 Although the importance of enabling regulators to operate with flexibility may be a legitimate reason in general for delegating legislative power, reasons why this is so in a particular instance requires detailed justification.

1.67 The committee requests the Minister's advice as to why flexibility is necessary in relation to setting the criteria as to whether providers are fit and proper persons, and seeks examples as to why 'market developments' mean that it is difficult to detail the relevant matters and circumstances in primary legislation.

Significant matters in delegated legislation[51]

1.68 Item 4 of Schedule 2 proposes a new fit and proper person requirement for the purposes of the *Tertiary Education Quality and Standards Agency Act 2011*. It provides that in determining whether a person is a fit and proper person for the purposes of that Act, regard may be had to any matters specified by the Tertiary

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49 Schedule 1, items 1 and 2. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

50 Explanatory memorandum, p. 26.

51 Schedule 2, item 4. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

Education Quality and Standards Agency (TEQSA) in a legislative instrument. The explanatory memorandum states that regulatory determinations around whether a provider is a fit and proper person to be an approved provider 'is properly a matter for TEQSA'.[52] However, no reasons are provided as to why these matters are more appropriate to be determined by TEQSA in a legislative instrument, rather than provided for in primary legislation.

1.69 The committee therefore requests the Minister's advice as to why it is more appropriate that the matters to be considered in determining whether a person is a fit and proper person are to be determined by TEQSA in a legislative instrument, rather than set out in primary legislation.

Broad delegation of administrative power[53]

1.70 Proposed section 215-10 triggers the investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions of the *Higher Education Support Act 2003*. Proposed subsection 215-10(3) provides that an authorised person may be assisted 'by other persons' in exercising most powers or performing functions or duties in relation to investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

1.71 The committee therefore requests the Minister's advice as to why it is necessary to confer investigatory powers on any 'other person' to assist an authorised person and whether it would be appropriate to amend the bill to require that any person assisting an authorised person have specified skills, training or experience.

52 Explanatory memorandum, p. 37.

53 Schedule 3, item 37, proposed subsection 215-10(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

Excise Tariff Amendment (Tobacco Duty Harmonisation) Bill 2017

Purpose	This bill seeks to amend the *Excise Tariff Act 1921* to increase the excise on roll your own tobacco to align it with the excise rate applied to cigarettes over four years commencing on 1 September 2017
Portfolio	Treasury
Introduced	House of Representatives on 1 June 2017

The committee has no comment on this bill.

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining and Other Measures) Bill 2017

Purpose	This bill seeks to amend the fee framework under the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015*
Portfolio	Treasury
Introduced	House of Representatives on 1 June 2017

The committee has no comment on this bill.

Government Procurement (Judicial Review) Bill 2017

Purpose	This bill seeks to designate the Federal Circuit Court with jurisdiction to receive and review local and international supplier complaints in relation to a breach of the Commonwealth Procurement Rules
Portfolio	Finance
Introduced	House of Representatives on 25 May 2017
Scrutiny principles	Standing Order 24(1)(a)(iii) and (iv)

Broad instrument-making power[54]

1.72 The bill seeks to establish an independent complaints mechanism for procurement processes. The bill would enable the Federal Court or Federal Circuit Court to grant an injunction in relation to a contravention of the relevant Commonwealth Procurement Rules (CPRs), so far as those rules relate to a 'covered procurement'. Clause 5 of the bill sets out the definition of a covered procurement. It defines a procurement as a covered procurement if the relevant CPRs apply to the procurement and the procurement is not in a class of procurements specified in a determination. Subclause (2) empowers the Minister to make, by legislative instrument, a determination that additional procurements may be exempted from the definition of a covered procurement. The clause does not specify any criteria by which such a determination is to be made.

1.73 The explanatory memorandum states that this ensures that 'additional procurements may be exempted from the CPRs if there are such provisions in Australia's free trade agreements'.[55] However, subclause 5(2) does not, by its terms, appear to be limited to determinations reflecting this purpose.

1.74 The committee requests the Minister's advice as to why it is necessary to provide a broad power for the Minister to make a determination exempting classes of procurements from the definition of a 'covered procurement' and whether it is appropriate for the bill to be amended to ensure that additional procurements could only be exempted from the definition if there are such provisions in Australia's free trade agreements (if this is the intention of the provision).

54 Subclause 5(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

55 Explanatory memorandum, p. 5.

Review rights[56]

1.75 Subclause 23(1) of the bill provides that a contravention of the Commonwealth Procurement Rules (CPRs) does not affect the validity of a contract, and subclause 23(2) provides that it is immaterial whether the contravention occurred before, at or after the commencement of this Act. The explanatory memorandum merely restates the terms of the provision without providing any explanation of the purpose or effect of the provision.[57]

1.76 It is unclear whether or not this provision might work to extinguish rights that an affected person might otherwise have to challenge the validity of a contract in circumstances where the CPRs are contravened.

1.77 Clause 14 of the bill provides that the powers conferred on the courts under the bill are in addition to, and not instead of, any other powers. However, the relationship between clauses 14 and 23 is not explained in the explanatory materials.

1.78 The committee requests the Minister's advice as to whether clause 23 could operate to extinguish existing legal rights relating to impugning the validity of a contract by way of proceedings not brought under this legislation, or whether the provision is intended to operate only in relation to proceedings brought under this bill.

56 Clause 23. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

57 See explanatory memorandum, p. 10.

Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017

Purpose	This bill seeks to amend various Acts in relation to higher education and vocational education and training to: • recalibrate the costs of higher education between taxpayers, higher education providers and students; • amend the Commonwealth Grant Scheme (CGS) including the introduction of a performance component to the CGS funding; • amend HELP eligibility and repayment arrangements; • amend how other grants in the *Higher Education Support Act 2003* operate to give effect to the Higher Education Participation and Partnerships Program reforms; and • make a minor amendment to the definition of the higher education award
Portfolio	Education and Training
Introduced	House of Representatives on 11 May 2017

The committee has no comment on this bill.

Imported Food Control Amendment Bill 2017

Purpose	This bill seeks to amend the *Imported Food Control Act 1992* to: • require documentary evidence from importers to demonstrate that they have effective internationally recognised food safety controls in place throughout the supply chain for certain types of food; • amend Australia's emergency powers to allow food to be held at the border where there is uncertainty about the safety of a particular food and where the scientific approach to verify its safety is not established; • provide additional powers to monitor and manage new and emerging risks; • recognise an entire foreign country's food safety regulatory system where it is equivalent to Australia's food safety system; • align the definition of 'food' with other Commonwealth legislation; • establish differentiated enforcement provisions to enable a graduated approach to non-compliance; • require all importers of food to be able to trace food one step forward and one step backward; and • make minor technical amendments
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives 1 June 2017
Scrutiny principles	Standing Order 24(1)(a)(ii), (iv) and (v)

Significant matters in delegated legislation[58]

1.79 Proposed subsection 18A will enable the Secretary to determine, in writing, that for food of a specified kind, a specified certificate issued by a specified person or body is a recognised food safety management certificate. Proposed subsection 18A(2) provides that the Secretary must make guidelines that the Secretary must have regard to before making a determination under proposed subsection 18A(1). Proposed subsection 18A(4) provides that determinations made under subsection 18A(1) and guidelines made under 18A(2) are not legislative instruments for the purposes of the *Legislation Act 2003*. The explanatory memorandum justifies

58 Item 4, proposed subsection 18A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

this provision on the basis that neither of these instruments would fall within the substantive definition of legislative instruments under the *Legislation Act 2003*, as the determination and guidelines:

> merely determine the particular cases or particular circumstances in which the law, as set out by the Act and the regulations, is or is not to apply; those instruments do not determine or alter the content of the law itself.[59]

1.80 Although it may be accepted that a determination that a specified certificate is a recognised food safety management certificate is one of an administrative rather than a legislative character, it is less clear why guidelines made under subsection 18A(2) should not be considered to be decisions of a legislative character and therefore subject to parliamentary oversight and accountability.

1.81 Insofar as the guidelines operate as mandatory relevant considerations, i.e. considerations that must be taken into account when the Secretary makes determinations under subsection 18A(1), the guidelines do appear to alter the content of the law and have general application.

1.82 Given the important role that the guidelines have in the making of determinations about recognised food safety management certificates, the committee requests the Minister's advice as to why the guidelines are not to be included in a disallowable legislative instrument (and therefore subject to parliamentary scrutiny).

Broad discretionary power[60]

1.83 Item 10 of the bill proposes making amendments to enable the Secretary to make a holding order that states certain food imported into Australia is to be held in an approved place, on the basis that the Secretary is satisfied there are reasonable grounds for believing food of that kind may pose a risk to human health. The order can last for up to 28 days and may be extended more than once. There is no provision for merits review of the decision but the explanatory memorandum provides a detailed explanation as to why access to merits review would be inappropriate in the circumstances.[61]

1.84 The explanatory memorandum states that the requirement in proposed subsection 15(4) to enable the Secretary to extend the 28 day period by a further period of up to 28 days (with no limits on the number of extensions) 'has been inserted to enable continued protection of human health until the appropriate

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59 Explanatory memorandum, pp 39–40.

60 Schedule 1, item 10. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

61 Explanatory memorandum, p. 42.

testing regime on the food for the particular hazard and/or adequate risk management strategies can be implemented in relation to the food'. It continues:

> To provide a safeguard against arbitrary discretion, it is intended that the decision maker for an order under new subsection 15(3) of the Act will not be the same decision maker for, if applicable, a decision to extend the order under new subsection 15(4) of the Act.[62]

1.85 The committee notes that this safeguard will presumably be facilitated through delegating the relevant powers reposed in the Secretary to different or multiple decision-makers. However, there appears nothing on the face of the legislation to require that a different decision-maker exercise the power to extend an order.

1.86 The committee suggests that it may be appropriate for the bill to be amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order, and seeks the Minister's response in relation to this.

Broad delegation of administrative power[63]

1.87 Proposed sections 22 and 23 trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions of the *Imported Food Control Act 1992*. Proposed subsections 22(14) and 23(11) provide that an authorised officer may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers, other than to explain that this 'preserves the effect of current section 32 of the Act' (which is being repealed).[64]

1.88 However, current section 32 of the *Imported Food Control Act 1992* provides that an authorised officer may request the occupier of any premises entered to provide reasonable assistance to the officer. As such, the current provision is limited to the occupier of the premises providing assistance to the authorised officer. Whereas the proposed new provisions apply to any 'other persons' providing assistance. The powers granted to 'other persons' could be coercive, including entering premises, inspecting documents, operating electronic equipment, etc.[65] The

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62 Explanatory memorandum, p. 10.

63 Schedule 1, item 25, proposed subsections 22(14) and 23(11). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

64 Explanatory memorandum, pp 57 and 59.

65 See Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014*.

bill also proposes to grant such 'other persons' the power to use such force against things as is necessary and reasonable in the circumstances.[66]

1.89 There is no explanation in the explanatory memorandum of the need to confer these powers on 'other persons' and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

1.90 The committee therefore requests the Minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised officer and whether it would be appropriate to amend the bill to require that any person assisting an authorised officer be confined to the occupier of the relevant premises (as is currently required by the *Imported Food Control Act 1992*) or require the person assisting have specified skills, training or experience.

Adequacy of parliamentary oversight[67]

1.91 Proposed section 42A provides that the Secretary may disclose information, including personal information, obtained under the *Imported Food Control Act 1992*, to a wide range of Commonwealth, State, Territory, local and foreign government departments and agencies. Subsection 42A(5) provides that the Secretary must, in writing, make guidelines that the Secretary must have regard to before disclosing information to foreign countries. Subsection 42A(6) provides that before making such guidelines the Secretary must consult with the Information Commissioner and subsection 42A(7) provides the guidelines are not a legislative instrument. The explanatory memorandum states the guidelines will be made in consultation with the Australian Information Commissioner, will be published on the Department's website and when developing the guidelines 'consideration will be given to principles and guidelines established by Codex Alimentarius Commission' (which appears to be a Food Code).[68]

1.92 However, it is unclear to the committee why the guidelines, which become a mandatory consideration for exercising a power that affects the right to privacy, should not be a legislative instrument and, therefore, subject to parliamentary scrutiny and disallowance. It is also unclear why the development of the guidelines is limited to the exercise of the Secretary's power in disclosing information to a foreign country, and not in relation to disclosing information to other Commonwealth agencies and State, Territory or local governments.

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66 See Schedule 1, item 25, proposed new subsections 22(15) and 23(12).

67 Schedule 1, item 43. The committee draws Senators' attention to this provision pursuant to principle 1(a)(v) of the committee's terms of reference.

68 Explanatory memorandum, p. 71.

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

- **why the guidelines to be made by the Secretary in guiding the exercise of the power to disclose personal information to a wide range of bodies will not be subject to parliamentary disallowance;**
- **why the guidelines are confined to the exercise of the power under subsection 42A(3) (foreign governments) and not in relation to subsection 42A(2) (Commonwealth, State, Territory and local governments); and**
- **whether it would be appropriate to amend the bill to require that the Secretary must have regard to any submissions made by the Information Commissioner arising from the consultation required by subsection 42A(6).**[69]

69 For an example of such a provision, see subsection 28(1A) of the *National Cancer Screening Register Act 2016*.

Industrial Chemicals Bill 2017

Purpose	This bill seeks to establish the legislative framework for the Australian Industrial Chemical Introduction Scheme, a new risk-based regulatory scheme for the Commonwealth to continue to regulate the introduction of industrial chemicals in Australia
Portfolio	Health
Introduced	House of Representatives on 1 June 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (iii), (iv) and (v)[70]

Merits Review[71]

1.94 Clause 166 sets out a table listing all of the decisions made by the Executive Director that will be considered to be a 'reviewable decision'. A 'reviewable decision' is one which sets out a process for reconsideration by the Executive Director and review by the Administrative Appeals Tribunal (AAT).

1.95 The explanatory memorandum does not explain whether there are decisions that may be made under the Act that may not be described as a 'reviewable decision'. It is therefore difficult to assess what decisions that may be made under the Act are not be subject to the internal review and AAT review process. It is also unclear why certain decisions have been included but others have been excluded. For example, it is unclear why a decision relating to cancellation of a person's registration is reviewable, yet the decision relating to the initial registration is not included as a reviewable decision.[72]

1.96 The committee therefore requests the Minister's advice as to each of the decisions that could be made under the bill that are not listed as being a 'reviewable decision', and if decisions are excluded that might have an adverse impact on an individual, the justification for not including these in the list of 'reviewable decisions'.

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70 See also Chapter 3 in relation to scrutiny of standing appropriations.

71 Clause 166. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

72 See paragraph 19(6)(a) and clause 17.

Privilege against self-incrimination[73]

1.97 Clause 175 provides that a person is not excused from giving information or producing a document under section 161 on the ground that the giving of the information or the production of the document would tend to incriminate the person or expose the person 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.[74]

1.98 The committee recognises there may be certain circumstances in which the privilege 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.

1.99 A use and derivative use immunity is included in clause 175(2) as it 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. Although the committee welcomes the inclusion of the use and derivative use immunity, the explanatory memorandum does not provide a justification for removing the privilege against self-incrimination.

1.100 The committee 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*.[75]

Incorporation of external materials existing from time to time[76]

1.101 Clause 180 provides that rules may be made prescribing a number of matters, and subclause 180(3) provides that despite subsection 14(2) of the *Legislation Act 2003*, the rules may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or other writing as in force or existing from time to time.

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73 Clause 175. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

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

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

76 Subclause 180(3). The committee draws Senators' attention to this provision pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

1.102 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, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- 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).

1.103 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

1.104 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.[77] 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.

1.105 The explanatory memorandum states that it is anticipated that the rules will prescribe certain international lists of chemicals that an introducer must consult, and as these lists may be regularly updated it is not meaningful to reference them as published on a certain date.[78]

1.106 Noting the above comments, the committee requests the Minister's advice as to whether the type of international lists that it is envisaged may be applied, adopted or incorporated by reference will be made freely available to all persons interested in the law.

77 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

78 Explanatory memorandum, p. 99.

Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017

Purpose	This bill seeks to repeal the *Industrial Chemicals (Notification and Assessment) Act 1989* together with three related Industrial Chemicals Charges Acts when new arrangements come into effect on 1 July 2018. The bill also seeks to make consequential amendments to a range of other Commonwealth legislation to reflect these changes
Portfolio	Health
Introduced	House of Representatives on 1 June 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Retrospective application[79]

1.107 Item 50 enables rules of a transitional nature to be made. Subitem 50(3) provides that rules made before 1 July 2020 may provide that 'this Act or any other Act or instrument' has effect with any modification prescribed by the rules.

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

1.109 In this instance, the explanatory memorandum provides a detailed justification as to the need for this power, particularly in light of the complexity of transitioning from the old to the new law (with over 45,000 industrial chemicals authorised for introduction) and the significant consequences for not having the right transitional arrangements in place.[80] The committee accepts that it may be appropriate for the limited use of a Henry VIII clause in such circumstances.

1.110 However, in addition, subitem 50(4) provides that subsection 12(2) of the *Legislation Act 2003* does not apply to rules made before 1 July 2020.

79 Subitems 50(3) and (4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

80 Explanatory memorandum, p. 23.

Subsection 12(2) of the *Legislation Act 2003* provides that a provision of a legislative instrument does not apply in relation to a person if the provision applies retrospectively and, as a result, the person's rights would be disadvantageously affected or liabilities would be retrospectively imposed on a person. 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. The committee therefore expects any disapplication of section 12(2) of the *Legislation Act 2003* to be fully justified. However, the explanatory memorandum does not address this issue.

1.111 The committee requests the Minister's advice as to why it is necessary, in relation to the making of transitional rules, to disapply the application of section 12(2) of the *Legislation Act 2003* (which prohibits the retrospective application of legislative instruments which have a detrimental effect on a person or impose retrospective liability on a person).

Industrial Chemicals Charges (General) Bill 2017

Purpose	This bill seeks to allow for the imposition of an annual registration charge on a person introducing chemicals under the Industrial Chemicals Bill 2017
Portfolio	Health
Introduced	House of Representatives on 1 June 2017
Scrutiny principle	Standing Order 24(1)(a)(iv)

Charges in delegated legislation[81]

1.112 This bill provides for the imposition of an annual registration charge on persons introducing chemicals into Australia (by import or manufacture) in accordance with the Industrial Chemical Bill 2017. The bill enables regulations to describe the methods of working out the annual registration charge applicable to each introducer of industrial chemicals.

1.113 Subclause 7(1) states that the amount of charge payable by a person is the amount:

(a) prescribed by the regulations; or

(b) worked out in accordance with a method prescribed by the regulations.

1.114 Subclause 7(2) provides that the regulations may also prescribe different charges or methods depending on the value of industrial chemicals.

1.115 Where charges are able to be prescribed by regulation the committee generally considers that some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.116 The explanatory memorandum suggests that the charges are to be imposed for the purposes of cost recovery:

> It is anticipated that the amount of the charge will be determined having regard to the value of the industrial chemicals introduced by the introducer in the registration year. Prior to the introduction of any regulations prescribing the charge, the proposed approach will be documented in a cost recovery implementation statement (consistent with

81 Clause 7. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

> the Australian Government Cost Recovery Guidelines) and subject to public consultation.[82]

1.117 However, no guidance is provided on the face of the bill as to the method of calculation (for example, there is no provision limiting the charge to cost recovery) nor is a maximum charge specified.

1.118 The committee notes that the same issue arises in relation to the Industrial Chemicals Charges (Customs) Bill 2017 and the Industrial Chemicals Charges (Excise) Bill 2017.

1.119 The committee requests the Minister's advice as to why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and a maximum charge can be specifically included in each of the proposed Industrial Chemical Charges bills.

82 Explanatory memorandum, p. 4.

Industrial Chemicals Charges (Customs) Bill 2017

Purpose	This bill seeks to for the imposition of a charge, only when they are considered a duty of customs, under the Industrial Chemicals Bill 2017
Portfolio	Health
Introduced	House of Representatives on 1 June 2017
Scrutiny principle	Standing Order 24(1)(a)(iv)

Charges in delegated legislation[83]

1.120 This bill provides for the imposition of an annual registration charge on persons introducing chemicals into Australia (by import or manufacture) in accordance with the Industrial Chemical Bill 2017. The bill enables regulations to describe the methods of working out the annual registration charge applicable to each introducer of industrial chemicals.

1.121 Subclause 7(1) states that the amount of charge payable by a person is the amount:

(a) prescribed by the regulations; or

(b) worked out in accordance with a method prescribed by the regulations.

1.122 Subclause 7(2) provides that the regulations may also prescribe different charges or methods depending on the value of industrial chemicals.

1.123 The committee has sought the Minister's advice as to why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and a maximum charge can be specifically included in each of the proposed Industrial Chemical Charges bills.

1.124 For the committee's full commentary in relation to this issue please refer to the committee's comments on the Industrial Chemicals Charges (General) Bill 2017 at paragraphs [1.112] to [1.119].

83 Clause 7. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

Industrial Chemicals Charges (Excise) Bill 2017

Purpose	This bill seeks to for the imposition of a charge, only when they are considered a duty of excise, under the Industrial Chemicals Bill 2017
Portfolio	Health
Introduced	House of Representatives on 1 June 2017
Scrutiny principle	Standing Order 24(1)(a)(iv)

Charges in delegated legislation[84]

1.125 This bill provides for the imposition of an annual registration charge on persons introducing chemicals into Australia (by import or manufacture) in accordance with the Industrial Chemical Bill 2017. The bill enables regulations to describe the methods of working out the annual registration charge applicable to each introducer of industrial chemicals.

1.126 Subclause 7(1) states that the amount of charge payable by a person is the amount:

(a) prescribed by the regulations; or

(b) worked out in accordance with a method prescribed by the regulations.

1.127 Subclause 7(2) provides that the regulations may also prescribe different charges or methods depending on the value of industrial chemicals.

1.128 The committee has sought the Minister's advice as to why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and a maximum charge can be specifically included in each of the proposed Industrial Chemical Charges bills.

1.129 For the committee's full commentary in relation to this issue please refer to the committee's comments on the Industrial Chemicals Charges (General) Bill 2017 at paragraphs [1.112] to [1.119].

84 Clause 7. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

Industrial Chemicals (Notification and Assessment) Amendment Bill 2017

Purpose	This bill seeks to amend the *Industrial Chemicals (Notification and Assessment) Act 1989* (the Act) to: • amend the definition of a new synthetic polymer; • amend the notification requirements for new chemicals; • remove requirements for introducers to provide annual reports to the National Industrial Chemicals Notification and Assessment Scheme for permits and self-assessed assessment certificates; • remove requirements for introducers to provide a final statement of the value of relevant industrial chemicals introduced in a registration year; and • make consequential amendments to the Act
Portfolio	Health
Introduced	House of Representatives on 1 June 2017

The committee has no comment on this bill.

International Monetary Agreements Amendment Bill 2017

Purpose	This bill seeks to amend the *International Monetary Agreements Act 1947* to provide standing appropriation and authority to borrow for payments to meet drawings made by the International Monetary Fund under a new bilateral loan agreement
Portfolio	Treasury
Introduced	House of Representatives on 25 May 2017

The committee has no comment on this bill.[85]

85 See, however, Chapter 3 in relation to scrutiny of standing appropriations.

Major Bank Levy Bill 2017

Purpose	This bill seeks to introduce a levy on authorised deposit-taking institutions with total liabilities of greater than $100 billion
Portfolio	Treasury
Introduced	House of Representatives on 30 May 2017
Scrutiny principle	Standing Order 24(1)(a)(iv) and (v)

Incorporation of materials existing from time to time[86]

1.130 Subclauses 5(4), 6(4) and 8(1) enable the Minister to, by legislative instrument, determine a kind of amount relating to a levy or the method for working out an amount of liability. Subclauses 5(5), 6(5) and 8(2) allow any such legislative instrument to apply, adopt or incorporate any matter contained in any other instrument or writing as in force or existing from time to time. The explanatory memorandum provides no explanation as to what type of instruments or documents may need to be applied, adopted or incorporated and does not explain why it would be necessary for the material to apply as in force or existing from time to time.

1.131 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 (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- 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).

1.132 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

86 Subclauses 5(5), 6(5) and 8(2). The committee draws Senators' attention to this provision pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

1.133 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.[87] 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.

1.134 Noting the above comments, the committee requests the Treasurer's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclauses 5(5), 6(5) and 8(2), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

87 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

Medicare Guarantee (Consequential Amendments) Bill 2017

Purpose	This bill seeks to make consequential amendments to the *Health Insurance Act 1973* and the *National Health Act 1953* to reflect the establishment of the Medicare Guarantee Fund (Treasury) Special Account and the Medicare Guarantee Fund (Health) Special Account
Portfolio	Treasury
Introduced	House of Representatives on 1 June 2017
Scrutiny principle	Standing Order 24(1)(a)

The committee has no comment on this bill.

Medicare Guarantee Bill 2017

Purpose	This bill seeks to establish the Medicare Guarantee Fund
Portfolio	Treasury
Introduced	House of Representatives on 1 June 2017

The committee has no comment on this bill.[88]

88 See, however, Chapter 3 in relation to scrutiny of standing appropriations.

National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017

Purpose	This bill seeks to amends the *National Disability Insurance Scheme Act 2013* to establish an independent national NDIS Quality and Safeguards Commission
Portfolio	Social Services
Introduced	House of Representatives on 31 May 2017
Scrutiny principles	Standing Order 24(1)(a)(ii), (iii) and (iv)

Broad discretionary power[89]

1.135 Proposed paragraph 67E(1)(a) provides that the NDIS Quality and Safeguards Commissioner may, if he or she considers it to be in the public interest to do so, disclose information acquired pursuant to the Act 'to such persons and for such purposes as the Commissioner determines'. Subsection 67E(2) provides that in disclosing such information the Commissioner must act in accordance with the National Disability Insurance Scheme rules made for the purposes of section 67F. However, proposed section 67F provides that the rules 'may' make provision for and in relation to the exercise of the Commissioner's power to disclose such information, but there is no requirement that such rules be made.

1.136 The explanatory memorandum gives an example of when it might be necessary to disclose such information as 'for the protection of persons with disability or the investigation of a criminal offence'.[90] It also explains why matters are to be set out in the rules rather than the primary legislation:

> It is necessary to provide for the parameters of this discretion in the NDIS rules as the Commissioner will be operating within the context of complex mainstream systems and services. The purposes for disclosure, the bodies to whom disclosure can be made and the type of information which may be disclosed is likely to change over time as States and Territories withdraw from the regulation of disability services under the NDIS and establish new arrangements for the protection of vulnerable people under mainstream service systems.

89 Schedule 1, item 45, proposed sections 67E and 67F. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

90 Explanatory memorandum, p. 12.

1.137 The committee notes that the information that may be disclosed under this power may be extremely sensitive, relating as it does to a person's disability, and the provision as drafted is extremely broad. There is no requirement that rules be made in relation to the Commissioner's power to disclose the information and no information on the face of the primary legislation as to the circumstances in which the power can be exercised (other than that the Commissioner must be satisfied that it is in the public interest to make the disclosure). There is also no requirement that before disclosing personal information about a person, the Commissioner must notify the person, give the person a reasonable opportunity to make written comments on the proposed disclosure and consider any written comments made by the person.

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

- **why (at least high-level) rules or guidance about the exercise of the Commissioner's disclosure power cannot be included in the primary legislation; and**
- **why there is no positive requirement that rules must be made regulating the exercise of the Commissioner's power (i.e. the committee requests advice as to why the proposed subsections have been drafted to provide that the rules *may* make provision for such matters, rather than requiring that the rules *must* make provision to guide the exercise of this significant power).**

Significant matters in delegated legislation[91]

1.139 The bill enables a number of significant matters to be included in delegated legislation rather than set out in primary legislation. This includes enabling the National Disability Insurance Scheme rules to make provision for matters such as:

- conditions of registration of NDIS providers;
- prescribed circumstances as to when registration of a registered NDIS provider may be suspended or revoked;
- standards concerning the quality of support or services to be provided by registered NDIS providers;
- the establishment of an NDIS Code of Conduct for NDIS providers and their employees;

91 Schedule 1, items 48, proposed section 73H, 73N(1)(f), 73P(1)(f), 73T, 73V, 73X and 73Z. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

- requirements for complaints management and resolution regarding registered NDIS providers; and
- arrangements relating to the notification and management of reportable incidents in connection with support or services by registered NDIS providers.[92]

1.140 In relation to the NDIS Code of Conduct which is to be established by the rules, proposed section 73V provides that a person who fails to comply with a requirement under the NDIS Code of Conduct is subject to a civil penalty of up to 250 penalty units (which for an individual could be up to $45,000 and for a body corporate could be up to $225,000).[93] The explanatory memorandum explains that in addition to civil penalties, the full range of enforcement action and sanctions available to the Commissioner applies in relation to determining the regulatory response to non-compliance with the Code of Conduct.[94]

1.141 No explanation is provided in the explanatory memorandum as to why it is necessary to include so much detail about the scheme in the rules and not in the primary legislation.

1.142 The committee's view is that significant matters, such as the provisions listed at paragraph [1.139] above, in particular the establishment of a Code of Conduct, breach of which could be subject to significant penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's advice as to:

- **why it is considered necessary, in each instance, to leave the details set out in paragraph [1.139] to delegated legislation; and**
- **the type of consultation that it is envisaged will be conducted prior to the making of regulations establishing the NDIS rules 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).**

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92 See Schedule 1, items 48, proposed section 73H, 73N(1)(f), 73P(1)(f), 73T, 73V, 73X and 73Z.

93 See section 4AA of the *Crimes Act 1914*.

94 Explanatory memorandum, p. 29.

Broad delegation of administrative powers[95]

1.143 Proposed sections 73ZE and 73ZF trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to new Part 3A of the *National Disability Insurance Scheme Act 2013*. Proposed subsections 73ZE(4) and 73ZF(3) provide that an authorised officer may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation.

1.144 The proposed new provisions apply to any 'other persons' providing assistance. The powers granted to 'other persons' could be coercive, including entering premises, inspecting documents, operating electronic equipment, etc.[96] There is no explanation in the explanatory memorandum of the need to confer such powers on 'other persons' and the bill does not confine who may exercise such powers by reference to any particular expertise or training.

1.145 The committee therefore requests the Minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised officer and whether it would be appropriate to amend the bill to require that any person assisting an authorised officer have specified skills, training or experience.

Fair hearing rights[97]

1.146 Proposed section 73ZN provides that the Commissioner may, by written notice, make a banning order that prohibits or restricts specified activities by an NDIS provider in certain circumstances. Subsection 73ZN(7) provides that the Commissioner may only make a banning order against a person after giving the person an opportunity to make submissions to the Commissioner on the matter. However, subsection 73ZN(8) provides that subsection 73ZN(7) does not apply if the Commissioner's grounds for making the banning order include that there is an immediate danger to the health, safety or wellbeing of a person with a disability or where the Commissioner has revoked the registration of the person as a registered NDIS provider. This would appear to remove fair hearing requirements in these specified circumstances. The explanatory memorandum does not give a justification for limiting the right to a fair hearing in this way. The committee notes that it would be possible to reconcile the need for urgent action and the right to a fair hearing by

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95 Schedule 1, item 48, proposed subsections 73ZE(4) and 73ZF2(3). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

96 See Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014*.

97 Schedule 1, item 48, proposed section 73ZN. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

providing for the banning order to have immediate effect but only making it permanent after a hearing has been provided.

1.147 The committee requests the Minister's advice as to the justification for removing the right of a person to make submissions to the Commissioner before a banning order is made in certain listed circumstances. The committee also requests the Minister's advice as to the appropriateness of amending the bill to provide that the banning order could have a temporary immediate effect in specified circumstances but that it would only become a permanent order after the affected person has been given an opportunity to make submissions to the Commissioner on the matter.

Merits review[98]

1.148 Proposed section 99 sets out a table that lists all of the 'reviewable decisions' under the *National Disability Insurance Scheme Act 2013*. Under that Act, section 100 (as amended by the bill)[99] provides that the decision-maker must notify a person directly affected by a reviewable decision of the right to request a review of the decision (or that there will be automatic review in certain circumstances), and section 103 provides that applications may be made to the Administrative Appeals Tribunal (AAT) for review of such decisions. The explanatory memorandum does not explain whether there are decisions that may be made under the Act that may not be described as a 'reviewable decision'. It is therefore difficult to assess whether there are any decisions that may be made under the Act that may not be subject to internal review and AAT review processes.

1.149 The committee requests the Minister's advice as to whether there are any decisions that could be made under the *National Disability Insurance Scheme Act 2013* that are not listed as being a 'reviewable decision', and if any decisions are excluded that might have an adverse impact on an individual, the justification for not including these in the list of 'reviewable decisions'.

Broad delegation of administrative powers[100]

1.150 Proposed section 202A provides that the Commissioner may delegate to 'a Commission officer' any or all of his or her power or functions under the NDIS

98 Schedule 1, item 50, proposed section 99. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

99 See Schedule 1, items 51 to 56.

100 Schedule 1, item 71, proposed section 202A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

(except in relation to privacy powers, which may only be delegated to an SES employee in the Commission).

1.151 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.

1.152 The explanatory materials provide no information about why these powers are proposed to be delegated to any Commission officer at any level.

1.153 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.

1.154 The committee requests the Minister's advice as to why it is necessary to allow most of the Commissioner's powers and functions to be delegated to any Commission officer at any level and also requests the Minister's advice as to the appropriateness of amending the bill 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.

Public Service Amendment (Supporting a Regional Workforce) Bill 2017

Purpose	This bill seeks to remove discrimination based on the location of candidates for positions in the Australian Public Service (APS) and to include 'telecommuting' to the employment principles of the APS and to the rules around the APS merit based promotion and selection process
Sponsor	Ms Cathy McGowan MP
Introduced	House of Representatives on 22 May 2017

The committee has no comment on this bill.

Safe Work Australia Amendment (Role and Functions) Bill 2017

Purpose	This bill seeks to amend the *Safe Work Australia Act 2008* to: • clarify Safe Work Australia's (SWA) role and the relationship between its role and functions; • amend SWA's functions; • replace outdated terms; and • clarify that work health and safety (WHS) ministers will continue to approve the model WHS legislative framework
Portfolio	Employment
Introduced	House of Representatives on 31 May 2017
Scrutiny principle	Standing Order 24(1)(a)

The committee has no comment on this bill.

Social Services Legislation Amendment (Ending Carbon Tax Compensation) Bill 2017

Purpose	This bill seeks to amend various Acts relating to social security, veterans' entitlements, military rehabilitation and compensation and farm household support to: • end the energy supplement to new income support recipients from 20 September 2017; and • ensure that welfare recipients who are paid the energy supplement with their payment prior to 20 September 2016 and satisfy certain requirements will continue to receive the energy supplement with their payment from 20 September 2017 onwards
Portfolio	Social Services
Introduced	House of Representatives on 31 May 2017

The committee has no comment on this bill.

Social Services Legislation Amendment (Energy Assistance Payment and Pensioner Concession Card) Bill 2017

Purpose	This bill seeks to provide: • a one-off Energy Assistance Payment to recipients of the age pension, disability support pension and parenting payment single, together with recipients of various veterans' payments, who are payable and residing in Australia on 20 June 2017; and • a pensioner concession card to various former social security pensioners and veterans' payments recipients where the payment or pension was cancelled on 1 January 2017 due to the rebalancing of the pension assets test
Portfolio	Social Services
Introduced	House of Representatives on 24 May 2017

The committee has no comment on this bill.

Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017

Purpose	This bill seeks to amend the *Social Security (Administration) Act 1999* to allow the Income Management element of Cape York Welfare Reform to continue for two additional years until 30 June 2019
Portfolio	Social Services
Introduced	House of Representatives on 24 May 2017

The committee has no comment on this bill.

Social Services Legislation Amendment (Relieving Domestic Violence Victims of Debt) Bill 2017

Purpose	This bill seeks to amend the *A New Tax System (Family Assistance) (Administration Act) 1999* and the *Social Security Act 1991* to allow social security and family assistance debts to be waived in cases of domestic or family violence
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 29 May 2017

The committee has no comment on this bill.

Statute Update (Winter 2017) Bill 2017

Purpose	This bill seeks to correct technical errors that have occurred in Acts including: • amending Acts so that their text reflects the legal effect that Part 6 of the *Acts and Instruments (Framework Reform) Act 2015* and section 10 of the *Acts Interpretation Act 1901* currently have; and • repeal spent and obsolete provisions and Acts
Portfolio	Attorney-General
Introduced	House of Representatives on 25 May 2017

The committee has no comment on this bill.

Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017

Purpose	This bill seeks to amend the *Corporations Act 2001* to: • provide for a safe harbour from personal liability for company directors from insolvent trading provisions in certain circumstances; and • stay the enforcement of ipso facto clauses that are triggered when a company enters administration, where a managing controller has been appointed over all or substantially all of the company's property, or where the company is undertaking a compromise or arrangement for the purpose of avoiding insolvent liquidation
Portfolio	Treasury
Introduced	House of Representatives on 1 June 2017

The committee has no comment on this bill.

Treasury Laws Amendment (2017 Measures No. 2) Bill 2017

Purpose	This bill seeks to amend various Acts relating to taxation, superannuation, personal insolvency and corporate insolvency Schedule 1 includes amendments relating the superannuation reform package, including amendments to: - the transfer balance cap; - concessional and non-concessional contribution rules; - the objective of superannuation; - the transition to retirement income stream rules; - capital gains tax relief for superannuation funds; and - administrative processes Schedule 2 includes amendments relating to insolvency
Portfolio	Treasury
Introduced	House of Representatives on 25 May 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Retrospective application[101]

1.155 Item 27 of Schedule 1 is an application provision that provides that the amendment made by item 5 of Schedule 1 (relating to assumptions about income streams in relation to superannuation) applies in relation to non-concessional contributions for the 2013-2014 financial year and later years.

1.156 The explanatory memorandum explains that this 'change aligns the application of the updated review rules with that for the review rights for the discretion for concessional contributions, which applies from the 2013-2014 financial year'.[102]

1.157 No further explanation is given and it is unclear why these amendments are intended to apply retrospectively. The committee has a long-standing scrutiny concern about provisions that apply retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

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101 Schedule 1, item 27. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

102 Explanatory memorandum, p. 25.

1.158 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should clearly 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.

1.159 The committee requests the Treasurer's advice as to why this measure is intended to apply retrospectively from the 2013-2014 financial year and whether this will cause any detriment to any individual.

Treasury Laws Amendment (Accelerated Depreciation For Small Business Entities) Bill 2017

Purpose	This bill seeks to amend Acts relating to taxation to extend by 12 months to 30 June 2018 the period during which small business entities can access expanded accelerated depreciation rules
Portfolio	Treasury
Introduced	House of Representatives on 25 May 2017

The committee has no comment on this bill.

Treasury Laws Amendment (Enterprise Tax Plan No. 2) Bill 2017

Purpose	This bill seeks to amend various Acts relating to taxation to: • progressively extend the lower 27.5 per cent corporate tax rate to all corporate tax entities by the 2023-24 income year, and then lower the corporate tax rate for all corporate tax entities to: - 27 per cent for the 2024-25 income year; - 26 per cent for the 2025-26 income year; and - 25 per cent for the 2026-27 income year and later income years; and • make consequential amendments to the income tax law to reflect the extension of the reduction in the corporate tax rate to all corporate tax entities
Portfolio	Treasury
Introduced	House of Representatives on 11 May 2017

The committee has no comment on this bill.

Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Bill 2017

Purpose	This bill seeks to vary the foreign resident capital gains withholding payments to: • increase the withholding rate to 12.5 per cent; and • reduce the withholding threshold to $750,000
Portfolio	Treasury
Introduced	House of Representatives on 1 June 2017

The committee has no comment on this bill.

Treasury Laws Amendment (GST Integrity) Bill 2017

Purpose	This bill seeks to amend the *A New Tax System (Goods and Services Tax) Act 1999* to: • introduce a reverse charge for business to business transactions between suppliers and purchasers of gold, silver and platinum to remove the opportunity for a supplier to avoid paying GST to the Commissioner of Taxation by liquidating; and • clarify that precious metals are not second hand goods
Portfolio	Treasury
Introduced	House of Representatives on 1 June 2017

The committee has no comment on this bill.

Treasury Laws Amendment (Major Bank Levy) Bill 2017

Purpose	This bill seeks to amend various Acts in relation to taxation to: • set out how to index the levy's $100 billion threshold to growth in nominal Gross Domestic Product; • allow the Australian Prudential Regulation Authority (APRA) to collect the data necessary to calculate the levy; • allow APRA to provide information relating to the major bank levy to the Australian Taxation Office (ATO); • ensure that when the major bank levy is payable to the ATO the ordinary collection and recovery provisions apply; and • introduce an anti-avoidance provision to protect the integrity of the levy
Portfolio	Treasury
Introduced	House of Representatives on 30 May 2017
Scrutiny principle	Standing Order 24(1)(a)(i), (iv) and (v)

Reversal of evidential burden of proof[103]

1.160 Section 56(2) of the *Australian Prudential Regulation Authority Act 1998* makes it an offence to disclose information acquired without authorisation. The offence carries a maximum penalty of imprisonment for 2 years. Proposed subsection 56(5D) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the production by a person of a document that was given to the Australian Prudential Regulation Authority (APRA) under section 13 of the *Financial Sector (Collection of Data) Act 2001* is to the Commissioner of Taxation for the purposes of the *Major Bank Levy Act 2017*.

1.161 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.

1.162 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

103 Schedule 1, item 1, proposed subsection 56(5D). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.163 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 reversal of the evidential burden of proof in proposed subsection 56(5D) has not been addressed in the explanatory materials.

1.164 As the explanatory materials do not address this issue, the committee requests the Treasurer's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of 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*.[104]

Incorporation of external materials existing from time to time[105]

1.165 Section 13 of the *Financial Sector (Collection of Data) Act 2001* provides that APRA may determine in writing reporting standards that are required to be complied with by certain financial sector entities. Proposed subsection 13(2C) provides that a reporting standard may make provision in relation to matters relating to the reporting of amounts for the purposes of the *Major Bank Levy Act 2017*, by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time. The explanatory memorandum provides no explanation as to what type of instruments or documents may need to be applied, adopted or incorporated in a reporting standard and does not explain why it would be necessary for the material to apply as in force or existing from time to time.

1.166 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, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);

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

105 Schedule 1, item 3, proposed subsection 13(2C). The committee draws Senators' attention to this provision pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

- 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).

1.167 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

1.168 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.[106] 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.

1.169 Noting the above comments, the committee requests the Treasurer's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subsection 13(2C), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the document is first made.

106 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

Treasury Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2017

Purpose	This bill seeks to amend the *Medicare Levy Act 1986* and the *A New Tax System (Medicare Levy Surcharge–Fringe Benefits) Act 1999* to increase: • the Medicare levy low-income thresholds for individuals and families (along with the dependent child/student component of the family threshold) in line with movements in the consumer price index (CPI); • the Medicare levy low-income threshold for individuals and families eligible for the seniors and pensioners tax offset (along with the dependent child/student component of the family threshold), in line with movements in the CPI; and • the Medicare levy surcharge low-income threshold in line with movements in the CPI
Portfolio	Treasury
Introduced	House of Representatives on 24 May 2017

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment (Budget Measures) Bill 2017

Purpose	This bill seeks to amend Acts relating to veterans' affairs, military rehabilitation and compensation to: • provide people already covered under the APBNTTA (British Nuclear Test Participants), as well as Australian veterans of the British Commonwealth Occupation Force and civilians present at a British nuclear test area during a relevant period, with treatment for all conditions; • amend the current work history restrictions for the Special and Intermediate Rates of Disability Pension; and • insert instrument making powers enabling the Military Rehabilitation and Compensation Commission to determine a class of persons eligible to participate in an early access to rehabilitation pilot programme
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 24 May 2017

The committee has no comment on this bill.

Commentary on amendments and explanatory materials

No comments

1.170 The committee has no comments on amendments made to the following bill:

- Social Security Legislation Amendment (Youth Jobs Path: Prepare, Trial, Hire) Bill 2016[107]

107 On 10 May 2017 the Senate agreed to one Nick Xenophon Team amendment. On 11 May 2017 the House of Representatives agreed to the Senate amendment and the bill was passed.

Chapter 2

Commentary on ministerial responses

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

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

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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(v)

2.3 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 30 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 1.

Modified disallowance procedures[1]

Initial scrutiny – extract

2.4 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;

1 Subclause 11(2).

- 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]

2.5 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 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.

2.6 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]

2.7 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.

2.8 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,

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

3 Explanatory memorandum, p. 22.

4 Explanatory memorandum, p. 22.

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]

2.9 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.

2.10 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.

Minister's response

2.11 The Minister advised:

> The Committee has identified proposed paragraph 11(2)(b) in the Bill as a modified disallowance procedure as it reverses the procedure set out in subsection 42(2) of the *Legislation Act 2003.* This is because paragraph 11(2)(b) provides that where a motion to disallow an instrument is unresolved at the end of the reduced five sitting day disallowance period, the instrument would be taken not to have been disallowed and would therefore continue in effect.
>
> The disallowance procedure has been reversed for the same reasons the disallowance period was shortened to five sitting days of each house, outlined in paragraphs 1.86 to 1.93 of the explanatory memorandum to the Bill. Namely, it will provide greater certainty, in a timely manner, to industry in relation to the levies that they need to pay.

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

> Allowing the instruments to be disallowed by default following a disallowance motion would create significant commercial uncertainty for industry as the instrument would not take effect in cases where a motion is not resolved within the five day disallowance period. If this were to occur, the instrument would need to be tabled again and a new five day disallowance period would have to conclude before the instrument could actually take effect. The delay in the instrument taking effect may disrupt industry plans, budgets and cash flows. If the recovery of costs subsequently falls into the following financial year, industry would have to pay the levy for two years of ASIC's costs in one financial year.
>
> The reversal of the disallowance procedure will ensure that the instrument is only disallowed if a motion to disallow is actually passed (not just if a motion is made). This change is appropriate in the circumstances because of the significant uncertainty it could otherwise create for industry. The change is also appropriate as the instrument provides only for factual details of ASIC's regulatory costs and the mechanistic application of the formulas and methods for determining the amounts of levy to be paid, which are prescribed in regulations. The regulations are subject to normal disallowance processes.

Committee comment

2.12 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is proposed to reverse the usual disallowance procedure (so that where a motion to disallow an instrument is unresolved at the end of the reduced five sitting day disallowance period, the instrument would be taken *not to have been disallowed* and would therefore continue in effect) for the same reasons the disallowance period was shortened to five sitting days of each House. That is, that the modified disallowance procedures will provide greater certainty, in a timely manner, to industry in relation to the levies that they need to pay.

2.13 As noted above, under the modified disallowance procedure in paragraph 11(2)(b) of this bill, if a disallowance motion is lodged, but not brought on for debate before the end of the five 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 five sitting day disallowance period and therefore the instrument would prevail regardless of the attempt to disallow it.

2.14 The Minister states that 'allowing the instruments to be disallowed by default following a disallowance motion would create significant commercial uncertainty for industry as the instrument would not take effect in cases where a motion is not resolved within the five day disallowance period'. Furthermore, it is suggested that any 'delay in the instrument taking effect may disrupt industry plans, budgets and cash flows' and that if 'the recovery of costs subsequently falls into the

following financial year, industry would have to pay the levy for two years of ASIC's costs in one financial year'.

2.15 The committee notes this advice in relation to the need for certainty and timeliness; however, the committee considers these concerns could be resolved through using well-established procedures of the Senate in the event that a disallowance motion is given in relation to one of these instruments, rather than reversing the usual disallowance process itself. Particularly in recent years, disallowance motions in the Senate have been subjected to time limits to ensure that the Senate is able to make a positive decision in relation to the disallowance motion before the expiry of the disallowance period (and thus prevent the relevant instrument from being taken to have been disallowed simply by the effluxion of time).[6]

2.16 The committee therefore considers that, from a scrutiny perspective, it would be more appropriate that the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* apply to these instruments (that is, that instruments are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period). The committee notes that the proposed procedure (that would result in the instrument remaining in force if a notice of motion to disallow is not resolved) would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the five sitting days. The committee considers that concerns regarding commercial uncertainty would be best dealt with by ensuring that any notice of motion to disallow was positively considered by the Senate (as is the usual approach in relation to disallowable instruments).

2.17 In relation to the proposal to reduce the disallowance period from the usual 15 sitting days to five sitting days, as noted in the committee's initial comments at paragraphs [2.6]–[2.7] above, the committee leaves the question of whether this aspect of the modified disallowance procedures is appropriate to the Senate as a whole.

2.18 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of reversing aspects of the usual disallowance procedure in relation to these instruments.

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

6 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 449.

Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017

Purpose	This bill seeks amend *Competition and Consumer Act 2010* to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives on 13 February 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.20 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2017*. The Member responded to the committee's comments in a letter received on 5 May 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the response provided by the Chief Executive Officers of Indigenous Art Code and Arts Law on behalf of the Member, followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Reversal of evidential burden of proof[7]

Initial scrutiny – extract

2.21 Proposed section 168A(1) makes it an offence to supply, or offer to supply, a thing in trade or commerce which includes an indigenous cultural expression. Proposed subsection 168A(2) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the thing is supplied by, or in accordance with an arrangement with a relevant indigenous community and artist. The offence carries a maximum penalty of $25,000 for an individual ($200,000 for a body corporate).

2.22 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.

2.23 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.

7 Item 4, subsection 168A(2).

2.24 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Member's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of 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*.[8]

Response provided by the Member

2.25 On behalf of the Member, the Chief Executive Officers advised:

> The purpose of the Bill is to change current practices in the sale of indigenous art and indigenous cultural expression. As you may be aware, throughout 2016 the Indigenous Art Code and the Arts Law Centre conducted a joint investigation into the sale of indigenous art or products bearing indigenous cultural expression in Australia. From that study, the Arts Law Centre and Indigenous Art Code estimates that 'up to 80% of items being sold as legitimate Indigenous artworks and souvenirs in tourist shops and some galleries around Australia are actually inauthentic.' This lead to the 'Fake Art Harms Culture' campaign.
>
> The crux of the fake art issue for indigenous persons is that their culture is being exploited for sale without their consent. The purpose of the Bill is therefore to ensure that the Bill requires suppliers and retailers to ensure that the work they supply is made by or made with the consent of an indigenous artist and indigenous community. Under clause 168A(2), the defendant bears a legal burden which requires the defendant to positively prove, as an exemption to clause 168A(1), that:
>
> 1. the thing is supplied in accordance with an arrangement with an indigenous community or indigenous artist; and
> 2. the thing is made in Australia unless an exemption applies.
>
> The offence-specific defence, that imposes a burden of proof on the defendant, is necessary to achieve the purpose of the Bill. In particular, the Indigenous Art Code and Arts Law Centre believe that:
>
> - the requirement for consent provides the best protection to indigenous communities and artists. The fact that suppliers are commercialising indigenous cultural expressions without obtaining any consent places indigenous communities and artists in a position of vulnerability and exploitation. This defence focusses on the key issue - whether the relevant indigenous community and artist has consented to the commercialisation of the indigenous cultural expression with which the community and artist is associated;

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

- this defence (and the legal burden associated with it) is appropriate because the consent or licensing arrangements in place for the supply of the art is peculiarly within the knowledge of the defendant. It would be a difficult and costly exercise for the prosecution to disprove consent and would necessarily require the prosecution to ensure that no indigenous person or community had granted consent to the defendant. Such a burden would be unreasonable and make the offence difficult to establish. By contrast, it does not impose any significant burden on the defendant - if they have obtained consent to use the indigenous cultural expression in the manner in which they have, they should be able to establish this without any real difficulty. If they have acquired the art or products bearing the indigenous cultural expression from a wholesaler, they can make it a condition of the wholesale purchase that the wholesaler provide evidence of consent.

This approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which relevantly provides that 'where a matter is peculiarly with in the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence'. The Guide also relevantly provides in this respect:

> ...the [Scrutiny of Bills] Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant 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 or expensive whereas it could be readily and cheaply provided by the accused.

Committee comment

2.26 The committee thanks the Member for this response. The committee notes the advice that the purpose of the bill is to require that suppliers and retailers ensure that the work they supply is made by or made with the consent of an indigenous artist and indigenous community.

2.27 The committee notes the advice that the burden sought to be imposed is a legal burden, however, in light of subsection 13.3(3) of the *Criminal Code Act 1995* the committee considers the reverse burden is evidential rather than legal. The committee notes the advice that the question of the consent or licensing arrangements in place for the supply of art is peculiarly within the defendant's knowledge, that it would be a difficult and costly exercise for the prosecution to disprove consent and it would not impose any significant burden on the defendant to establish evidence of consent.

2.28 The committee considers that the response has established that the matters are likely to be peculiarly within the knowledge of the defendant. However, the

committee considers that the offence itself is extremely broad, with an offence likely to be committed simply where a person supplies or offers to supply a thing, which includes indigenous cultural expression, to a consumer in trade or commerce, unless a defence can be established. It would appear that this could capture indigenous artists themselves supplying their own artwork in trade or commerce, unless they positively raised evidence in their defence. Whether an arrangement is in place with each indigenous community and indigenous artist before the thing is supplied in trade or commerce would appear to be a matter that is a key element of the offence. The committee considers this issue should more properly be included as an element of the offence itself, rather than drafted as a defence.

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

2.30 The committee requests that the key information provided by the Member 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*).

2.31 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 defence.

Strict liability[9]

Initial scrutiny – extract

2.32 Proposed subsection 168A(3) makes the offence in subsection 168A(1) a strict liability offence. The explanatory memorandum provides no justification as to why the offence is one of strict liability.

2.33 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*.

2.34 The committee requests a detailed justification from the Member for the proposed strict liability offence with reference to the principles set out in the *Guide*

9 Item 4, subsection 168A(3).

to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.[10]

Response provided by the Member

2.35 On behalf of the Member, the Chief Executive Officers advised:

> The offence in clause 168A(1) of the Bill is one of strict liability subject to the offence-specific defence outlined above.
>
> The Bill was drafted in this way because the Indigenous Art Code and the Arts Law Centre consider that a Bill that requires intent to be established would not adequately protect indigenous persons, indigenous communities and consumers from exploitation. This is because the conduct has the potential to cause widespread detriment to indigenous communities both financially and culturally. It also has the potential to cause significant loss to consumers. Many consumers purchase indigenous art or products bearing indigenous cultural expression in Australia on the understanding that the item they are purchasing is an authorised item or does in fact bear indigenous cultural expression. The strict liability approach is consistent with other provisions of the Australian Consumer law, including those in respect of unfair practices (the section which the Bill proposes to amend). As outlined in the Explanatory Memorandum to the Australian Consumer law:
>
> > "The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches these provisions, whether or not he, she or it intended to engage in the contravention."
>
> The Indigenous Art Code and Arts Law Centre believe that the strict liability offence is appropriate because:
>
> - it is not difficult for suppliers to ensure they know whether or not the art that they supply is made by or made with the consent of an indigenous artist and indigenous community. It simply requires the supplier to ask the producer for certification or confirmation;
> - the offence is not punishable by imprisonment. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that it is only appropriate for strict liability to apply if the offence is not punishable by imprisonment and that is the case here;

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

- while the fine imposed is higher than that recommend in the Guide, these fines are consistent with other fines imposed for strict liability offences under the Australian Consumer Law; and
- the offence is narrow and easily capable of avoidance. Suppliers can readily obtain information regarding the origin of products that they supply and should be encouraged to do so. The defence of reasonable mistake of fact in section 207 of the Australian Consumer Law will also help to protect suppliers which rely on information provided to them when they acquire the art for resale.

Committee comment

2.36 The committee thanks the Member for this response. The committee notes the advice that the relevant conduct has the potential to cause widespread detriment to indigenous communities and cause significant loss to consumers, and if there was a requirement for intent to be established this would not adequately protect indigenous persons, indigenous communities and consumers from exploitation. The committee also notes the advice that it would not be difficult for suppliers to ensure they know whether the art they supply is made by or with the consent of an indigenous artist and indigenous community; the offence is not punishable by imprisonment; and the offence is narrow and easily capable of avoidance as suppliers can readily obtain information regarding the origin of the products they supply.

2.37 As set out at paragraphs [2.28] to [2.29] above, the committee considers that the offence as currently drafted is extremely broad. It does not consider that the offence is narrow and easily capable of avoidance, as the offence would apply whenever a person supplies or offers to supply a thing, which includes indigenous cultural expression, to a consumer in trade or commerce. There is no requirement that the supplier knows whether the art they supply is done with or without an arrangement with the indigenous artist or indigenous community. The application of strict liability would mean that there is no need to prove an intention to supply a thing that includes an indigenous cultural expression. This could mean that a person may be guilty of the offence simply by offering to sell an artwork that has a likeness to an artwork made by an indigenous artist, without any knowledge that the artwork has that likeness. While the application of strict liability may be appropriate in certain regulatory contexts, such as where the person is placed on notice to guard against the possibility of any contravention, the committee notes this offence would apply to any person selling any thing that has an indigenous cultural expression to any person, and not just to art dealers or suppliers.

2.38 From a scrutiny perspective, the committee considers that the offence as currently drafted is overly broad and the application of strict liability in the circumstances may unduly trespass on personal rights and liberties.

2.39 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 application of strict liability.

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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.40 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Treasurer responded to the committee's comments in a letter dated 1 June 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Treasurer's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Legal burden of proof[11]

Initial scrutiny – extract

2.41 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).

2.42 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.

2.43 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.

2.44 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

11 Schedule 11, item 3.

each time the burden is reversed, with the rights of people affected being the paramount consideration.

2.45 The explanatory memorandum notes that whether a person has made a reasonable search is an objective test,[12] 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, 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.[13]

2.46 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.

2.47 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.

Treasurer's response

2.48 The Treasurer advised:

> Schedule 11 to the Bill proposes to introduce a new defence to a contravention of section 155 of the *Competition and Consumer Act 2010* (the CCA) for a person who has undertaken a reasonable search for the requested documents but, following that search, is not aware of the documents. Whether or not a search is reasonable depends on factors including the nature and complexity of the matter, the number of documents involved and the ease and cost of retrieving documents relative to the resources of the defendant. Persons seeking to take

12 Explanatory memorandum, p. 89.

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

advantage of the defence must also include a description of the scope and limitations of their search to the ACCC.

The Committee has requested advice as to why a legal, rather than an evidential, burden of proof is imposed on a defendant wishing to rely on the new defence.

Section 155 of the CCA contains the primary investigative power of the Australian Competition and Consumer Commission (ACCC) and is crucial to the ACCC's administration and enforcement of the CCA. The ACCC relies heavily on its power to compel parties to provide information, documents and evidence, in order to investigate anti-competitive conduct.

The introduction of the new defence was recommended by the Harper Competition Policy Review, in recognition of the fact that strict compliance with a section 155 notice may be unreasonably burdensome on businesses, particularly where they hold a large number of electronic documents.

The new defence was modelled on Rule 20.14 of the *Federal Court Rules 2011,* which requires a party to discover relevant documents of which the party is aware after a reasonable search. Rule 20.14 also contains several factors the party may take into account in making a reasonable search, which closely resemble the factors in proposed subsection 155(6) for determining whether a search was reasonable.

Whichever burden of proof is placed on the defendant, if this burden is satisfied, the prosecutor would need to prove beyond reasonable doubt that the search in question was not reasonable. This would present significant practical challenges.

For example, whether a search was reasonable or not may often turn on the nature of the methodology used to conduct the search. The reasonableness of the methodology would be assessed against the factors set out in the new defence, including:

- the nature and complexity of the matter;
- the number of documents involved; and
- the ease and cost of retrieving the documents, which would be assessed against the backdrop of how they were stored.

Information on the second and third matters above would typically be peculiarly within the knowledge of the defendant. The prosecution would therefore often find it very difficult to obtain compelling evidence that it was reasonable for a defendant to have conducted a more extensive search.

For example, the ease and cost of retrieving documents could depend on, for example, the search capabilities and limitations of its electronic filing system; how documents were archived (for example, email accounts of former employees); how rigorously the defendant stored documents in

the correct places; and where the computer servers containing electronic documents were located (which may not be in Australia).

Much of this information would be known only by the defendant. Even where, for example, a company used an 'off-the-shelf' electronic filing system, about which there would be public information, a key factor affecting the ease of finding documents would be the conventions used internally by the company for naming folders and files .

As the Committee has acknowledged in Scrutiny Digest No. 5, the factors discussed above suggest that reversing the burden of proof is appropriate. The Committee then asks why this should not just be reversing an evidential burden of proof.

The concern with an evidential burden is that it would be relatively straightforward for defendants to provide evidence suggesting a reasonable possibility that they had conducted a reasonable search. In many cases, this evidence would simply be the description of the scope and limitations of the search provided to provide the ACCC. The prosecution would then face the very considerable challenge - as outlined above - of proving beyond reasonable doubt that a search was unreasonable.

Introducing the reasonable search defence with an evidential burden would therefore, in many cases, so reduce the risk of a defendant being successfully prosecuted for failing to comply with a section 155 notice, as to significantly undermine the effectiveness of section 155 as an enforcement tool.

In contrast, requiring defendants to prove that a search was reasonable on the balance of probabilities would require them to provide a more persuasive case to the court, with significantly more supporting evidence. Given the defendant's unique knowledge of how its documents are stored, if the additional evidence exists, it would be relatively easy and inexpensive for the defendant to provide it to the court. The additional evidence would also help redress the prosecution's lack of information (as outlined above) when seeking to disprove the defence beyond reasonable doubt.

A legal burden would therefore find a better balance between introducing the new defence and ensuring that section 155 remains an effective tool in the ACCC's enforcement capability.

Committee comment

2.49 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the new defence applies where a person has undertaken a reasonable search for the requested documents, and the prosecution would often find it very difficult to obtain compelling evidence that it was reasonable for a defendant to have conducted a more extensive search. The Treasurer advises that much of the relevant information would be known only by the defendant, and the

concern with only reversing the evidential burden of proof (as opposed to the legal burden) is that it would be relatively straightforward for defendants to provide evidence suggesting a reasonable possibility that they had conducted a reasonable search, which could just be a description of the scope and limitations of the search. But that then the prosecution would face the considerable challenge of proving beyond reasonable doubt that a search was unreasonable. The committee also notes the Treasurer's advice that it would be relatively easy and inexpensive for the defendant to provide such evidence to the court.

2.50 The committee reiterates that the general duty of the prosecution to prove all elements of an offence is an important aspect of the right to be presumed innocent until proven guilty and that provisions that reverse the legal burden of proof and require a defendant to disprove one or more elements of an offence, interferes with this important common law right.

2.51 However, the committee notes that the reversal of the legal burden of proof in this instance is proposed to apply to a defence (rather than a matter that would more properly form an element of the offence) and applies in a regulatory context where the defendant has been put on notice of the requirement to produce the information. The committee also notes that the question of whether a reasonable search was undertaken is a matter likely to be relatively easily and readily provable by the defendant.

2.52 The committee requests that the key information provided by the Treasurer 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*).

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

Significant penalties[14]

2.54 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).[15] The justification given in the explanatory

14 Schedule 11, item 4.

15 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.

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'.[16] It also notes that the Harper Review into competition policy recommended that the maximum penalty for an offence under section 155 be increased.[17]

2.55 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.[18]

2.56 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,[19] 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.[20] 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.[21]

2.57 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'.[22] It therefore does not necessarily appear

16 Explanatory memorandum, p. 91.

17 Explanatory memorandum, p. 87.

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

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

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

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

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

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).

2.58 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*.

2.59 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.

Treasurer's response

2.60 The Treasurer advised:

> Schedule 11 to the Bill proposes to increase the maximum penalty for contravening section 155 of the CCA to two years imprisonment or 100 penalty units. The Committee has requested the justification for this increase.
>
> The Bill seeks to implement Recommendation 40 of the Harper Competition Policy Review, which included that:
>
> > The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001.*
>
> In its analysis leading to this recommendation, the Harper Review highlighted the maximum penalty for failing to comply with various notices issued by the *Australian Securities and Investment Act 2001,* which is 100 penalty units or two years imprisonment or both.
>
> It reasonably follows that the reference to ' similar notice-based evidence-gathering powers' in Harper's recommendation is a reference to these provisions.
>
> The Bill therefore adopts the maximum penalty for the relevant provisions in the *ASIC Act 2001* but with one variation reflecting the existing maximum penalty for contravening section 155; that is, the Bill would enable a fine or imprisonment to be imposed, but not both.
>
> The Bill also retains the current methodology for determining maximum penalties for individuals and corporations. The CCA currently provides for a penalty for breaching section 155 for a person. Section 4B of the *Crimes Act 1914* then operates, so that the maximum penalty for a corporation is up to five times the maximum penalty for a natural person. The Harper

Review would have been fully aware of this methodology, but did not recommend changing it. The Bill therefore retains the methodology.

The Committee requested advice on the 'level of penalty applicable to all comparable Commonwealth offence provisions'. There are likely to be a large number of provisions in Commonwealth legislation that are comparable to section 155 to varying degrees. However, the Harper Review correctly highlighted that the most comparable provisions to section 155 are in the *ASIC Act 2001,* and the proposed penalties in the Bill are based on the penalties for breaching these provisions.

Committee comment

2.61 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the proposed amendments implement a recommendation of the Harper Review and as the Harper Review recommended that 'the fine for non-compliance with section 155' should be increased in line with similar notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the bill adopts the maximum penalty for the relevant provisions in the ASIC Act. The committee also notes the Treasurer's advice that there are likely to be a large number of provisions that are comparable to section 155, but that the most comparable are in the ASIC Act.

2.62 The committee is aware that there are a large number of comparable provisions, and it had therefore sought advice as to the level of penalty applicable to those comparable provisions. In determining whether a penalty is appropriate having regard to other comparable penalties across the statute book, the committee considers it important to consider provisions across a number of regulatory contexts. It would therefore have assisted the committee in assessing the appropriateness of this penalty if detail were provided as to other comparable Commonwealth provisions.

2.63 The committee also reiterates that while it is stated that these amendments are as a result of recommendations of the Harper Review, the Harper Review had noted that in 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'. The Harper Review instead appeared to be concerned that the current sanction 'for a corporation' is inadequate and therefore recommended that the 'fine' for non-compliance with section 155 be increased. There was no specific recommendation that the maximum period of imprisonment (which can only necessarily apply to an individual) be doubled.[23]

23 Harper, Anderson, McCluskey and O'Bryan, *Competition Policy Review*, Final Report, March 2015, p. 71.

2.64 **Noting the committee's responsibility to report to the Senate on provisions that trespass unduly on personal rights and liberties,[24] the committee does not consider that sufficient information has been provided to be able to conclude that the significant increase in penalties for non-compliance with section 155 is consistent with other comparable Commonwealth offences or is necessary in the circumstances.**

2.65 **The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of significantly increasing the maximum period of imprisonment for non-compliance with section 155**.

Retrospective commencement[25]

2.66 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'.

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

2.68 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.

2.69 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.

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

24 Senate standing order 24(1)(a)(i).

25 Schedule 12, item 37.

Treasurer's response

2.71 The Treasurer advised:

> The amendments made by Part 2 of Schedule 12 would apply in relation to decisions made by the responsible Commonwealth Minister under section 44N of the *Competition and Consumer Act 2010* on or after 1 January 2017.
>
> Generally, grandfathering existing certifications is intended to avoid creating undue sovereign risk as investment decisions made under certified regimes would not have accounted for the potential for revocation included in Schedule 12.
>
> Stakeholders became aware of the potential for revocation through the exposure draft process for the Bill undertaken in September and October 2016. Limiting grandfathering to certifications before 1 January 2017 was intended to manage any risk of certification applications being brought forward with a view to achieving a decision before the legislation commenced.

Committee comment

2.72 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the amendments would apply in relation to decisions made by the relevant Minister on or after 1 January 2017 and that stakeholders became aware of the potential for revocation through the exposure draft process for the bill undertaken in September and October 2016. The committee also notes the Treasurer's advice that bringing this forward was intended to manage any risk of certification applications being brought forward.

2.73 The committee notes that the Treasurer's advice did not address the committee's request for advice as to whether this retrospective application may cause disadvantage to any person.

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

2.75 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the retrospective application of the amendments sought to be made by Part 2 of Schedule 12.

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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.76 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 26 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 1.

Significant matters in delegated legislation[26]

Initial scrutiny – extract

2.77 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)

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

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.

2.78 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)'.[27]

2.79 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.[28]

2.80 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.

2.81 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.

2.82 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.

Minister's response

27 Explanatory memorandum, p. 31.

28 Explanatory memorandum, p. 31.

2.83 The Minister advised:

> I understand the Committee is seeking 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. The complaints and mediation scheme relating to defence reserve service is currently specified in the *Defence Reserve Service (Protection) Regulations 2001* (the Regulations), which are made under the *Defence Reserve Service (Protection) Act 2001* (the Act). This has been the case since 2001.
>
> The intent of the proposed measures in the Bill, which would amend the Act if passed, is to implement outstanding recommendations from a 2007 review of the Act, as well as some minor consequential matters.
>
> The review gave no consideration to moving the complaints and mediation scheme into the principal legislation, so this was not considered when the Bill was drafted. Further, there has been no consultation with affected stakeholders, including potentially employer groups, for this type of change. The complaints and mediation scheme has, for the most part, been operating effectively since its inception in 2001.
>
> The review made quite limited recommendations about the complaint and mediation scheme, which is why the proposed amendments relating to that scheme are limited to:
>
> - introducing a new regulation-making power to remove any doubt about the validity of regulations about the scheme; and
> - to enhance the penalties that can be imposed for offences against the regulations.
>
> Defence will review the complaints and mediation scheme being moved from the regulations into the principal legislation following implementation of the Bill and prior to the Regulations sunset date of 1 October 2019.

Committee comment

2.84 The committee thanks the Minister for this response. The committee notes the Minister's advice that the complaints and mediation scheme relating to defence reserve service has been specified in the Defence Reserve Service (Protection) Regulations 2001 (the Regulations) since 2001, and that the intent of the bill is to implement outstanding recommendations from a 2007 review of the *Defence Reserve Service (Protection) Act 2001*. The Minister advised that the review gave no consideration to moving the complaints and mediation scheme into the principal legislation, so this was not considered when the bill was drafted. However, the Minister indicated that Defence will review the complaints and mediation scheme being moved from the regulations into the principal legislation following implementation of the bill and prior to the Regulations sunsetting on 1 October 2019.

2.85 As noted above, 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. Providing for the complaints and mediation scheme in primary legislation would ensure that the 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.

2.86 The committee welcomes the Minister's undertaking to review moving the complaints and mediation scheme from the regulations into the principal legislation prior to the regulations sunsetting on 1 October 2019. However, the committee notes that there is no legislative requirement for a pre-sunset review to consider whether to move the provisions of the sunsetting delegated legislation into primary legislation.

2.87 The committee therefore suggests that it may be appropriate for the bill to be amended to include a legislative requirement to conduct a review into the desirability of, and potential options for, moving the complaints and mediation scheme from the regulations into the principal legislation prior to the sunsetting of the Regulations on 1 October 2019 (with any document or report arising from the review to be tabled in both Houses of Parliament).[29] The committee requests the Minister's response in relation to this matter.

29 In this regard, the committee notes that the *Guide to Managing Sunsetting of Legislative Instruments* states that, for any major pre-sunset review, it is good practice to table the review document in Parliament (see Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments*, December 2016, p. 13, https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf).

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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i) and (iv)

2.88 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 31 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 1.

Significant matters in delegated legislation[30]

Initial scrutiny – extract

2.89 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.

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

2.90 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.

2.91 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.[31] There does not appear to be anything in the legislation that would require the Electoral Commissioner to take into account the objects of the Part when making the instrument.

2.92 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'.[32] 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.[33]

2.93 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.

2.94 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.

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31 Explanatory memorandum, pp 26-27.

32 Explanatory memorandum, p. 27.

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

Minister's response

2.95 The Minister advised:

> Subsection 321D(7) allows the Electoral Commissioner to determine types of communication and circumstances as exceptions to the general requirements to authorise electoral matter, and specific requirements or particulars that must be notified. This provision is intended to provide flexibility for the Electoral Commissioner to respond to the rapidly evolving communication environment, including emergent technologies which are not necessarily foreseeable. Expediency in responding may also be critical in the context of electoral events with uncertain timing.
>
> A determination by the Electoral Commissioner under proposed subsection 321D(7) of the Bill would be by legislative instrument, disallowable by the Parliament. In my view, this mechanism, in conjunction with section 17 of the *Legislation Act 2003,* which requires a rule-maker to be satisfied that appropriate and reasonably practicable consultation has taken place, provides appropriate oversight over the discretion proposed for the Electoral Commissioner. This oversight would also extend to consistency with the stated objects in section 321C. I also note that the Electoral Commissioner may be required to appear before Parliamentary Committees to explain the action taken in relation to content of the determination and any consultation.
>
> Taking into account these factors, I consider that including specific obligations on the Electoral Commissioner to consult and as a condition of validity of the determination, would detract from the flexibility and timeliness of responding to changing circumstances relevant to electoral and referendum matter. I also consider that the inclusion of a specific requirement for the Electoral Commissioner to ensure that requirements are consistent with stated objects is unnecessary and would be expected to occur in any event, with oversight mechanisms to ensure this.

Committee comment

2.96 The committee thanks the Minister for this response. The committee notes the Minister's advice that proposed subsection 321D(7) is intended to provide flexibility for the Electoral Commissioner and may be critical in the context of electoral events with uncertain timing. The committee also notes the Minister's advice that a determination by the Electoral Commissioner would be by legislative instrument and therefore subject to disallowance by the Parliament, that section 17 of the *Legislation Act 2003* regarding consultation applies and that the Electoral Commissioner may be required to appear before Parliamentary committees to explain the action taken in relation to content of the determination and any consultation. The committee also notes the Minister's advice that it is unnecessary to include a specific requirement that the Electoral Commissioner's requirements are consistent with the stated objects in the bill.

2.97 The committee takes this opportunity to reiterate its general view that where the Parliament delegates its legislative power in relation to significant regulatory schemes 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.

2.98 While the committee welcomes the safeguards mentioned by the Minister, the committee notes that they do not offer a direct method to enforce the consultation requirements. 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. There is also no requirement that the consultation requirements be complied with and a parliamentary committee would not have the power to direct that consultation be undertaken before an instrument is made.

2.99 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of not including a specific obligation on the Electoral Commissioner to appropriately consult before making certain regulations.

Reversal of evidential burden of proof[34]

Initial scrutiny – extract

2.100 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 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.

2.101 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.

2.102 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.

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

2.103 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.

2.104 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.

2.105 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*.[35]

Minister's response

2.106 The Minister advised:

> Proposed section 150.1 of the Criminal Code introduces new offences to criminalise a person falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body. Proposed subsection 150.1(3) clarifies that, for the purposes of the new offences, it is immaterial whether the Commonwealth body exists or it is fictitious. Proposed subsection 150.1(4) provides that, if the Commonwealth body is fictitious, these offences do not apply unless a person would reasonably believe that the Commonwealth body exists.
>
> The Government considers that proposed subsection 150.1(4) does not create an offence-specific defence. Rather, the condition of 'unless a person would reasonably believe that the Commonwealth body exists' forms an element of the offence and the burden of proof for proving that element will sit with the prosecution. That is, there is no reversal of the onus of proof with respect to this subsection.
>
> This conclusion is based on the wording of the provision. The provision provides that, if the Commonwealth body is fictitious, the offences do not apply unless the condition is fulfilled. The condition is therefore a condition precedent to the offence being applicable, and forms an element of the offence to be proven by the prosecution. For example, if a person falsely represents they are the Ministry for Hot Dog Appreciation - a fictitious Commonwealth body - no offence is committed unless the

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

prosecution can prove that a member of the public would reasonably believe that the Ministry for Hot Dog Appreciation in fact exists.

Committee comment

2.107 The committee thanks the Minister for this response. The committee notes the Minister's advice that proposed subsection 150.1(4) does not create an offence-specific defence, but that the condition of 'unless a person would reasonably believe that the Commonwealth body exists' forms an element of the offence and the burden of proof for proving that element will sit with the prosecution.

2.108 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*).

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

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
Bill status	Before Senate
Scrutiny principle	Standing Order 24(1)(a)(i)

2.110 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Senator responded to the committee's comments in a letter dated 23 May 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Senator's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Retrospective application[36]

Initial scrutiny – extract

2.111 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.

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

2.113 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.

36 Schedule 1, item 10.

Senator's response

2.114 The Senator advised:

> Please be advised the bill's amendments will apply to enterprise agreements currently in force, but only from the date the amendments commence, so principle 1(a)(i) is not infringed.
>
> Further, Subsection 30(2) operates as a 'savings' provision should a court determine that the amendments may only apply to agreements made on or after the commencement of the amendments.

Committee comment

2.115 The committee thanks the Senator for this response. The committee notes the Senator's advice that the bill is intended to apply to enterprise agreements currently in force, and so principle 1(a)(i) is not infringed. However, the committee notes that the application of an amended law to enterprise agreements made before that law is in force would appear to have a retrospective application. However, the committee notes the Senator's advice that subsection 30(2) is intended to operate as a savings provision if a court should determine the amendments may only apply to agreements made on or after commencement.

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

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
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(iv)

2.117 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 23 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 1.

Significant matters in delegated legislation[37]

Initial scrutiny – extract

2.118 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.[38]

2.119 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.[39] The explanatory memorandum justifies this approach as follows:

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

38 Explanatory memorandum, p. 2.

39 Proposed subsection 6B(2).

> 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 appropriate for ASQA to perform its functions and enhance the transparency and accountability of the VET sector.[40]

2.120 The committee notes this explanation, however, the committee emphasises that one of the most fundamental functions of the Parliament is to levy taxation.[41] 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.

2.121 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.

2.122 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.[42]

2.123 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;[43]

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40 Explanatory memorandum, pp 9–10.

41 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'.

42 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.

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

- providing that the instruments do not come into effect until the relevant disallowance period has expired;[44] or
- a combination of these processes.[45]

2.124 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).

Minister's response

2.125 The Minister advised:

> The Committee has sought a response to its concerns regarding parliamentary oversight of the annual registration charge being determined by myself as the Minister in a legislative instrument. I note that the Committee also recognised the additional scrutiny provided by the requirement that the amount of the charge must be agreed by the Ministerial Council.
>
> Having given due consideration to the Committee's request to consider amendments to the bill, I will be proposing the government amend the bill in the Senate to include provisions in relation to the setting of a maximum charge on the face of the primary legislation. The method for calculation and the setting of the actual charge will remain in a legislative instrument.
>
> As noted by the Committee, the National Vocational Education and Training Regulator legislation is based on constitutional referral of power from the states and territories with fees and charges amounts agreed by the Ministerial Council. I am confident that this process, combined with the amendments proposed by the Committee, will ensure cost recovery charging mechanisms are transparent, appropriate and comply with current legislative practice.

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

45 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*.

Committee comment

2.126 The committee thanks the Minister for this response. The committee welcomes the Minister's commitment to amend the bill to include provisions in relation to the setting of a maximum charge on the face of the primary legislation. The committee notes the Minister's advice that the process of agreeing to the amount of the charge with the States and Territories, combined with the foreshadowed amendment, 'will ensure cost recovery charging mechanisms are transparent, appropriate and comply with current legislative practice'.

2.127 The committee takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation.[46] 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.

2.128 Noting the fact that the government has foreshadowed amendments which provide some level of parliamentary oversight by setting a maximum charge on the face of the primary legislation, the committee leaves to the Senate as a whole the appropriateness of allowing the method and amount of taxation to be determined by legislative instrument in this instance.

46 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'.

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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i) and (iv)

2.129 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 23 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 1.

Reversal of evidential burden of proof[47]

Initial scrutiny – extract

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

2.130 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.

2.131 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 13(2), (3), (5) and (6)'.[48] 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.

2.132 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'.[49]

2.133 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*[50] 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).

2.134 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

48 Explanatory memorandum, p. 14.

49 Explanatory memorandum, p. 50.

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

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*.[51]

Minister's response

2.135 The Minister advised:

> Each of the matters outlined in proposed subsections 13(2), (3), (5) and (6) are peculiarly within the knowledge of the defendant. It would be significantly more difficult and costly for the prosecution to disprove these matters than it would be for the defendant to raise evidence to establish them.
>
> Proposed subsection 13(1) sets out prohibitions on the manufacture, import, or export of hydrochloroflurocarbons (HCFCs), methyl bromide, synthetic greenhouse gases (SGGs), hydrobromoflurocarbons (HBFCs), stage-1 or stage-2 scheduled substances, and on the import of ODS equipment ('ODS' stands for ozone depleting substances) or SGG equipment.
>
> Proposed subsection 13(2) provides that subsection 13(1) does not apply to an activity allowed by a licence the person holds. It is peculiarly within the knowledge of the defendant whether they held, at the time of the activity, a licence that allowed that activity. It would also be relatively easy for the defendant to raise evidence of this, whereas it would be significantly more difficult and costly for the prosecution to establish that a relevant licence was not held at the time the activity was undertaken.
>
> Proposed subsection 13(3) provides that subparagraph 13(1)(a)(iii) (which prohibits the manufacture, import, or export of an SGG) does not apply where the import, export, or manufacture was undertaken in circumstances prescribed in the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* (the Regulations). An example of this exemption is where a synthetic greenhouse gas is used in a medical device. It is anticipated that, if an exempt use of synthetic greenhouse gases is prescribed under the Regulations for the purposes of proposed subsection 13(3), that it is appropriate for the evidentiary burden to lie with the defendant, as it would be peculiarly within the defendant's knowledge what the intended use of the synthetic greenhouse gases they had manufactured, imported, or exported was. It would also be more difficult and costly for the prosecution to disprove.

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

Proposed subsection 13(5) provides that subparagraph 13(1)(b) (which prohibits the import of ODS equipment and SGG equipment) does not apply if the equipment is kept by the person (or a member of their household) for private or domestic use, the equipment is prescribed by the Regulations (such as medical equipment, air conditioning equipment, heat pumps etc.), and any conditions prescribed by the Regulations are satisfied.

What the defendant used the equipment for (i.e. domestic use, as opposed to commercial or other use) is peculiarly within the defendant's knowledge. The defendant would be best placed to raise evidence of the equipment's use and could do so relatively easily, by providing service records or other indications of where and how the equipment was used. It would be far more difficult for the prosecution to raise evidence disproving that disproving that the equipment was used domestically.

The nature of the equipment that the defendant has imported is also peculiarly within his or her knowledge, and he or she would be best placed to provide evidence (such as receipts, manuals, etc.) to demonstrate that the equipment is of a type specified under the Regulations, and meets any other conditions specified under the Regulations. By contrast, it would be significantly more difficult for the prosecution to prove that the equipment was not of a type prescribed in the Regulations, and that it did not meet any other criteria that may be prescribed.

Proposed subsection 13(6) provides that subparagraph 13(1)(b) does not apply if the total amount of controlled substances contained in ODS equipment (equipment containing ozone depleting chemicals) or SGG equipment (equipment containing synthetic greenhouse gases) in the importation does not exceed the amounts prescribed by the Regulations and that any other requirements prescribed by the Regulations are satisfied. This provision is intended to provide an exemption for low-volume imports where the total amount of controlled substances contained in the equipment imported by the importer falls below an amount specified in the Regulations as it is immaterial to Australia's international obligations. It is peculiarly within the defendant's knowledge whether the total amount of controlled substances contained in the equipment that they have imported does not exceed these thresholds. Conversely, it would be significantly more difficult for the prosecution to disprove.

It is anticipated that any other requirements that would be specified under the Regulations in relation to proposed subsection 13(6) would relate to the nature and type of equipment or the substances the equipment contained. As the equipment belongs to, or is in the charge of, the importer, it is anticipated that questions of whether the equipment in question met these requirements would also be peculiarly within the knowledge of the importer, whereas it would be significantly more difficult for the prosecution to disprove these matters.

Committee comment

2.136 The committee thanks the Minister for this response. The committee notes the Minister's advice that each of the exceptions to the unlicensed manufacture, import or export offence in proposed section 13 are peculiarly within the knowledge of the defendant and that it would be significantly more difficult and costly for the prosecution to disprove these matters than it would be for the defendant to raise evidence to establish them.

2.137 While the committee notes that some of the matters are likely to be peculiarly within the knowledge of the defendant and more difficult for the prosecution to disprove, it is still not clear how other matters (such as whether the defendant held a licence at the time of the relevant activity) is peculiarly within the knowledge of the defendant.

2.138 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*).

2.139 In light of the detailed explanation provided by the Minister, the committee makes no further comment on this matter.

Significant matters in delegated legislation[52]

Initial scrutiny – extract

2.140 Some of the exceptions to the offence (offence-specific defences) in proposed section 13 rely on certain circumstances,[53] types of equipment,[54] amounts of relevant substances,[55] and conditions[56] 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

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

53 Proposed subsection 13(3).

54 Proposed paragraph 13(5)(b).

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

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

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.

2.141 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.

2.142 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.

Minister's response

2.143 The Minister advised:

> It is appropriate for the exceptions in proposed section 13 to rely on matters to be specified in the Regulations, because elements of the offence may be determined by reference to treaties and conventions, the relevant content involves a level of detail that would not be appropriate for an act, and because of the changing nature of the subject matter and industry. Including details in delegated legislation allows exemptions and circumstances to be varied quickly to meet the needs of Australian businesses and individuals.
>
> Proposed subsection 13(3) provides that subparagraph 13(1)(a)(iii) (which prohibits the manufacture, import, or export of a synthetic greenhouse gas) does not apply where the import, export, or manufacture was undertaken in circumstances prescribed by the Regulations. This provision is generally applied where the potential quantity of synthetic greenhouse gas emissions is immaterial to Australia's greenhouse gas emissions such as when it is converted into a benign substance. This provision has been included with a view to providing a facility to prescribe exempt uses under the Regulations to ensure the legislation is able to be adapted quickly to take account of essential uses that emerge, while ensuring Australia's ongoing compliance with its international obligations.
>
> Proposed subsection 13(5) provides that subparagraph 13(1)(b) (which prohibits the import of ODS equipment and SGG equipment) does not apply if the equipment is kept by the person (or a member of their household) for private or domestic use, the equipment is prescribed by the Regulations, and any conditions prescribed by the Regulations are

satisfied. It is appropriate that the equipment be prescribed in the Regulations, as opposed to being specified on the face of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act), as the number of different types of equipment that would be prescribed and the level of specificity in which they would be described means that the level of detail is such that it is not appropriate that it be included in the Act. Similarly, it is envisaged that the conditions prescribed by the Regulations would relate to such matters as specifying size limitations for different equipment types. This level of detail is inappropriate for inclusion in the Act and is better suited to being prescribed in the Regulations.

Proposed subsection 13(6) provides that subparagraph 13(1)(b) does not apply if the total amount of HCFC contained in the ODS equipment or the total amount of synthetic greenhouse gas contained in the equipment in the importation does not exceed the amounts prescribed by the Regulations for ODS equipment or SGG equipment respectively, and that any other requirements prescribed by the regulation are satisfied. This provision is intended to provide an exemption for low-volume imports where the total amount of HCFCs or SGGs contained in the equipment imported by the importer falls below an amount specified in the Regulations and is immaterial to protection of the ozone layer or climate system. It is appropriate that the total amounts of HCFCs and SGGs be specified in the Regulations rather than the Act, as the threshold may be adjusted in the future as technology changes over time in line with the hydrofluorocarbon (HFC) phase-down and HCFC phase-out.

It is anticipated that other requirements that would be specified under the Regulations in relations to proposed subsection 13(6) would relate to the nature of and type of the equipment or the substances it contained. These requirements are likely to involve a high level of detail, and so it is appropriate that they be include in the Regulations rather than on the face of the Act.

Before amending the Act or Regulations, the Department of Environment and Energy undertakes extensive stakeholder consultation in line with the Government's Regulatory Impact Guide. This includes appropriate consultation with directly affected stakeholders, industry groups and bodies, State and Territory Governments, and other Commonwealth agencies. The consultation is targeted and fit-for-purpose, depending on the affected stakeholders which are varied and exist within a rapidly changing industry affected by domestic and global technological advancement. Prescribing the type of consultation may therefore be restrictive and not allow the most appropriate approach to be taken.

Committee comment

2.144 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is appropriate for the exceptions to the offence in proposed section 13 to rely on matters to be specified in regulations because elements of the offence may be determined by reference to treaties and

conventions, the relevant content involves a level of detail that would not be appropriate for an Act, and because of the changing nature of the subject matter and industry. The committee also notes the Minister's advice in relation to the consultation undertaken by the Department of Environment and Energy prior to amending portfolio legislation.

2.145 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*).

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

2.147 In light of the detailed explanation provided by the Minister and the fact that any amendments to the regulations would be subject to parliamentary disallowance, the committee makes no further comment on this matter.

Strict liability offence[57]

Initial scrutiny – extract

2.148 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.

2.149 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.*[58]

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

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

2.150 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.[59] 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.

2.151 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*.[60]

Minister's response

2.152 The Minister advised:

> Proposed subsection 13(7) provides that a person commits an offence of strict liability if the person contravenes subsection 13(1), and the offence is subject to a maximum penalty of 500 penalty units.
>
> Strict liability is appropriate in this instance, as it is necessary to ensure the integrity of a regulatory regime that protects both the environment and public health. The punishment of offences not involving fault is important in deterring conduct that would represent a breach of these provisions. There are also legitimate grounds for penalising persons lacking fault, as the public (and relevant stakeholders especially) have been warned through communications strategies to guard against the possibility of any contravention. It should be noted that the offence is also not punishable by imprisonment.
>
> The offence is subject to a maximum penalty of 500 penalty units. This is greater than the maximum of 300 penalty units prescribed for strict liability offences in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 (the *Guide to Framing Commonwealth Offences).* However, this is justified given the significant harm to the environment that may result from breaches of this provision. It is also consistent with other offences in the Act of comparable seriousness (such as those set out in subsections 38(1) and (2) and 18(7)) that are also offences of strict liability and are subject to maximum penalties of 500 penalty units. As such, it is important for the overall integrity and consistency of the regulatory scheme that this provision continue to be a strict liability offence and that the existing maximum penalty of 500 penalty units is maintained.
>
> It is intended for the Act and regulations to be holistically reviewed for compliance with the *Regulatory Powers (Standard Provisions) Act 2014* in the near future, as part of broader reform across the Environment and

59 Explanatory memorandum, p. 14.

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

Energy portfolio. This will ensure that changes to offences, if any are necessary, are considered and appropriate for this regulatory program as a whole.

Committee comment

2.153 The committee thanks the Minister for this response. The committee notes the Minister's advice that strict liability is appropriate in this instance, as it is necessary to ensure the integrity of a regulatory regime that protects both the environment and public health and that the offence is not punishable by imprisonment. The committee also notes that Minister's advice that the maximum penalty of 500 penalty units is justified given the significant harm to the environment that may result from breaches of this provision and that the level of penalty is consistent with other offences in the Act of comparable seriousness.

2.154 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*).

2.155 In light of the detailed explanation provided by the Minister, the committee makes no further comment on this matter.

Reversal of evidential burden of proof[61]

Initial scrutiny – extract

2.156 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.

2.157 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'

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

and that it is 'expected that is would not be unreasonably difficult for the defendant to discharge the evidentiary burden'.[62]

2.158 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).

2.159 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*.[63]

Minister's response

2.160 The Minister advised:

> Proposed subsection 45C introduces a new offence in respect of the use of HCFCs that are manufactured or imported on or after 1 January 2020. Proposed subsection 45C(2) provides that subsection 45C(1) does not apply if the use is for a purpose prescribed by the Regulations. The defendant bears the evidential burden in relation to a matter covered by proposed subsection 45C(2).
>
> Proposed subsection 45C introduces a new offence in respect of the use of HCFCs that are manufactured or imported on or after 1 January 2020. Proposed subsection 45C(2) provides that subsection 45C(1) does not apply if the use is for a purpose prescribed by the Regulations. The defendant bears the evidential burden in relation to a matter covered by proposed subsection 45C(2).
>
> The reversal of the evidential burden of proof is appropriate in these circumstances, as the purpose for which they used HCFCs is a matter peculiarly within the knowledge of the defendant. It would be relatively easy for the defendant to raise evidence of that purpose (for example, with receipts, customs declarations, and service records), whereas it would be significantly more difficult for the prosecution to disprove.

62 Explanatory memorandum, p. 50.

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

Committee comment

2.161 The committee thanks the Minister for this response. The committee notes the Minister's advice that reversal of the evidential burden of proof for the new offence in respect of the use of hydrochlorofluorocarbons (HCFCs) that are manufactured or imported on or after 1 January 2020 is appropriate as the purpose for which a defendant uses the HCFCs would be a matter peculiarly within the knowledge of the defendant. The Minister also advised that it would be relatively easy for the defendant to raise evidence of that purpose (for example, with receipts, customs declarations, and service records), whereas it would be significantly more difficult for the prosecution to disprove.

2.162 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*).

2.163 In light of the detailed explanation provided by the Minister, the committee makes no further comment on this matter.

Significant matters in delegated legislation[64]

Initial scrutiny – extract

2.164 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.

2.165 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'.[65]

2.166 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

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

65 Explanatory memorandum, p. 50.

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.

2.167 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.

Minister's response

2.168 The Minister advised:

> As previously noted, it is anticipated that additional purposes for the use of HCFCs manufactured or imported on or after 1 January 2020 may be allowed under the Montreal Protocol. As such, it is appropriate that uses for allowable purposes be specified in the Regulations under proposed subsection 45C(2), rather than on the face of the Act, because these elements of the offence are to be determined by reference to an international agreement.
>
> The Department of Environment and Energy undertakes extensive stakeholder consultation before making amendments to the Act or Regulations, in line with the Government's Regulatory Impact Guide. This includes appropriate consultation with directly affected stakeholders, industry groups and bodies, State and Territory Governments, and other Commonwealth agencies. The consultation is targeted and fit-for-purpose, depending on the affected stakeholders which are varied and exist within a rapidly changing industry affected by domestic and global technological advancement. Prescribing the type of consultation may therefore be restrictive and not allow the most appropriate approach to be taken.

Committee comment

2.169 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is appropriate that uses for allowable purposes be specified in the regulations, rather than on the face of the Act, because these elements of the offence are to be determined by reference to an international agreement. The committee also notes the Minister's advice in relation to the consultation undertaken by the Department of Environment and Energy prior to amending portfolio legislation.

2.170 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*).

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

2.172 In light of the detailed explanation provided by the Minister and the fact that any amendments to the regulations would be subject to parliamentary disallowance, the committee makes no further comment on this matter.

Strict liability offence[66]

Initial scrutiny – extract

2.173 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.

2.174 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.*[67]

2.175 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.[68]

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

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

68 Explanatory memorandum, p. 50.

2.176 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.

2.177 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*.[69]

Minister's response

2.178 The Minister advised:

> A contravention of proposed subsection 45C(1) (which prohibits the use of HCFCs imported or manufactured on or after 1 January 2020) would be a strict liability offence subject to a maximum penalty of 300 penalty units. The application of strict liability to this offence is appropriate and consistent with the Guide to Framing Commonwealth Offences, as the offence is not punishable by imprisonment, the offence is punishable by a maximum of 300 penalty units for a body corporate, and the punishment of the offence without involving a fault element is likely to significantly enhance the effectiveness of the enforcement regime in deterring the use of HCFCs in contravention of the provision. A breach could put Australia in non-compliance with its international obligations, with the ultimate sanction being Australia not being able to trade in scheduled substances with the other 196 countries who are party to the *Montreal Protocol on Substances that Deplete the Ozone Layer.* This would have serious consequences for Australian businesses and the wider community - access to medical devices such as metered dose inhalers would be jeopardised; access to scheduled substances to manufacture and service refrigeration and air conditioning equipment would be cut; and access to scheduled substances to manufacture and service fire protection equipment would be cut.
>
> Further, as noted in the explanatory memorandum, there are legitimate grounds for penalising persons lacking fault, as persons will be placed on notice to guard against the possibility of contravention through an education campaign in the lead up to 1 January 2020.

Committee comment

2.179 The committee thanks the Minister for this response. The committee notes the Minister's advice that the application of strict liability is consistent with the *Guide*

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

to Framing Commonwealth Offences.[70] In particular, the Minister advised that application of strict liability is appropriate because the offence is not punishable by imprisonment, the offence is punishable by a maximum of 300 penalty units for a body corporate, and the punishment of the offence without involving a fault element is likely to significantly enhance the effectiveness of the enforcement regime in deterring the use of hydrochlorofluorocarbons in contravention of the provision.

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 explanation provided by the Minister, the committee makes no further comment on this matter.

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

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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(ii)

2.182 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter received 26 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 1.

Broad delegation of coercive powers[71]

Initial scrutiny – extract

2.183 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.

2.184 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.

2.185 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

71 Clause 34.

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 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.[72]

2.186 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'.[73]

2.187 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:

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72 Explanatory memorandum, p. 31.

73 Explanatory memorandum, p. 30.

- 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 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.

Minister's response

2.188 The Minister advised:

> *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)?*
>
> It is possible to the limit the appointment of authorised persons to either Senior Executive Service (SES) employees or SES and Executive Level (EL) employees or employees with specific training in the Bill. However, I do not consider that it would be appropriate to do so for two reasons.
>
> Firstly, the Secretary of the Department of the Environment and Energy (the Secretary) currently delegates some compliance monitoring powers under other legislation to relatively junior employees, including staff members at the APS 5 and APS 6 classifications (i.e. non Executive level employees). With effective training, clear guidance and appropriate direction, the Department of the Environment and Energy (the Department) has found that APS level staff are more than capable of effectively exercising compliance monitoring powers.
>
> For example, section 82 of the *Greenhouse and Energy Minimum Standards Act 2012* allows any officer of the Department to be appointed as a GEMS Inspector. The Department successfully uses this delegation to empower APS level staff to conduct certain compliance monitoring activities such as site inspections under appropriate direction.
>
> The Department also sometimes delegates compliance monitoring powers to consultants and contractors, in particular technical experts. This is done to ensure that business can be confident that formal or highly technical audits are performed independently by suitably qualified experts. This approach is supported by industry stakeholders, subject to assurances that their sensitive information is secure. The provisions in the Bill on this point are discussed further in response to Question 3.

For example, section 34 of the *Building Energy Efficiency Disclosure Act 2010* allows for contractors to be appointed as auditors for the Commercial Building Disclosure Program. A number of contractors have been appointed as auditors for the program and undertaken a number of complex and technical audits successfully.

Secondly, providing a wide power of delegation engagement helps the Department to deliver cost-effective compliance monitoring. This is especially relevant to the engagement of consultants and contractors.

The Department employs a number of compliance monitoring specialists and has extensive experience with managing compliance in areas such as environmental protection and energy efficiency standards. The Department's experience in some industries covered by the Bill, such as the waste lubricant recycling and natural gas liquid processing, is more limited. To obtain the necessary knowledge and experience to audit such activities through the engagement of permanent employees would be expensive, especially as the need for such skills on a continuing basis would be limited. As a result, the engagement of consultants and contractors is expected to provide greater value for money to the Government then employing permanent staff to provide this service.

A second factor which suggests that the engagement of consultants and contractors would be cost-effective is the various locations where compliance powers would be exercised. The relevant facilities and head offices that could require on-site attendance are located in state capital cities, regional ports and remote locations such as oil platforms on the North West Continental Shelf. It is expected to be significantly more cost-effective to engage local consultants to conduct some compliance monitoring activities than to dispatch Departmental employees from Canberra for activities such as gathering documents and recording fuel levels in storage tanks.

Therefore, it is my view that an absolute prohibition on the delegation of compliance monitoring powers to non-SES and EL employees would be unnecessarily restrictive in light of the Department's existing practices and the importance of delivering value for money.

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?

It is possible to amend the Bill to provide further restrictions on the circumstances and conditions under which the Secretary may appoint an authorised person. However, I consider it more appropriate to leave the determination of what qualifications or experience is required to the discretion of the Secretary of the Department as limited by subclause 34(2), which provides:

> 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 powers of an authorised person.

Therefore, the power of the Secretary, or their SES delegate, to appoint an authorised person is limited to only those persons who have the necessary knowledge or experience to properly exercise the compliance powers they would be delegated.

The determination of what knowledge or experience is appropriate for authorised persons to have is a matter best left to the discretion of the Secretary because of the breadth of knowledge and experience that may be necessary for effective compliance monitoring, both now and in the future.

First, the scope of activities relevant to the reporting obligation in the Bill is broad. The covered activities and covered products listed in the Bill range from the production of biofuels to the wholesaling of hydrogen. The knowledge and experience necessary to effectively audit one activity may be very different to the knowledge and experience necessary to audit another. As a result, if all the potentially appropriate types of training and experience were listed, the resulting list would be extensive.

Moreover, the type of activities and products subject to a reporting obligation may need to change in the future. The Australian Government has produced the Australian Petroleum Statistics for over forty years and it is envisioned that this publication will continue well into the future. Given the potential for changes in the transport fuel sector in the future, any list of necessary knowledge and experience for authorised persons would need to be able to accommodate the full range of potential technological and market changes in the transport fuel sector.

Second, a broad range of monitoring activities may be required to ensure the effective operation of the reporting obligation. Certainly, professional auditing qualifications and prior experience in exercising compliance monitoring powers would be relevant for certain compliance monitoring roles. However, a range of experiences and knowledge could also be relevant for other roles. For example, an ability to physically inspect fuel storage tanks, determine ownership and rights of possession under contracts or determine the chemical composition of a substance may be necessary skills for some activities undertaken by authorised persons.

Specifying the types of training and experience that may be necessary to undertake compliance monitoring activities would result in a long list that few, if any, individuals could satisfy in total.

Therefore, it is my view that including additional specificity in the Bill on the types of knowledge or experience that would be required by auditors would be unduly restrictive. It is preferable to allow the Secretary to determine what knowledge and experience is required on a case by case basis.

Whether the bill can be amended...to provide that a 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?

The Committee's suggestion is sensible and appropriate. However, it is my understanding that the Committee's concerns are already addressed through subclause 20(1) of the Bill.

Subclause 20(1) of the Bill provides:

20 Secrecy

Offence

(1) A person commits an offence if:

(a) the person is, or has been, an entrusted person; and

(b) the person has obtained information in his or her capacity as an entrusted person; and

(c) the information is protected information; and

(d) the person:

(i) makes a record of the information; or

(ii) uses the information; or

(iii) discloses the information to another person.

Penalty: Imprisonment for 2 years.

Clause 21 of the Bill provides an exemption to the offence at clause 20, relevantly providing:

21 Exercising powers, or performing functions or duties, as an entrusted person

An entrusted person may make a record of, use or disclose protected information if the record is made, or the information is used or disclosed, in the course of exercising powers, or performing functions or duties, as an entrusted person.

Clause 5 of the Bill defines "entrusted person" as:

entrusted person means:

(a) the Secretary; or

(b) an APS employee in the Department; or

(c) any other person employed or engaged by the Department.

To be appointed as an authorised person under clause 34 of the Bill, a person must be either an employee of the Department or engaged by the Department as a consultant or contractor.

Accordingly, an authorised person under clause 34 would be an entrusted person as defined in clause 5, and as a result, they would commit a

criminal offence under clause 20 if they recorded, used or disclosed protected information obtained during an audit if that act was not in accordance with their role and function as an auditor.

Protected information is defined at clause 4 as follows:

> ***protected information*** means fuel information that is personal information, or fuel
>
> information that is commercial-in-confidence, that:
>
> (a) is obtained under, or in accordance with, this Act, section 95ZPA of the *Competition and Consumer Act 2010* or subsection 355-65(8) in Schedule 1 to the *Taxation Administration Act 1953;* or
>
> (b) is derived from a record of personal information, or information that is commercial-in-confidence, that was made under, or in accordance with, this Act or a provision referred to in paragraph (a); or
>
> (c) is derived from a disclosure or use of personal information, or information that is commercial-in-confidence, that was made under, or in accordance with, this Act or a provision referred to in paragraph (a).

Therefore, where an authorised person obtained commercial-in-confidence or personal information through their role as an auditor, it would be an offence to disclose this information except in accordance with their role and function as an authorised person.

The Bill provides a number of additional exemptions to the offence provided at section 20. For example, clause 23 would allow an authorised person to disclose the results of an audit to me as the responsible Minister; and clause 25 would allow disclosure where the audited entity consented. These exemptions are appropriate and will help to ensure the effective administration of the compliance monitoring regime.

Therefore, I see no need to amend the Bill as requested by the Committee.

If the Committee considers that the Bill would not achieve the outcomes I have described in this answer, I am happy to review the Bill and investigate the appropriateness of adding the prohibition recommended by the Committee to clause 34.

Committee comment

2.189 The committee thanks the Minister for this detailed response. The committee notes the Minister's advice that the Department currently delegates some compliance monitoring powers to relatively junior employees, and with effective training, clear guidance and appropriate direction the Department has found APS level staff are more than capable of effectively exercising compliance monitoring powers.

2.190 The committee also notes the Minister's advice that it can be more cost-effective to delegate to local consultants, covering a range of specialties and experiences, the power to conduct some compliance monitoring powers. The Minister advises that he considers it more appropriate to leave the determination of what qualifications or experience is required to the discretion of the Secretary of the Department, as the breadth of knowledge and experience that may be necessary for effective compliance monitoring differs according to the activities or products to be monitored and the type of activities and products subject to a reporting obligation may change in the future. The committee also notes the Minister's advice that where an authorised person obtains commercial-in-confidence or personal information through their role as an auditor, the bill makes it an offence for them to disclose that information, except in accordance with their role and function as an authorised person.

2.191 The committee appreciates the Minister's advice that the exercise of compliance monitoring powers in this field may require a person with a range of skills depending on the activities or products to be monitored. However, in all instances the committee would expect that the relevant person to whom these coercive powers are delegated, would have training in the use of such powers (in addition to their relevant skills and experiences in auditing the particular activity or product).

2.192 The committee therefore considers it would be appropriate if the power to delegate to any APS employee in the Department or to a consultant or contractor were limited to those with appropriate training in the use of compliance monitoring powers.

2.193 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*).

2.194 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing for a broad delegation of coercive powers.

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
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.195 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Assistant Minister responded to the committee's comments in a letter dated 30 May 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Assistant Minister's response followed by the committee's comments on the response. A copy of the letter is at Appendix 1.

Reversal of evidential burden of proof[74]

Initial scrutiny – extract

2.196 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.

2.197 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.

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

2.198 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.

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

2.200 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*.[75]

Assistant Minister's response

2.201 The Assistant Minister advised:

> The Committee requests advice 'as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof)' in [connection with the proposed defences to the offence of refusing or failing to give information or a statement in writing pursuant to a notice to do so issued by a Commissioner]. The Committee notes that its 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'.*
>
> To assist with understanding the provision questioned by the Committee, outlined below is a description of how the defence provisions operate in the context of the Bill.
>
> Item 2 of Schedule 5 of the Bill proposes to amend the *Royal Commissions Act 1902* to give a Commissioner a new power to issue a written notice requiring a person to give information or a statement in writing. Item 11 of Schedule 5 of the Bill makes it an offence for a person to refuse or fail to comply with that notice. That item also makes provision for certain defences to that offence, namely, where a person has a 'reasonable excuse' (proposed subsection 3(6B)) or where the person asserts that the

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

requested information or statement is not relevant to a Commission's inquiry (proposed subsection 3(6C)).

The Bill adopts existing policy in subsection 13.3(3) of the Criminal Code Act 1995 which provides that 'a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter'.

In terms of the 'evidential burden', through subsection 13.3(6) of the Criminal Code, a defendant relying on the proposed defences in the Bill needs to adduce or point to evidence that suggests a *reasonable possibility* that the matter exists or does not exist. Where that evidential burden is discharged by the defendant the prosecution then has the legal burden of disproving that matter (i.e. beyond reasonable doubt) (subsection 13.3(2) of the Criminal Code).

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that an 'offence-specific defence' is a defence that 'reverse[s] the fundamental principle of criminal law that the prosecution must prove every element of the offence' and that a matter should only be included in an offence-specific defence where:

- it is peculiarly within the knowledge of the defendant;
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter [see paragraph 4.3.1 of the Guide].

Where a person seeks to rely on the proposed defence of 'reasonable excuse' to justify not giving information or a statement in writing as requested by a Commissioner, the defendant needs to bring that excuse to the attention of the prosecution (for example, that the information or statement has not been given because the information is subject to legal professional privilege). The factual circumstances to support the existence of the excuse (or the defence) will be known to the defendant (eg that the information being requested is or might be privileged). It is going to be significantly more difficult and costly for the prosecution to adduce evidence that suggests the information or statement requested is not privileged, than for the defendant to adduce evidence to support the privilege claim.

Similarly, if a defendant claims that the information required to be given to a Commissioner is not relevant to the Commission's inquiries, the factual circumstances to support the existence of that excuse (or the defence) is going to be within the knowledge of the defendant.

The approach in the Bill for the offence-specific defences is consistent with other offences for failure to comply with summonses in the Royal Commissions Act (see e.g. subsections 3(1B), (2B), (3), (5) (6)).

Committee comment

2.202 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that where a defendant seeks to rely on the proposed defence of 'reasonable excuse', he or she will need to bring that excuse to the attention of the prosecution and the factual circumstances to support the existence of the excuse will be known to the defendant and it would be significantly more difficult and costly for the prosecution to adduce evidence. The committee also notes the Assistant Minister's advice that if the defendant claims that the information required to be given is not relevant to the Commission's inquiries, the factual circumstances to support the existence of that excuse is going to be within the knowledge of the defendant.

2.203 The committee notes that the *Guide to Framing Commonwealth Offences*[76] provides that the matters must be 'peculiarly' within the knowledge of the defendant, rather than just within the defendant's knowledge. However, the committee considers it likely in these instances that the matters required to be established for these defences will often be peculiarly within the defendant's knowledge.

2.204 The committee requests that the key information provided by the Assistant 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*).

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

Privilege against self-incrimination[77]

Initial scrutiny – extract

2.206 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.

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

77 Schedule 5, items 19-25 and 28.

2.207 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.[78] 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'.[79]

2.208 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).

2.209 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.

2.210 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'.[80] 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

78 Explanatory memorandum, p. 19.

79 Explanatory memorandum, p. 19.

80 Explanatory memorandum, p. 19.

necessary to abrogate the privilege against self-incrimination, other than the general statement that this supports the Commission's functions.

2.211 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*.[81]

Assistant Minister's response

2.212 The Assistant Minister advised:

> The Committee requests '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'.*
>
> Item 2 of Schedule 5 of the Bill inserts new subsection 2(3C) into the Royal Commissions Act to give a member of a Royal Commission the power to issue a written notice requiring a person to give information or a statement in writing to the Commission. It is an offence for a person to refuse or fail to comply with that notice. Further, new subsection 6(1A) provides that it is not a reasonable excuse for a person to fail comply with the notice on the ground that the information or statement might tend to incriminate the person or make the personal liable to a penalty.
>
> The *Guide to Framing Commonwealth Offences* provides that 'the privilege against self-incrimination may be overridden by legislation where there is clear justification for doing so' and 'if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained'.
>
> As explained in the Explanatory Memorandum of the Bill, the justification for a partial abrogation of the privilege against self-incrimination is to support a Commission's function to inquire into, and report on, matters of public importance. In doing so, that approach gives weight to the public benefit in equipping Royal Commissions with appropriate investigative powers. The abrogation of the privilege against self-incrimination is not absolute and there are limits and safeguards on the abrogation.
>
> On safeguards, the privilege against self-incrimination still applies where the giving of information or a statement might tend to incriminate the person in relation to an offence, and the person has been charged with the offence, and the charge has not been finally dealt with by a court (see amendments to sections 6A(3) and (4) of the Royal Commissions Act as proposed by items 20-25 of Schedule 5 of the Bill). Furthermore, if incriminating evidence is obtained by a Royal Commission, it is proposed

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

that the 'use' immunity in section 6DD of the Royal Commissions Act apply so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings.

It is also acknowledged that a Commissioner may communicate information or evidence that relates to a contravention of the law to certain office holders such as the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so (section 6P). It is not proposed to introduce a 'derivative use' immunity to prevent any incriminating evidence being used to gather other evidence against the person because it would unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission.

The approach in the Bill to partially abrogate the privilege against self-incrimination, and not to give a 'derivative use' immunity for a person required to give information or a written statement to a Commission, is consistent with the approach in the Royal Commissions Act for a person who is summonsed to appear or to produce documents (see e.g. sections 6A and 6P).

Committee comment

2.213 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that the justification for abrogating the privilege against self-incrimination is to support a Commission's function to inquire into and report on matters of public importance and so equips Royal Commissions with appropriate investigative powers. The committee also notes the Assistant Minister's advice that it is not proposed to introduce a derivative use immunity to prevent any incriminating evidence being used to gather other evidence against the person 'because it would unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission'.

2.214 The committee reiterates that abrogating the privilege against self-incrimination represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty and 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).

2.215 In this case while a use immunity is included by the amendments in item 28, 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. The Assistant Minister's advice does not suggest that providing such immunity would undermine the Commission's investigatory functions. Rather, it states that it would unreasonably hinder law

enforcement agencies investigation and prosecution of matters reported on by a Royal Commission, but provides no reasons for that conclusion.

2.216 In light of the information provided to the committee, the committee has scrutiny concerns about the abrogation of the privilege against self-incrimination (particularly without the inclusion of a derivative use immunity). The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination.

Significant penalties[82]

Initial scrutiny – extract

2.217 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;[83]
- failure of a witness or a person served with a notice to produce a document or other thing;[84]
- failure of a witness to be sworn or to make an affirmation;[85]
- failure of a witness to answer any question relevant to the inquiry.[86]

2.218 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.[87] No further explanation is given for the substantial increase in penalties for these offences.

2.219 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

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

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

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

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

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

87 Explanatory memorandum, p. 15.

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]'.[88]

2.220 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 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.[89] 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.[90]

2.221 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,[91] 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.[92] 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.[93]

2.222 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'.[94] 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

88 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.

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

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

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

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

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

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

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.[95]

2.223 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*.

2.224 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).

Assistant Minister's response

2.225 The Assistant Minister advised:

> The Committee notes that it is 'not apparent to the Committee that increasing the penalty [from 6 months imprisonment or $1000, or both] to two years' imprisonment (without the option of a fine) for a failure to attend as a witness, produce documents or things, be sworn 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.*
>
> The Committee therefore seeks '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 the offences relating to Royal Commissions (noting that the powers under the Royal Commissions Act could also apply to any person in Australia relating to any matter for which the executive has established a Royal Commission).

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

In relation to the Committee's comment that the proposed amendments to increase the penalties for certain offences do not give an option of a fine, I refer the Committee to the Explanatory Memorandum for the Bill which explains that section 4B of the *Crimes Act 1914* applies so that a court has discretion to impose a pecuniary penalty instead of, or in addition to, imprisonment (see e.g. paragraphs 64 and 67 of the Explanatory Memorandum).

It is acknowledged that the *Guide to Framing Commonwealth Offences* states that 'if non-compliance with a notice to produce or attend is to be an offence, the maximum penalty for non-compliance should *generally* be six months' imprisonment and/or a fine of 30 penalty units' (para 9.4.1). The Guide also includes a principle that a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness (para 3.1.2). That latter principle has particular application in this case.

The Bill implements recommendation 78 of the final report of the Royal Commission into Trade Union Governance and Corruption. The Hon John Dyson Heydon AC QC recommended that the Royal Commissions Act be amended *'to increase the penalties for a failure to comply with a summons to attend, a failure to comply with a notice to produce, a failure to be sworn or answer questions, and a failure or refusal to provide documents to at least a maximum penalty of 2 years' imprisonment or a fine of 120 penalty units or both'.*

In making that recommendation, Commissioner Hedyon observed that the existing penalty for those offences is 'inadequate', and explained that a penalty of up to 2 years' imprisonment is consistent with other penalties applicable to a failure to comply with notices, such as notices issued by the Australian Security and Investments Commission (section 63 of the *Australian Securities and Investments Commission Act 2001).* The proposed penalty is also consistent with the *Law Enforcement Integrity Commissioner Act 2006* (section 78). Penalties for other similar offences are examined further in Commissioner Heydon's Final Report (see pages 626 and 630 and footnote number 16).

Committee comment

2.226 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that section 4B of the *Crimes Act 1914* would apply so a court has a discretion to impose a pecuniary penalty instead of, or in addition to, imprisonment. The committee also notes the Assistant Minister's advice that the penalty of up to two years imprisonment was chosen because of the recommendation by Commissioner Hedyon and that it is consistent with other penalties applicable to a failure to comply with notices.

2.227 The committee thanks the Assistant Minister for referring the committee to Commissioner Heydon's report in relation to penalties for other similar offences. The committee notes that the report refers to a number of other provisions which

empower regulators to exercise compulsory information-gathering powers.[96] The committee notes in relation to the compulsory examination powers of regulators, only the powers under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) provide for up to two years imprisonment.[97] The other five regulatory regimes listed[98] provide for penalties between 30 penalty units (without imprisonment) to 6 or 12 months imprisonment for failure to comply with a notice.[99] Note too that the *Ombudsman Act 1976* provides that 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.[100] In contrast, Commissioner Heydon's report later notes that failure to comply with notices issued by the Australian Crime Commission (now Australian Criminal Intelligence Commission) carries a penalty of up to five years imprisonment or 200 penalty units.[101] The committee also notes that the Assistant Minister advised that the penalty in the bill is consistent with the *Law Enforcement Integrity Commissioner Act 2006* which provides a period of up to two years imprisonment for failure to comply with a notice to give information or to produce a document or thing.

2.228 The committee's review of the legislative provisions in this area indicates that a range of penalties apply in relation to a failure to comply with compulsory requirements to provide information or produce documents or things across the Commonwealth statute book. However, the committee is only aware of three enforcement regimes that allow for a penalty of imprisonment of over 12 months: ASIC, the Australian Criminal Intelligence Commission and the Australian Commission for Law Enforcement Integrity. The committee notes that these contexts appear to

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96 See paragraphs 117 to 129 of chapter 8, volume 5 of the Final Report, Royal Commission into Trade Union Governance and Corruption, 2015.

97 While the report states that the powers under the *Competition and Consumer Act 2010* provide for up to two years imprisonment, the relevant provision of the Act relating to the power to obtain information, documents and evidence currently only provides for up to one year imprisonment (see section 155(6A) of the *Competition and Consumer Act 2010*).

98 Namely section 155 of the *Competition and Consumer Act 2010* (20 penalty units/12 months imprisonment); section 8E of the *Taxation Administration Act 1953* (first offence, 20 penalty units, more than two offences, 50 penalty units/12 months imprisonment); sections 55, 62C, 81 and 115 of the *Insurance Act 1973* (3-6 months imprisonment); sections 269 and 270 *Superannuation Industry (Supervision) Act 1993* (30 penalty units); section 335(2) *Fair Work (Registered Organisations) Act 2009* (30 penalty units).

99 See paragraphs 117 to 129 of chapter 8, volume 5 of the Final Report, Royal Commission into Trade Union Governance and Corruption, 2015.

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

101 Sections 21A and 30 of the *Australian Crime Commission Act 2002.* See footnote 16 on page 627 of chapter 10, volume 5 of the Final Report, Royal Commission into Trade Union Governance and Corruption, 2015.

be quite different to those of Royal Commissions. ASIC notices apply in a regulatory context and the other two bodies apply in relation to the investigation of serious and organised crime and the investigation of law enforcement agencies and their staff. In contrast, notices issued by a Royal Commission to witnesses to attend to give evidence, produce a document or answer a question, could apply to any person in any context, depending on the subject matter under investigation by the Royal Commission.

2.229 The committee notes that the proposed maximum penalty of two years' imprisonment for non-compliance with a notice for a witness to attend to give evidence, produce a document or answer a question before a Royal Commission is mostly inconsistent with the maximum penalties in other comparable Commonwealth offences. Therefore, from a scrutiny perspective, the proposed significant increase in penalty does not appear to be appropriate in the circumstances, particularly 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.

2.230 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of significantly increasing the maximum period of imprisonment in these circumstances.

Transport Security Amendment (Serious Crime) Bill 2016

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

Purpose	This bill amends various Acts in relation to transport security to: • seek to prevent the use of aviation and maritime transport or offshore facilities in connection with serious or organised crime; • establish a regulatory framework to implement harmonised eligibility criteria for the aviation security identification card (ASIC) and maritime security identification card (MSIC) schemes; • clarify and align the legislative basis for undertaking security checking of ASIC and MSIC applicants and holders; • provide for regulations to prescribe penalties for offences; and • insert an additional severability provision to provide guidance to a court as to Parliament's intention
Portfolio	Infrastructure and Regional Development
Introduced	House of Representatives on 30 August 2016 *This bill is substantively similar to a bill introduced in the previous Parliament*
Bill status	Before the Senate
Scrutiny principle	Standing Order 24(1)(a)(iii)

2.231 The committee dealt with this bill in the amendment section of *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 23 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 1.

Merits Review

Initial scrutiny – extract

2.232 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).

2.233 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 Regulations 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.

2.234 The reasons further state that the 'Office of Parliamentary Counsel has advised that introducing ASIC and MSIC appeals mechanisms into primary legislation would not create any additional practical protection against future changes to the Aviation and Maritime Regulations'.

2.235 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.

Minister's response

2.236 The Minister advised:

> The Transport Security Amendment (Serious Crime) Bill 2016 (the Bill) introduces an additional purpose to the Aviation Transport Security Act 2004 and the Maritime Transport and Offshore Facilities Security Act 2003 (the Aviation and Maritime Acts) to reduce criminal influence at Australia's security controlled airports, security regulated ports, security regulated ships, and security regulated offshore oil and gas facilities. The additional purpose would apply solely to the aviation and maritime security identification card (ASIC and MSIC) scheme and would complement the scheme's current purpose of preventing unlawful interference.
>
> The level of specificity with which the Aviation and Maritime Acts could refer to the ASIC and MSIC appeals mechanisms is currently limited. This is because the concepts of the ASIC and MSIC are introduced by the *Aviation Transport Security Regulations 2005* and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Aviation and Maritime Regulations) and are not acknowledged by the Aviation and Maritime Acts.
>
> In practice, because the Aviation and Maritime Acts cannot predict exactly what the Aviation and Maritime Regulations might say in the future, specific references to the ASIC and MSIC may be too specific and could become ineffective if the Aviation and Maritime Regulations change. Alternatively, if the reference is too general, it may have unintended consequences.

> The practical protection provided by amendments (8) and (14) as agreed by the Senate would be limited by the fact that they refer expressly to decisions 'in relation to a security identification card'. If technological developments lead to access to areas and zones being regulated by a mechanism not involving security cards, such as the use of biometrics, then the proposed requirements in relation to reconsideration and review would not apply.
>
> Further, the proposed provisions are drafted to apply the protections to every possible decision under the regulations relating to a security identification card. The regulations will be amended over time to respond to the changing environment and technology, and it is possible that this broad reference could require the regulations to provide for reconsideration or review of decisions where this is clearly inappropriate.
>
> It is important to note that a comprehensive appeals process for ASIC and MSIC applicants and cardholders exists in the current Aviation and Maritime Regulations. The appeals process is essential to the administrative transparency of the schemes.
>
> As you know, every regulatory amendment is scrutinised by the Senate Standing Committee on Regulations and Ordinances (SSCRO). The SSCRO is responsible for ensuring, among other matters, that legislative instruments do not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal. On this basis, it is expected that any future amendment to the Aviation and Maritime Regulations seeking to remove or reduce appeal rights would be at the control of Parliament and would stand a high chance of disallowance.
>
> I would also note, should the Bill be passed by the Parliament, it is the Australian Government's intention to expand aspects of review for all ASIC applicants to mirror the reconsideration mechanism currently available for all MSIC applicants.

Committee comment

2.237 The committee thanks the Minister for this response. The committee notes the Minister's advice that the level of specificity with which the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003* (Aviation and Maritime Acts) could refer to the aviation and maritime security identification cards is limited because the concepts of these cards are introduced by the Regulations and are 'not acknowledged by the Aviation and Maritime Acts'. The Minister also advised that specific references to the ASIC and MSIC may be too specific and become ineffective if the regulations change. The committee also notes the Minister's advice that if technological developments lead to access to areas being regulated by a mechanism not involving security cards the proposed requirements would not apply, and if the regulations are amended in the future it is possible that a right to review every decision under the regulations

relating to a security identification card may provide for reconsideration or review of decisions where this is clearly inappropriate. The committee also notes and welcomes the Minister's advice that it is the government's intention to expand aspects of review for all ASIC applicants to mirror the reconsideration mechanism currently available for all MSIC applicants.

2.238 The committee considers that the main reasons given for disagreeing to the amendments passed by the Senate appear to be based on concerns as to drafting rather than objections to the policy of ensuring that the primary legislation include a requirement for reconsideration or review of relevant decisions. The committee considers that the apparent drafting concerns may be able to be addressed by re-drafting the amendments so as to require reconsideration or review of a decision in relation to the security checking of persons with access to the relevant areas or zones (without specific reference to security cards).

2.239 The committee considers that if there are concerns regarding the drafting of the amendments (rather than the policy intention of ensuring that the primary legislation includes a requirement for review of relevant decisions), this may be able to be addressed by technical amendments to the amendments already agreed to.

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

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
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(ii) and (iv)

2.241 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 24 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 1.

Broad delegation of administrative powers[102]

Initial scrutiny – extract

2.242 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 *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.

2.243 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.

2.244 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.[103] 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.[104] 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.[105] However, no justification is provided as to why these matters could be delegated to an APS employee at any level.

2.245 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.

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102 Schedule 6, item 1.

103 Explanatory memorandum, p. 25.

104 Explanatory memorandum, p. 26.

105 Explanatory memorandum p. 26.

2.246 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.

Minister's response

2.247 The Minister advised:

> The amendments were drafted to align the *Military Rehabilitation and Compensation Act 2004* (MRCA) delegation powers with those of the *Veterans' Entitlements Act 1986* (VEA) delegation powers.
>
> The existing Ministerial powers in the VEA are not subject to any specific restrictions. Therefore in practice, it would be preferred that a similar approach would be adopted in respect to the MRCA.
>
> However, in light of the concern expressed by the SCSB, it is proposed to make Government amendments to the Bill, subject to approvals being obtained, to appropriately limit the delegation of certain functions and powers to certain senior staff in the Department, such as officers at the SES or equivalent level.

Committee comment

2.248 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is proposed to make government amendments to the bill, subject to approvals being obtained, to appropriately limit the delegation of certain functions and powers to certain senior staff in the Department, such as officers at the SES or equivalent level.

2.249 The committee welcomes the Minister's undertaking to amend the bill to appropriately limit the categories of people to whom the Minister's powers and functions under the *Military Rehabilitation and Compensation Act 2004* may be delegated. The committee would also welcome amendments to similarly limit the delegation of ministerial powers and functions under the *Veterans' Entitlements Act 1986*.

2.250 In light of the Minister's commitment to amend the bill, the committee makes no further comment in relation to this matter.

Incorporation of external material into the law[106]

Initial scrutiny – extract

2.251 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'.

2.252 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).

2.253 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.[107] 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.

2.254 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 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

106 Schedule 7.

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

> the document under which the appliance may be provided will need to be amended to refer to the changed date of that document.[108]

2.255 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.

2.256 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.[109]

2.257 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'.[110] It is not clear whether all documents in the second category will be freely available.

2.258 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.

Minister's response

2.259 The Minister advised:

> Currently the Treatment Principles, MRCA Treatment Principles, Repatriation Pharmaceutical Benefits Scheme and the MRCA Pharmaceutical Benefits Scheme incorporate documents by reference.
>
> The incorporation of such documents benefits veterans as it enables a service provider to provide treatment using the most up to date information available. An exemption for these legislative instruments would not disadvantage veterans and other eligible persons.
>
> Service providers will be familiar with all of the incorporated documents that are relevant to them and the location of the documents on the Department's website or the website of the relevant Department (usually the Department of Health).

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108 Explanatory memorandum, p. 27.

109 Explanatory memorandum, p. 28.

110 Explanatory memorandum, p. 28.

The Department is currently creating a legislation webpage that will include details about new legislation. The site will be commence with details of the Omnibus Bill and will be online this week.

In addition, the Department proposes to use this webpage to provide links to legislative instruments, including the documents incorporated by reference into those legislative instruments. In this way, such documents will be freely available to the public.

At the present time, no documents are incorporated by reference into the remaining legislative instruments for which an exemption to subsection 14(2) of the *Legislation Act 2003* has also been sought:

- the Guide to the Assessment of Rate of Veterans' Pensions (made under section 29 of the VEA with the equivalent made under section 67 of the MRCA);
- the Repatriation Private Patent Principles (made under section 90A of the VEA and the MRCA Private Patient Principles under section 286 of the MRCA).

The exemption for those documents was sought on the basis that there may be a future need to incorporate by reference non-legislative documents as in force from time to time. It is envisaged that such documents would be of a type that is readily available and not restricted by subscription.

Committee comment

2.260 The committee thanks the Minister for this response. The committee notes the Minister's advice that the incorporation of documents into delegated legislation benefits veterans as it enables a service provider to provide treatment using the most up to date information available. The committee also notes the advice that service providers will be familiar with all of the incorporated documents that are relevant to them.

2.261 The committee takes this opportunity to reiterate that it is fundamental principle of the rule of the law that every person subject to the law should be able to freely and readily access its terms. As a result, the committee will have scrutiny concerns when external materials that are incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law.

2.262 The committee notes the Minister's advice that the Department proposes to develop a legislation webpage which will provide links to legislative instruments, including the documents incorporated by reference into those legislative instruments. The Minister advises that, as a result, such documents will be freely available to the public. The committee welcomes this approach as it will greatly improve accessibility to material incorporated by reference and notes that if all documents incorporated by reference, including those in the second category of

documents referred to above,[111] are made freely available to the public the committee's scrutiny concerns in relation to this matter will be addressed.

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

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

2.264 The committee welcomes steps being undertaken by the Department of Veterans' Affairs to increase accessibility to material incorporated by reference in delegated legislation. The committee would appreciate receiving further advice from the Minister when the links to legislative instruments, including the documents incorporated by reference into those legislative instruments, have been included on the Department's legislation webpage. Based on the advice that all material incorporated into the law will be freely available to the public, the committee makes no further comment in relation to this matter at this stage.

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

111 Reference 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.

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*.

3.3 Provisions in the following bills establish or amend standing appropriations or establish, amend or continue in existence special accounts:

- **Industrial Chemicals Bill 2017** — Part 8, Division 6, clause 155;[1]
- **International Monetary Agreements Amendment Bill 2017** — Schedule 1;[2]
- **Medicare Guarantee Bill 2017** — clauses 6 and 12;[3] and clause 18.[4]

Senator Helen Polley
Chair

1 This provision continues in existence a Special Account where the Consolidated Revenue Fund is appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 Schedule 1 amends the existing standing appropriation clause in section 8CAA of the *International Monetary Agreements Act 1947*.

3 These provisions continue in existence a Special Account where the Consolidated Revenue Fund is appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013.*

4 This provision establishes a new standing appropriation.

Appendix 1
Ministerial and other correspondence

SENATOR THE HON MATHIAS CORMANN

Minister for Finance
Deputy Leader of the Government in the Senate
Acting Minister for Revenue and Financial Services

Ref: MC17-004449

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) of 11 May 2017 about the ASIC Supervisory Cost Recovery Levy Bill 2017 (the Bill). The Committee requested detailed justification in relation to provisions which reverse the usual disallowance procedure.

I appreciate the Committee's consideration of the Bill and have attached a detailed response below.

I hope this information will be of assistance to you.

Mathias Cormann

May 2017

Cc: scrutiny.sen@aph.gov.au

ATTACHMENT

Modified disallowance procedure – proposed paragraph 11(2)(b)

The Committee has identified proposed paragraph 11(2)(b) in the Bill as a modified disallowance procedure as it reverses the procedure set out in subsection 42(2) of the *Legislation Act 2003*. This is because paragraph 11(2)(b) provides that where a motion to disallow an instrument is unresolved at the end of the reduced five sitting day disallowance period, the instrument would be taken not to have been disallowed and would therefore continue in effect.

The disallowance procedure has been reversed for the same reasons the disallowance period was shortened to five sitting days of each house, outlined in paragraphs 1.86 to 1.93 of the explanatory memorandum to the Bill. Namely, it will provide greater certainty, in a timely manner, to industry in relation to the levies that they need to pay.

Allowing the instruments to be disallowed by default following a disallowance motion would create significant commercial uncertainty for industry as the instrument would not take effect in cases where a motion is not resolved within the five day disallowance period. If this were to occur, the instrument would need to be tabled again and a new five day disallowance period would have to conclude before the instrument could actually take effect. The delay in the instrument taking effect may disrupt industry plans, budgets and cash flows. If the recovery of costs subsequently falls into the following financial year, industry would have to pay the levy for two years of ASIC's costs in one financial year.

The reversal of the disallowance procedure will ensure that the instrument is only disallowed if a motion to disallow is actually passed (not just if a motion is made). This change is appropriate in the circumstances because of the significant uncertainty it could otherwise create for industry. The change is also appropriate as the instrument provides only for factual details of ASIC's regulatory costs and the mechanistic application of the formulas and methods for determining the amounts of levy to be paid, which are prescribed in regulations. The regulations are subject to normal disallowance processes.

TREASURER

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

Dear Chair

I am responding to the letter of 11 May 2017 from Ms Anita Coles, Secretary, Senate Scrutiny of Bills Committee, bringing my attention to concerns outlined in Scrutiny Digest No. 5 of 2017 about certain aspects of the Competition and Consumer Amendment (Competition Policy Review) Bill 2017.

My response to the Committee's concerns is attached.

The Hon Scott Morrison MP
1 / 6 / 2017

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

ATTACHMENT

COMPETITION AND CONSUMER AMENDMENT (COMPETITION LAW REFORM) BILL 2017

RESPONSE TO SENATE SCRUTINY OF BILLS COMMITTEE

Section 155 – reasonable search defence – legal burden of proof

Schedule 11 to the Bill proposes to introduce a new defence to a contravention of section 155 of the *Competition and Consumer Act 2010* (the CCA) for a person who has undertaken a reasonable search for the requested documents but, following that search, is not aware of the documents. Whether or not a search is reasonable depends on factors including the nature and complexity of the matter, the number of documents involved and the ease and cost of retrieving documents relative to the resources of the defendant. Persons seeking to take advantage of the defence must also include a description of the scope and limitations of their search to the ACCC.

The Committee has requested advice as to why a legal, rather than an evidential, burden of proof is imposed on a defendant wishing to rely on the new defence.

Section 155 of the CCA contains the primary investigative power of the Australian Competition and Consumer Commission (ACCC) and is crucial to the ACCC's administration and enforcement of the CCA. The ACCC relies heavily on its power to compel parties to provide information, documents and evidence, in order to investigate anti-competitive conduct.

The introduction of the new defence was recommended by the Harper Competition Policy Review, in recognition of the fact that strict compliance with a section 155 notice may be unreasonably burdensome on businesses, particularly where they hold a large number of electronic documents.

The new defence was modelled on Rule 20.14 of the *Federal Court Rules 2011*, which requires a party to discover relevant documents of which the party is aware after a reasonable search. Rule 20.14 also contains several factors the party may take into account in making a reasonable search, which closely resemble the factors in proposed subsection 155(6) for determining whether a search was reasonable.

Whichever burden of proof is placed on the defendant, if this burden is satisfied, the prosecutor would need to prove beyond reasonable doubt that the search in question was not reasonable. This would present significant practical challenges.

For example, whether a search was reasonable or not may often turn on the nature of the methodology used to conduct the search. The reasonableness of the methodology would be assessed against the factors set out in the new defence, including:

- the nature and complexity of the matter;
- the number of documents involved; and
- the ease and cost of retrieving the documents, which would be assessed against the backdrop of how they were stored.

Information on the second and third matters above would typically be peculiarly within the knowledge of the defendant. The prosecution would therefore often find it very difficult to obtain compelling evidence that it was reasonable for a defendant to have conducted a more extensive search.

For example, the ease and cost of retrieving documents could depend on, for example, the search capabilities and limitations of its electronic filing system; how documents were archived (for example, email accounts of former employees); how rigorously the defendant stored documents in the correct places; and where the computer servers containing electronic documents were located (which may not be in Australia).

Much of this information would be known only by the defendant. Even where, for example, a company used an 'off-the-shelf' electronic filing system, about which there would be public information, a key factor affecting the ease of finding documents would be the conventions used internally by the company for naming folders and files.

As the Committee has acknowledged in Scrutiny Digest No.5, the factors discussed above suggest that reversing the burden of proof is appropriate. The Committee then asks why this should not just be reversing an evidential burden of proof.

The concern with an evidential burden is that it would be relatively straightforward for defendants to provide evidence suggesting a reasonable possibility that they had conducted a reasonable search. In many cases, this evidence would simply be the description of the scope and limitations of the search provided to provide the ACCC. The prosecution would then face the very considerable challenge – as outlined above – of proving beyond reasonable doubt that a search was unreasonable.

Introducing the reasonable search defence with an evidential burden would therefore, in many cases, so reduce the risk of a defendant being successfully prosecuted for failing to comply with a section 155 notice, as to significantly undermine the effectiveness of section 155 as an enforcement tool.

In contrast, requiring defendants to prove that a search was reasonable on the balance of probabilities would require them to provide a more persuasive case to the court, with significantly more supporting evidence. Given the defendant's unique knowledge of how its documents are stored, if the additional evidence exists, it would be relatively easy and inexpensive for the defendant to provide it to the court. The additional evidence would also help redress the prosecution's lack of information (as outlined above) when seeking to disprove the defence beyond reasonable doubt.

A legal burden would therefore find a better balance between introducing the new defence and ensuring that section 155 remains an effective tool in the ACCC's enforcement capability.

Section 155 – increased maximum penalty

Schedule 11 to the Bill proposes to increase the maximum penalty for contravening section 155 of the CCA to two years imprisonment or 100 penalty units. The Committee has requested the justification for this increase.

The Bill seeks to implement Recommendation 40 of the Harper Competition Policy Review, which included that:

> The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001*.

In its analysis leading to this recommendation, the Harper Review highlighted the maximum penalty for failing to comply with various notices issued by the *Australian Securities and Investment Act 2001*, which is 100 penalty units or two years imprisonment or both.

It reasonably follows that the reference to 'similar notice-based evidence-gathering powers' in Harper's recommendation is a reference to these provisions.

The Bill therefore adopts the maximum penalty for the relevant provisions in the *ASIC Act 2001* but with one variation reflecting the existing maximum penalty for contravening section 155; that is, the Bill would enable a fine or imprisonment to be imposed, but not both.

The Bill also retains the current methodology for determining maximum penalties for individuals and corporations. The CCA currently provides for a penalty for breaching section 155 for a person. Section 4B of the *Crimes Act 1914* then operates, so that the maximum penalty for a corporation is up to five times the maximum penalty for a natural person. The Harper Review would have been fully aware of this methodology, but did not recommend changing it. The Bill therefore retains the methodology.

The Committee requested advice on the 'level of penalty applicable to all comparable Commonwealth offence provisions'. There are likely to be a large number of provisions in Commonwealth legislation that are comparable to section 155 to varying degrees. However, the Harper Review correctly highlighted that the most comparable provisions to section 155 are in the *ASIC Act 2001*, and the proposed penalties in the Bill are based on the penalties for breaching these provisions.

Retrospective commencement

The amendments made by Part 2 of Schedule 12 would apply in relation to decisions made by the responsible Commonwealth Minister under section 44N of the *Competition and Consumer Act 2010* on or after 1 January 2017.

Generally, grandfathering existing certifications is intended to avoid creating undue sovereign risk as investment decisions made under certified regimes would not have accounted for the potential for revocation included in Schedule 12.

Stakeholders became aware of the potential for revocation through the exposure draft process for the Bill undertaken in September and October 2016. Limiting grandfathering to certifications before 1 January 2017 was intended to manage any risk of certification applications being brought forward with a view to achieving a decision before the legislation commenced.

PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES

HON BOB KATTER MP

Federal Member for Kennedy

5 May 2017

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

Dear Senator Polley,

Response to Request for Information

Please find attached a response to your letter dated 23 March 2017 in relation to the *Competition and Consumer Amendment Exploitation of Indigenous Culture)* Bill *2017* ('the Bill').

The attached letter has been signed by Gabrielle Sullivan, Chief Executive Officer of the Indigenous Art Code, and Robyn Ayres, Chief Executive Officer of the Arts Law Centre of Australia. The work of both of these organisations has been fundamental in bringing the issues addressed by the Bill to our attention.

We believe that the measures outlined in the Bill are necessary and proportionate to achieve the Bill's aims of preventing the exploitation of Indigenous culture and more-readily enabling Indigenous artists to benefit economically from their work.

Should the Committee require any further information please do not hesitate to contact us.

Yours Sincerely,

Bob Katter MP

Federal Member for Kennedy

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FAKE ART HARMS CULTURE

28 April 2017

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

Dear Senator Polley

Response to Request for Information

We write in response to your letter dated 23 March requesting further information about the *Competition and Consumer Amendment Exploitation of Indigenous Culture) Bill* ('the Bill').

We set out responses to your questions below.

1 **Why is it proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance?**

The purpose of the Bill is to change current practices in the sale of indigenous art and indigenous cultural expression. As you may be aware, throughout 2016 the Indigenous Art Code and the Arts Law Centre conducted a joint investigation into the sale of indigenous art or products bearing indigenous cultural expression in Australia. From that study, the Arts Law Centre and Indigenous Art Code estimates that 'up to 80% of items being sold as legitimate Indigenous artworks and souvenirs in tourist shops and some galleries around Australia are actually inauthentic.' This lead to the 'Fake Art Harms Culture' campaign.

The crux of the fake art issue for indigenous persons is that their culture is being exploited for sale without their consent. The purpose of the Bill is therefore to ensure that the Bill requires suppliers and retailers to ensure that the work they supply is made by or made with the consent of an indigenous artist and indigenous community. Under clause 168A(2), the defendant bears a legal burden which requires the defendant to positively prove, as an exemption to clause 168A(1), that:

1. the thing is supplied in accordance with an arrangement with an indigenous community or indigenous artist; and
2. the thing is made in Australia unless an exemption applies.

The offence-specific defence, that imposes a burden of proof on the defendant, is necessary to achieve the purpose of the Bill. In particular, the Indigenous Art Code and Arts Law Centre believe that:

ARTS LAW INDIGENOUS ART CODE

Arts Law Centre of Australia and Indigenous Art Code, The Gunnery, 43-51 Cowper Wharf Road, Woolloomooloo NSW 2011
Robyn Ayres, CEO Arts Law rayres@artslaw.com.au | 02 9356 2566
Gabrielle Sullivan, CEO Indigenous Art Code gabrielle@indigenousartcode.org | 0438 637 862

- the requirement for consent provides the best protection to indigenous communities and artists. The fact that suppliers are commercialising indigenous cultural expressions without obtaining any consent places indigenous communities and artists in a position of vulnerability and exploitation. This defence focusses on the key issue – whether the relevant indigenous community and artist has consented to the commercialisation of the indigenous cultural expression with which the community and artist is associated;
- this defence (and the legal burden associated with it) is appropriate because the consent or licensing arrangements in place for the supply of the art is peculiarly within the knowledge of the defendant. It would be a difficult and costly exercise for the prosecution to disprove consent and would necessarily require the prosecution to ensure that no indigenous person or community had granted consent to the defendant. Such a burden would be unreasonable and make the offence difficult to establish. By contrast, it does not impose any significant burden on the defendant – if they have obtained consent to use the indigenous cultural expression in the manner in which they have, they should be able to establish this without any real difficulty. If they have acquired the art or products bearing the indigenous cultural expression from a wholesaler, they can make it a condition of the wholesale purchase that the wholesaler provide evidence of consent.

This approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which relevantly provides that 'where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence'. The Guide also relevantly provides in this respect:

> ...the [Scrutiny of Bills] Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant 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 or expensive whereas it could be readily and cheaply provided by the accused.

2 Why is the offence in subsection 168A(1) one of strict liability?

The offence in clause 168A(1) of the Bill is one of strict liability subject to the offence-specific defence outlined above.

The Bill was drafted in this way because the Indigenous Art Code and the Arts Law Centre consider that a Bill that requires intent to be established would not adequately protect indigenous persons, indigenous communities and consumers from exploitation. This is because the conduct has the potential to cause widespread detriment to indigenous communities both financially and culturally. It also has the potential to cause significant loss to consumers. Many consumers purchase indigenous art or products bearing indigenous cultural expression in Australia on the understanding that the item they are purchasing is an authorised item or does in fact bear indigenous cultural expression.

The strict liability approach is consistent with other provisions of the Australian Consumer Law, including those in respect of unfair practices (the section which the Bill proposes to amend). As outlined in the Explanatory Memorandum to the Australian Consumer Law:

> *"The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be*

caused by a person that breaches these provisions, whether or not he, she or it intended to engage in the contravention."

The Indigenous Art Code and Arts Law Centre believe that the strict liability offence is appropriate because:

- it is not difficult for suppliers to ensure they know whether or not the art that they supply is made by or made with the consent of an indigenous artist and indigenous community. It simply requires the supplier to ask the producer for certification or confirmation;
- the offence is not punishable by imprisonment. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that it is only appropriate for strict liability to apply if the offence is not punishable by imprisonment and that is the case here;
- while the fine imposed is higher than that recommend in the Guide, these fines are consistent with other fines imposed for strict liability offences under the Australian Consumer Law; and
- the offence is narrow and easily capable of avoidance. Suppliers can readily obtain information regarding the origin of products that they supply and should be encouraged to do so. The defence of reasonable mistake of fact in section 207 of the Australian Consumer Law will also help to protect suppliers which rely on information provided to them when they acquire the art for resale.

We hope this information assists the committee in their final consideration of the Bill.

Yours sincerely

Gabrielle Sullivan

CEO Indigenous Art Code

Robyn Ayres

CEO Arts Law

The Hon Dan Tehan MP
Minister for Veterans' Affairs
Minister for Defence Personnel
Minister Assisting the Prime Minister for Cyber Security
Minister Assisting the Prime Minister for the Centenary of ANZAC

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MC17-001327

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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Dear Senator Polley Helen,

Thank you for your letter of 11 May 2017 seeking my advice about the *Defence Legislation Amendment (2017 Measures No. 1) Bill 2017* (the Bill), and in particular the inclusion of some matters in delegated legislation.

I understand the Committee is seeking 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. The complaints and mediation scheme relating to defence reserve service is currently specified in the *Defence Reserve Service (Protection) Regulations 2001* (the Regulations), which are made under the *Defence Reserve Service (Protection) Act 2001* (the Act). This has been the case since 2001.

The intent of the proposed measures in the Bill, which would amend the Act if passed, is to implement outstanding recommendations from a 2007 review of the Act, as well as some minor consequential matters.

The review gave no consideration to moving the complaints and mediation scheme into the principal legislation, so this was not considered when the Bill was drafted. Further, there has been no consultation with affected stakeholders, including potentially employer groups, for this type of change. The complaints and mediation scheme has, for the most part, been operating effectively since its inception in 2001.

The review made quite limited recommendations about the complaint and mediation scheme, which is why the proposed amendments relating to that scheme are limited to:

- introducing a new regulation-making power to remove any doubt about the validity of regulations about the scheme; and
- to enhance the penalties that can be imposed for offences against the regulations.

Defence will review the complaints and mediation scheme being moved from the regulations into the principal legislation following implementation of the Bill and prior to the Regulations sunset date of 1 October 2019.

I trust this information clarifies the matter for you.

SENATOR THE HON SCOTT RYAN
Special Minister of State
Minister Assisting the Prime Minister for Cabinet
Senator for Victoria

REF: MC17-0001813

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Polley,

I refer to the letter from the Committee Secretary of 11 May 2017 regarding the Electoral and Other Legislation Amendment Bill (the Bill). The letter refers to the Committee's *Scrutiny Digest No. 5 of 2017* and seeks my advice on the relevant matters raised.

The Committee has requested 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) of the Bill, with compliance with the consultation obligations a condition of the validity of the legislative instrument
- expressly require the Electoral Commissioner to ensure the requirements or particulars prescribed are consistent with the objects stated in proposed section 321C.

Subsection 321D(7) allows the Electoral Commissioner to determine types of communication and circumstances as exceptions to the general requirements to authorise electoral matter, and specific requirements or particulars that must be notified . This provision is intended to provide flexibility for the Electoral Commissioner to respond to the rapidly evolving communication environment, including emergent technologies which are not necessarily foreseeable. Expediency in responding may also be critical in the context of electoral events with uncertain timing.

A determination by the Electoral Commissioner under proposed subsection 321D(7) of the Bill would be by legislative instrument, disallowable by the Parliament. In my view, this mechanism, in conjunction with section 17 of the *Legislation Act 2003*, which requires a rule-maker to be satisfied that appropriate and reasonably practicable consultation has taken place, provides appropriate oversight over the discretion proposed for the Electoral Commissioner. This oversight would also extend to consistency with the stated objects in section 321C. I also note that the Electoral Commissioner may be required to appear before Parliamentary Committees to explain the action taken in relation to content of the determination and any consultation.

Taking into account these factors, I consider that including specific obligations on the Electoral Commissioner to consult and as a condition of validity of the determination, would detract from the flexibility and timeliness of responding to changing circumstances relevant to electoral and referendum matter. I also consider that the inclusion of a specific requirement for the Electoral Commissioner to ensure that requirements are consistent with stated objects is unnecessary and would be expected to occur in any event, with oversight mechanisms to ensure this.

In addition, the Committee has requested my advice as to why it is proposed to use what appears to the Committee to be an offence-specific defence (which reverses the evidential burden of proof), and what the justification is for doing so.

Proposed section 150.1 of the Criminal Code introduces new offences to criminalise a person falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body. Proposed subsection 150.1(3) clarifies that, for the purposes of the new offences, it is immaterial whether the Commonwealth body exists or it is fictitious. Proposed subsection 150.1(4) provides that, if the Commonwealth body is fictitious, these offences do not apply unless a person would reasonably believe that the Commonwealth body exists.

The Government considers that proposed subsection 150.1(4) does not create an offence-specific defence. Rather, the condition of 'unless a person would reasonably believe that the Commonwealth body exists' forms an element of the offence and the burden of proof for proving that element will sit with the prosecution. That is, there is no reversal of the onus of proof with respect to this subsection.

This conclusion is based on the wording of the provision. The provision provides that, if the Commonwealth body is fictitious, the offences do not apply unless the condition is fulfilled. The condition is therefore a condition precedent to the offence being applicable, and forms an element of the offence to be proven by the prosecution. For example, if a person falsely represents they are the Ministry for Hot Dog Appreciation – a fictitious Commonwealth body – no offence is committed unless the prosecution can prove that a member of the public would reasonably believe that the Ministry for Hot Dog Appreciation in fact exists.

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

LEE RHIANNON

GREENS SENATOR FOR NSW

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23 May 2017

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

Dear Senator Polley

Re: Fair Work Amendment (Pay Protection) Bill 2017

Thank you for the Senate Scrutiny of Bills Committee's request for information about issues identified in the above bill.

The Committee requests my 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.*

The committee also suggests the provision may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Please be advised the bill's amendments will apply to enterprise agreements currently in force, but only from the date the amendments commence, so principle 1(a)(i) is not infringed.

Further, Subsection 30(2) operates as a 'savings' provision should a court determine that the amendments may only apply to agreements made on or after the commencement of the amendments.

I hope this answers the Committee's concerns.

Yours sincerely

Senator Lee Rhiannon

TAKING A STAND

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THE GREENS

THE HON KAREN ANDREWS MP
ASSISTANT MINISTER FOR VOCATIONAL EDUCATION AND SKILLS

Our Ref MS17-000777

23 MAY 2017

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

Dear Senator

I am writing in response to the letter of 11 May 2017 received from Ms Anita Coles, Committee Secretary, which contained comments from the Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest No. 5 of 2017 (the Scrutiny Digest), concerning the National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 (the bill).

The Committee has sought a response to its concerns regarding parliamentary oversight of the annual registration charge being determined by myself as the Minister in a legislative instrument. I note that the Committee also recognised the additional scrutiny provided by the requirement that the amount of the charge must be agreed by the Ministerial Council.

Having given due consideration to the Committee's request to consider amendments to the bill, I will be proposing the government amend the bill in the Senate to include provisions in relation to the setting of a maximum charge on the face of the primary legislation. The method for calculation and the setting of the actual charge will remain in a legislative instrument.

As noted by the Committee, the National Vocational Education and Training Regulator legislation is based on constitutional referral of power from the states and territories with fees and charges amounts agreed by the Ministerial Council. I am confident that this process, combined with the amendments proposed by the Committee, will ensure cost recovery charging mechanisms are transparent, appropriate and comply with current legislative practice.

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

Karen Andrews MP

cc. Senator the Hon Simon Birmingham, Minister for Education and Training

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MS17-000707

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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23 MAY 2017

Dear Senator Polley

Thank you for your letter seeking advice in relation to the Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017.

My response to the issues raised in the Committee's *Alert Digest No. 5 of 2017* in relation to the reversal of evidential burden of proof, significant matters being in delegated legislation and inclusion of a strict liability offence, is attached.

I trust this addresses your concerns regarding these matters.

Yours sincerely

JOSH FRYDENBERG

Reply to the Standing Committee for the Scrutiny of Bills Alert Digest No.5 of 2017 about the Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017

Item 1 Reversal of evidential burden of proof[1]

3.1 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.

3.2 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 13(2), (3), (5) and (6)'.[2] 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.

3.3 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'.[3]

3.4 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*[4] 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).

Item 1.1

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

2 Explanatory memorandum, p. 14.

3 Explanatory memorandum, p. 50.

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

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*.[5]

Response to Item 1.1

Each of the matters outlined in proposed subsections 13(2),(3),(5) and (6) are peculiarly within the knowledge of the defendant. It would be significantly more difficult and costly for the prosecution to disprove these matters than it would be for the defendant to raise evidence to establish them.

Proposed subsection 13(1) sets out prohibitions on the manufacture, import, or export of hydrochloroflurocarbons (HCFCs), methyl bromide, synthetic greenhouse gases (SGGs), hydrobromoflurocarbons (HBFCs), stage-1 or stage-2 scheduled substances, and on the import of ODS equipment ('ODS' stands for ozone depleting substances) or SGG equipment.

Proposed subsection 13(2) provides that subsection 13(1) does not apply to an activity allowed by a licence the person holds. It is peculiarly within the knowledge of the defendant whether they held, at the time of the activity, a licence that allowed that activity. It would also be relatively easy for the defendant to raise evidence of this, whereas it would be significantly more difficult and costly for the prosecution to establish that a relevant licence was not held at the time the activity was undertaken.

Proposed subsection 13(3) provides that subparagraph 13(1)(a)(iii) (which prohibits the manufacture, import, or export of an SGG) does not apply where the import, export, or manufacture was undertaken in circumstances prescribed in the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* (the Regulations). An example of this exemption is where a synthetic greenhouse gas is used in a medical device. It is anticipated that, if an exempt use of synthetic greenhouse gases is prescribed under the Regulations for the purposes of proposed subsection 13(3), that it is appropriate for the evidentiary burden to lie with the defendant, as it would be peculiarly within the defendant's knowledge what the intended use of the synthetic greenhouse gases they had manufactured, imported, or exported was. It would also be more difficult and costly for the prosecution to disprove.

Proposed subsection 13(5) provides that subparagraph 13(1)(b) (which prohibits the import of ODS equipment and SGG equipment) does not apply if the equipment is kept by the person (or a member of their household) for private or domestic use, the equipment is

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

prescribed by the Regulations (such as medical equipment, air conditioning equipment, heat pumps etc.), and any conditions prescribed by the Regulations are satisfied

What the defendant used the equipment for (i.e. domestic use, as opposed to commercial or other use) is peculiarly within the defendant's knowledge. The defendant would be best placed to raise evidence of the equipment's use and could do so relatively easily, by providing service records or other indications of where and how the equipment was used. It would be far more difficult for the prosecution to raise evidence disproving that disproving that the equipment was used domestically.

The nature of the equipment that the defendant has imported is also peculiarly within his or her knowledge, and he or she would be best placed to provide evidence (such as receipts, manuals, etc.) to demonstrate that the equipment is of a type specified under the Regulations, and meets any other conditions specified under the Regulations. By contrast, it would be significantly more difficult for the prosecution to prove that the equipment was not of a type prescribed in the Regulations, and that it did not meet any other criteria that may be prescribed.

Proposed subsection 13(6) provides that subparagraph 13(1)(b) does not apply if the total amount of controlled substances contained in ODS equipment (equipment containing ozone depleting chemicals) or SGG equipment (equipment containing synthetic greenhouse gases) in the importation does not exceed the amounts prescribed by the Regulations and that any other requirements prescribed by the Regulations are satisfied. This provision is intended to provide an exemption for low-volume imports where the total amount of controlled substances contained in the equipment imported by the importer falls below an amount specified in the Regulations as it is immaterial to Australia's international obligations. It is peculiarly within the defendant's knowledge whether the total amount of controlled substances contained in the equipment that they have imported does not exceed these thresholds. Conversely, it would be significantly more difficult for the prosecution to disprove.

It is anticipated that any other requirements that would be specified under the Regulations in relation to proposed subsection 13(6) would relate to the nature and type of equipment or the substances the equipment contained. As the equipment belongs to, or is in the charge of, the importer, it is anticipated that questions of whether the equipment in question met these requirements would also be peculiarly within the knowledge of the importer, whereas it would be significantly more difficult for the prosecution to disprove these matters.

Item 1.2 [6]

3.5 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 (HCFC) that are manufactured or imported on or after 1 January 2020.

3.6 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 states that the

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

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'.[7]

3.7 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).

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*.[8]

Response to Item 1.2

Proposed subsection 45C introduces a new offence in respect of the use of HCFCs that are manufactured or imported on or after 1 January 2020. Proposed subsection 45C(2) provides that subsection 45C(1) does not apply if the use is for a purpose prescribed by the Regulations. The defendant bears the evidential burden in relation to a matter covered by proposed subsection 45C(2).

Under Article 2F of the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Montreal Protocol), the only purpose for which HCFCs manufactured or imported on or after 1 January 2020 can be used is for the servicing of refrigeration and air conditioning equipment that existed before 1 January 2020. It is envisaged that this purpose would be prescribed in the Regulations under proposed subsection 45C(2). It is anticipated that other permitted purposes, such as fire protection, may also be specified under the Montreal Protocol, as the parties to the Montreal Protocol are currently considering recommendations of the Technology and Economic Assessment Panel on this issue, and have requested further information from the Panel (Decision XXVII/5).

The reversal of the evidential burden of proof is appropriate in these circumstances, as the purpose for which they used HCFCs is a matter peculiarly within the knowledge of the defendant. It would be relatively easy for the defendant to raise evidence of that purpose (for example, with receipts, customs declarations, and service records), whereas it would be significantly more difficult for the prosecution to disprove.

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7 Explanatory memorandum, p. 50.

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

Item 2 Significant matters in delegated legislation[9]

3.8 Some of the exceptions to the offence (offence-specific defences) in proposed section 13 rely on certain circumstances,[10] types of equipment,[11] amounts of relevant substances,[12] and conditions[13] 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.

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.

Item 2.1

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.**

Response to Item 2.1

It is appropriate for the exceptions in proposed section 13 to rely on matters to be specified in the Regulations, because elements of the offence may be determined by reference to treaties and conventions, the relevant content involves a level of detail that would not be appropriate for an act, and because of the changing nature of the subject matter and industry. Including details in delegated legislation allows exemptions and circumstances to be varied quickly to meet the needs of Australian businesses and individuals.

Proposed subsection 13(3) provides that subparagraph 13(1)(a)(iii) (which prohibits the manufacture, import, or export of a synthetic greenhouse gas) does not apply where the import, export, or manufacture was undertaken in circumstances prescribed by the Regulations. This provision is generally applied where the potential quantity of synthetic

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

10 Proposed subsection 13(3).

11 Proposed paragraph 13(5)(b).

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

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

greenhouse gas emissions is immaterial to Australia's greenhouse gas emissions such as when it is converted into a benign substance. This provision has been included with a view to providing a facility to prescribe exempt uses under the Regulations to ensure the legislation is able to be adapted quickly to take account of essential uses that emerge, while ensuring Australia's ongoing compliance with its international obligations.

Proposed subsection 13(5) provides that subparagraph 13(1)(b) (which prohibits the import of ODS equipment and SGG equipment) does not apply if the equipment is kept by the person (or a member of their household) for private or domestic use, the equipment is prescribed by the Regulations, and any conditions prescribed by the Regulations are satisfied. It is appropriate that the equipment be prescribed in the Regulations, as opposed to being specified on the face of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act), as the number of different types of equipment that would be prescribed and the level of specificity in which they would be described means that the level of detail is such that it is not appropriate that it be included in the Act. Similarly, it is envisaged that the conditions prescribed by the Regulations would relate to such matters as specifying size limitations for different equipment types. This level of detail is inappropriate for inclusion in the Act and is better suited to being prescribed in the Regulations.

Proposed subsection 13(6) provides that subparagraph 13(1)(b) does not apply if the total amount of HCFC contained in the ODS equipment or the total amount of synthetic greenhouse gas contained in the equipment in the importation does not exceed the amounts prescribed by the Regulations for ODS equipment or SGG equipment respectively, and that any other requirements prescribed by the regulation are satisfied. This provision is intended to provide an exemption for low-volume imports where the total amount of HCFCs or SGGs contained in the equipment imported by the importer falls below an amount specified in the Regulations and is immaterial to protection of the ozone layer or climate system. It is appropriate that the total amounts of HCFCs and SGGs be specified in the Regulations rather than the Act, as the threshold may be adjusted in the future as technology changes over time in line with the hydrofluorocarbon (HFC) phase-down and HCFC phase-out.

It is anticipated that other requirements that would be specified under the Regulations in relations to proposed subsection 13(6) would relate to the nature of and type of the equipment or the substances it contained. These requirements are likely to involve a high level of detail, and so it is appropriate that they be include in the Regulations rather than on the face of the Act.

Before amending the Act or Regulations, the Department of Environment and Energy undertakes extensive stakeholder consultation in line with the Government's Regulatory Impact Guide. This includes appropriate consultation with directly affected stakeholders, industry groups and bodies, State and Territory Governments, and other Commonwealth agencies. The consultation is targeted and fit-for-purpose, depending on the affected stakeholders which are varied and exist within a rapidly changing industry affected by domestic and global technological advancement. Prescribing the type of consultation may therefore be restrictive and not allow the most appropriate approach to be taken.

Item 2.2[14]

3.9 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.

3.10 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'.[15]

3.11 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.

3.12 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.

Response to Item 2.2

As previously noted, it is anticipated that additional purposes for the use of HCFCs manufactured or imported on or after 1 January 2020 may be allowed under the Montreal Protocol. As such, it is appropriate that uses for allowable purposes be specified in the Regulations under proposed subsection 45C(2), rather than on the face of the Act, because these elements of the offence are to be determined by reference to an international agreement.

The Department of Environment and Energy undertakes extensive stakeholder consultation before making amendments to the Act or Regulations, in line with the Government's Regulatory Impact Guide. This includes appropriate consultation with directly affected stakeholders, industry groups and bodies, State and Territory Governments, and other Commonwealth agencies. The consultation is targeted and fit-for-purpose, depending on the affected stakeholders which are varied and exist within a rapidly changing industry affected by domestic and global technological advancement. Prescribing the type of consultation may therefore be restrictive and not allow the most appropriate approach to be taken.

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

15 Explanatory memorandum, p. 50.

Item 3 Strict liability offence[16]

3.13 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.

3.14 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.*[17]

3.15 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.[18] 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.

Item 3.1

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.*[19]

Response to Item 3.1

Proposed subsection 13(7) provides that a person commits an offence of strict liability if the person contravenes subsection 13(1), and the offence is subject to a maximum penalty of 500 penalty units.

Strict liability is appropriate in this instance, as it is necessary to ensure the integrity of a regulatory regime that protects both the environment and public health. The punishment of offences not involving fault is important in deterring conduct that would represent a breach of these provisions. There are also legitimate grounds for penalising persons lacking fault, as the public (and relevant stakeholders especially) have been warned through communications strategies to guard against the possibility of any contravention. It should be noted that the offence is also not punishable by imprisonment.

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

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

18 Explanatory memorandum, p. 14.

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

The offence is subject to a maximum penalty of 500 penalty units. This is greater than the maximum of 300 penalty units prescribed for strict liability offences in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 (the *Guide to Framing Commonwealth Offences*). However, this is justified given the significant harm to the environment that may result from breaches of this provision. It is also consistent with other offences in the Act of comparable seriousness (such as those set out in subsections 38(1) and (2) and 18(7)) that are also offences of strict liability and are subject to maximum penalties of 500 penalty units. As such, it is important for the overall integrity and consistency of the regulatory scheme that this provision continue to be a strict liability offence and that the existing maximum penalty of 500 penalty units is maintained.

It is intended for the Act and regulations to be holistically reviewed for compliance with the *Regulatory Powers (Standard Provisions) Act 2014* in the near future, as part of broader reform across the Environment and Energy portfolio. This will ensure that changes to offences, if any are necessary, are considered and appropriate for this regulatory program as a whole.

Item 3.2[20]

3.16 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.

3.17 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.*[21]

3.18 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.[22]

3.19 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

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

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

22 Explanatory memorandum, p. 50.

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.

3.20 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*.[23]

Response to Item 3.2

A contravention of proposed subsection 45C(1) (which prohibits the use of HCFCs imported or manufactured on or after 1 January 2020) would be a strict liability offence subject to a maximum penalty of 300 penalty units. The application of strict liability to this offence is appropriate and consistent with the Guide to Framing Commonwealth Offences, as the offence is not punishable by imprisonment, the offence is punishable by a maximum of 300 penalty units for a body corporate, and the punishment of the offence without involving a fault element is likely to significantly enhance the effectiveness of the enforcement regime in deterring the use of HCFCs in contravention of the provision. A breach could put Australia in non-compliance with its international obligations, with the ultimate sanction being Australia not being able to trade in scheduled substances with the other 196 countries who are party to the *Montreal Protocol on Substances that Deplete the Ozone Layer*. This would have serious consequences for Australian businesses and the wider community - access to medical devices such as metered dose inhalers would be jeopardised; access to scheduled substances to manufacture and service refrigeration and air conditioning equipment would be cut; and access to scheduled substances to manufacture and service fire protection equipment would be cut.

Further, as noted in the explanatory memorandum, there are legitimate grounds for penalising persons lacking fault, as persons will be placed on notice to guard against the possibility of contravention through an education campaign in the lead up to 1 January 2020.

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

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MS17-000669

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

Dear Senator

I am writing in response to the letter dated 11 May 2017 from Committee Secretary Anita Coles. The letter contained comments from the Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest No. 5 of 2017, concerning the *Petroleum and Other Fuels Reporting Bill 2017* (the Bill).

The Committee Secretary asked that I provide further explanation as to why the Bill grants the Secretary of the Department of the Environment and Energy broad powers to appoint authorised persons for the purposes of monitoring compliance and suggested limitations be applied to this power.

A detailed response to the Committee's question is attached to this letter.

I thank the Committee for raising these issues and providing me with the opportunity to explain the reasons for the approach adopted in the Bill.

Yours sincerely

JOSH FRYDENBERG

ATTACHEMENT

Detailed Response to Questions from the Committee

Introduction

The Senate Standing Committee for the Scrutiny of Bills (the Committee) noted concerns over the operation of clause 34 in the *Petroleum and Other Fuels Reporting Bill 2017* (the Bill) in its Scrutiny Digest No. 5 of 2017.

Clause 34 of the Bill relevantly provides that:

34 Appointment of authorised persons

(1) The Secretary may, in writing, appoint a person who is one of the following as an authorised person for the purposes of this Act:

(a) an APS employee in the Department;

(b) a person who is engaged as a consultant or contractor to perform services in relation to this Act.

(2) 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 powers of an authorised person.

(3) An authorised person must, in exercising powers as such, comply with any directions of the Secretary.

The Committee raised three questions in relation to this clause which I will deal with in turn.

Question 1

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)?

It is possible to the limit the appointment of authorised persons to either Senior Executive Service (SES) employees or SES and Executive Level (EL) employees or employees with specific training in the Bill. However, I do not consider that it would be appropriate to do so for two reasons.

Firstly, the Secretary of the Department of the Environment and Energy (the Secretary) currently delegates some compliance monitoring powers under other legislation to relatively junior employees, including staff members at the APS 5 and APS 6 classifications (i.e. non Executive level employees). With effective training, clear guidance and appropriate direction, the Department of the Environment and Energy (the Department) has found that APS level staff are more than capable of effectively exercising compliance monitoring powers.

For example, section 82 of the *Greenhouse and Energy Minimum Standards Act 2012* allows any officer of the Department to be appointed as a GEMS Inspector. The Department successfully uses this delegation to empower APS level staff to conduct certain compliance monitoring activities such as site inspections under appropriate direction.

The Department also sometimes delegates compliance monitoring powers to consultants and contractors, in particular technical experts. This is done to ensure that business can be confident that formal or highly technical audits are performed independently by suitably qualified experts. This approach is supported by industry stakeholders, subject to assurances that their

sensitive information is secure. The provisions in the Bill on this point are discussed further in response to Question 3.

For example, section 34 of the *Building Energy Efficiency Disclosure Act 2010* allows for contractors to be appointed as auditors for the Commercial Building Disclosure Program. A number of contractors have been appointed as auditors for the program and undertaken a number of complex and technical audits successfully.

Secondly, providing a wide power of delegation engagement helps the Department to deliver cost-effective compliance monitoring. This is especially relevant to the engagement of consultants and contractors.

The Department employs a number of compliance monitoring specialists and has extensive experience with managing compliance in areas such as environmental protection and energy efficiency standards. The Department's experience in some industries covered by the Bill, such as the waste lubricant recycling and natural gas liquid processing, is more limited. To obtain the necessary knowledge and experience to audit such activities through the engagement of permanent employees would be expensive, especially as the need for such skills on a continuing basis would be limited. As a result, the engagement of consultants and contractors is expected to provide greater value for money to the Government then employing permanent staff to provide this service.

A second factor which suggests that the engagement of consultants and contractors would be cost-effective is the various locations where compliance powers would be exercised. The relevant facilities and head offices that could require on-site attendance are located in state capital cities, regional ports and remote locations such as oil platforms on the North West Continental Shelf. It is expected to be significantly more cost-effective to engage local consultants to conduct some compliance monitoring activities than to dispatch Departmental employees from Canberra for activities such as gathering documents and recording fuel levels in storage tanks.

Therefore, it is my view that an absolute prohibition on the delegation of compliance monitoring powers to non-SES and EL employees would be unnecessarily restrictive in light of the Department's existing practices and the importance of delivering value for money.

Question 2

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?

It is possible to amend the Bill to provide further restrictions on the circumstances and conditions under which the Secretary may appoint an authorised person. However, I consider it more appropriate to leave the determination of what qualifications or experience is required to the discretion of the Secretary of the Department as limited by subclause 34(2), which provides

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 powers of an authorised person.

Therefore, the power of the Secretary, or their SES delegate, to appoint an authorised person is limited to only those persons who have the necessary knowledge or experience to properly exercise the compliance powers they would be delegated.

The determination of what knowledge or experience is appropriate for authorised persons to have is a matter best left to the discretion of the Secretary because of the breadth of knowledge and experience that may be necessary for effective compliance monitoring, both now and in the future.

First, the scope of activities relevant to the reporting obligation in the Bill is broad. The covered activities and covered products listed in the Bill range from the production of biofuels to the wholesaling of hydrogen. The knowledge and experience necessary to effectively audit one activity may be very different to the knowledge and experience necessary to audit another. As a result, if all the potentially appropriate types of training and experience were listed, the resulting list would be extensive.

Moreover, the type of activities and products subject to a reporting obligation may need to change in the future. The Australian Government has produced the Australian Petroleum Statistics for over forty years and it is envisioned that this publication will continue well into the future. Given the potential for changes in the transport fuel sector in the future, any list of necessary knowledge and experience for authorised persons would need to be able to accommodate the full range of potential technological and market changes in the transport fuel sector.

Second, a broad range of monitoring activities may be required to ensure the effective operation of the reporting obligation. Certainly, professional auditing qualifications and prior experience in exercising compliance monitoring powers would be relevant for certain compliance monitoring roles. However, a range of experiences and knowledge could also be relevant for other roles. For example, an ability to physically inspect fuel storage tanks, determine ownership and rights of possession under contracts or determine the chemical composition of a substance may be necessary skills for some activities undertaken by authorised persons.

Specifying the types of training and experience that may be necessary to undertake compliance monitoring activities would result in a long list that few, if any, individuals could satisfy in total.

Therefore, it is my view that including additional specificity in the Bill on the types of knowledge or experience that would be required by auditors would be unduly restrictive. It is preferable to allow the Secretary to determine what knowledge and experience is required on a case by case basis.

Question 3

Whether the bill can be amended ... to provide that a 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?

The Committee's suggestion is sensible and appropriate. However, it is my understanding that the Committee's concerns are already addressed through subclause 20(1) of the Bill.

Subclause 20(1) of the Bill provides:

20 Secrecy

Offence

(1) A person commits an offence if:
   (a) the person is, or has been, an entrusted person; and

(b) the person has obtained information in his or her capacity as an entrusted person; and
(c) the information is protected information; and
(d) the person:
(i) makes a record of the information; or
(ii) uses the information; or
(iii) discloses the information to another person.

Penalty: Imprisonment for 2 years.

Clause 21 of the Bill provides an exemption to the offence at clause 20, relevantly providing:

21 Exercising powers, or performing functions or duties, as an entrusted person

An entrusted person may make a record of, use or disclose protected information if the record is made, or the information is used or disclosed, in the course of exercising powers, or performing functions or duties, as an entrusted person.

Clause 5 of the Bill defines "entrusted person" as:

entrusted person means:
(a) the Secretary; or
(b) an APS employee in the Department; or
(c) any other person employed or engaged by the Department.

To be appointed as an authorised person under clause 34 of the Bill, a person must be either an employee of the Department or engaged by the Department as a consultant or contractor.

Accordingly, an authorised person under clause 34 would be an entrusted person as defined in clause 5, and as a result, they would commit a criminal offence under clause 20 if they recorded, used or disclosed protected information obtained during an audit if that act was not in accordance with their role and function as an auditor.

Protected information is defined at clause 4 as follows:

protected information means fuel information that is personal information, or fuel information that is commercial-in-confidence, that:
(a) is obtained under, or in accordance with, this Act, section 95ZPA of the *Competition and Consumer Act 2010* or subsection 355-65(8) in Schedule 1 to the *Taxation Administration Act 1953*; or
(b) is derived from a record of personal information, or information that is commercial-in-confidence, that was made under, or in accordance with, this Act or a provision referred to in paragraph (a); or
(c) is derived from a disclosure or use of personal information, or information that is commercial-in-confidence, that was made under, or in accordance with, this Act or a provision referred to in paragraph (a).

Therefore, where an authorised person obtained commercial-in-confidence or personal information through their role as an auditor, it would be an offence to disclose this information except in accordance with their role and function as an authorised person.

The Bill provides a number of additional exemptions to the offence provided at section 20. For example, clause 23 would allow an authorised person to disclose the results of an audit to me as the responsible Minister; and clause 25 would allow disclosure where the audited entity consented. These exemptions are appropriate and will help to ensure the effective administration of the compliance monitoring regime.

Therefore, I see no need to amend the Bill as requested by the Committee.

If the Committee considers that the Bill would not achieve the outcomes I have described in this answer, I am happy to review the Bill and investigate the appropriateness of adding the prohibition recommended by the Committee to clause 34.

SENATOR THE HON JAMES MCGRATH
ASSISTANT MINISTER TO THE PRIME MINISTER
ASSISTANT MINISTER FOR REGULATORY REFORM

Reference: MC17-045277

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

Dear Senator Helen,

I refer to the letter dated 11 May 2017 from the Committee Secretary to the Office of the Minister for Indigenous Affairs requesting advice on the Prime Minister and Cabinet Legislation Amendment (Measures No. 1) Bill 2017 (the Bill). I have been asked to respond.

Reversal of evidential burden of proof

The Committee requests advice 'as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof)' in [connection with the proposed defences to the offence of refusing or failing to give information or a statement in writing pursuant to a notice to do so issued by a Commissioner]. The Committee notes that its 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*'.

To assist with understanding the provision questioned by the Committee, outlined below is a description of how the defence provisions operate in the context of the Bill.

Item 2 of Schedule 5 of the Bill proposes to amend the *Royal Commissions Act 1902* to give a Commissioner a new power to issue a written notice requiring a person to give information or a statement in writing. Item 11 of Schedule 5 of the Bill makes it an offence for a person to refuse or fail to comply with that notice. That item also makes provision for certain defences to that offence, namely, where a person has a 'reasonable excuse' (proposed subsection 3(6B)) or where the person asserts that the requested information or statement is not relevant to a Commission's inquiry (proposed subsection 3(6C)).

The Bill adopts existing policy in subsection 13.3(3) of the *Criminal Code Act 1995* which provides that '*a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter*'.

In terms of the 'evidential burden', through subsection 13.3(6) of the Criminal Code, a defendant relying on the proposed defences in the Bill needs to adduce or point to evidence that suggests a *reasonable possibility* that the matter exists or does not exist. Where that evidential burden is discharged by the defendant the prosecution then has the legal burden of disproving that matter (i.e. beyond reasonable doubt) (subsection 13.3(2) of the Criminal Code).

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that an 'offence-specific defence' is a defence that 'reverse[s] the fundamental principle of criminal law that the prosecution must prove every element of the offence' and that a matter should only be included in an offence-specific defence where:

- it is peculiarly within the knowledge of the defendant;
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter [see paragraph 4.3.1 of the Guide].

Where a person seeks to rely on the proposed defence of 'reasonable excuse' to justify not giving information or a statement in writing as requested by a Commissioner, the defendant needs to bring that excuse to the attention of the prosecution (for example, that the information or statement has not been given because the information is subject to legal professional privilege). The factual circumstances to support the existence of the excuse (or the defence) will be known to the defendant (eg that the information being requested is or might be privileged). It is going to be significantly more difficult and costly for the prosecution to adduce evidence that suggests the information or statement requested is not privileged, than for the defendant to adduce evidence to support the privilege claim.

Similarly, if a defendant claims that the information required to be given to a Commissioner is not relevant to the Commission's inquiries, the factual circumstances to support the existence of that excuse (or the defence) is going to be within the knowledge of the defendant.

The approach in the Bill for the offence-specific defences is consistent with other offences for failure to comply with summonses in the Royal Commissions Act (see e.g. subsections 3(1B), (2B), (3), (5) (6)).

Privilege against self-incrimination

The Committee requests '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'*.

Item 2 of Schedule 5 of the Bill inserts new subsection 2(3C) into the Royal Commissions Act to give a member of a Royal Commission the power to issue a written notice requiring a person to give information or a statement in writing to the Commission. It is an offence for a person to refuse or fail to comply with that notice. Further, new subsection 6(1A) provides that it is not a reasonable excuse for a person to fail comply with the notice on the ground that the information or statement might tend to incriminate the person or make the personal liable to a penalty.

The *Guide to Framing Commonwealth Offences* provides that 'the privilege against self-incrimination may be overridden by legislation where there is clear justification for doing so' and 'if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained'.

As explained in the Explanatory Memorandum of the Bill, the justification for a partial abrogation of the privilege against self-incrimination is to support a Commission's function to inquire into, and report on, matters of public importance. In doing so, that approach gives weight to the public benefit in equipping Royal Commissions with appropriate investigative powers. The abrogation of the privilege against self-incrimination is not absolute and there are limits and safeguards on the abrogation.

On safeguards, the privilege against self-incrimination still applies where the giving of information or a statement might tend to incriminate the person in relation to an offence, and the person has been charged with the offence, and the charge has not been finally dealt with by a court (see amendments to sections 6A(3) and (4) of the Royal Commissions Act as proposed by items 20-25 of Schedule 5 of the Bill). Furthermore, if incriminating evidence is obtained by a Royal Commission, it is proposed that the 'use' immunity in section 6DD of the Royal Commissions Act apply so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings.

It is also acknowledged that a Commissioner may communicate information or evidence that relates to a contravention of the law to certain office holders such as the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so (section 6P). It is not proposed to introduce a 'derivative use' immunity to prevent any incriminating evidence being used to gather other evidence against the person because it would unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission.

The approach in the Bill to partially abrogate the privilege against self-incrimination, and not to give a 'derivative use' immunity for a person required to give information or a written statement to a Commission, is consistent with the approach in the Royal Commissions Act for a person who is summonsed to appear or to produce documents (see e.g. sections 6A and 6P).

Significant penalties

The Committee notes that it is 'not apparent to the Committee that increasing the penalty [from 6 months' imprisonment or $1000, or both] to two years' imprisonment (without the option of a fine) for a failure to attend as a witness, produce documents or things, be sworn 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*.'.

The Committee therefore seeks '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 the offences relating to Royal Commissions (noting that the powers under the Royal Commissions Act could also apply to any person in Australia relating to any matter for which the executive has established a Royal Commission).'.

In relation to the Committee's comment that the proposed amendments to increase the penalties for certain offences do not give an option of a fine, I refer the Committee to the Explanatory Memorandum for the Bill which explains that section 4B of the *Crimes Act 1914* applies so that a court has discretion to impose a pecuniary penalty instead of, or in addition to, imprisonment (see e.g. paragraphs 64 and 67 of the Explanatory Memorandum).

It is acknowledged that the *Guide to Framing Commonwealth Offences* states that 'if non-compliance with a notice to produce or attend is to be an offence, the maximum penalty for non-compliance should *generally* be six months' imprisonment and/or a fine of 30 penalty units' (para 9.4.1). The Guide also includes a principle that a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness (para 3.1.2). That latter principle has particular application in this case.

The Bill implements recommendation 78 of the final report of the Royal Commission into Trade Union Governance and Corruption. The Hon John Dyson Heydon AC QC recommended that the Royal Commissions Act be amended '*to increase the penalties for a failure to comply with a summons to attend, a failure to comply with a notice to produce, a failure to be sworn or answer questions, and a failure or refusal to provide documents to at least a maximum penalty of 2 years' imprisonment or a fine of 120 penalty units or both*'.

In making that recommendation, Commissioner Hedyon observed that the existing penalty for those offences is 'inadequate', and explained that a penalty of up to 2 years' imprisonment is consistent with other penalties applicable to a failure to comply with notices, such as notices issued by the Australian Security and Investments Commission (section 63 of the *Australian Securities and Investments Commission Act 2001*). The proposed penalty is also consistent with the *Law Enforcement Integrity Commissioner Act 2006* (section 78). Penalties for other similar offences are examined further in Commissioner Heydon's Final Report (see pages 626 and 630 and footnote number 16).

I trust this information will be of assistance.

Yours sincerely

JAMES MCGRATH

30 / 5 / 2017

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

PDR ID: MC17-002203

23 MAY 2017

Senator Helen Polley
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Helen

Dear Senator Polley

Thank you for your letter of 11 May 2017 regarding the Senate Scrutiny of Bills Committee's report, *Scrutiny Digest 5* of 2017. I note that the Committee has requested a response about how inserting the requirement for appeals mechanisms into primary legislation would not create any additional protection against future changes to regulations.

The *Transport Security Amendment (Serious Crime) Bill 2016* (the Bill) introduces an additional purpose to the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Aviation and Maritime Acts) to reduce criminal influence at Australia's security controlled airports, security regulated ports, security regulated ships, and security regulated offshore oil and gas facilities. The additional purpose would apply solely to the aviation and maritime security identification card (ASIC and MSIC) scheme and would complement the scheme's current purpose of preventing unlawful interference.

The level of specificity with which the Aviation and Maritime Acts could refer to the ASIC and MSIC appeals mechanisms is currently limited. This is because the concepts of the ASIC and MSIC are introduced by the *Aviation Transport Security Regulations 2005* and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Aviation and Maritime Regulations) and are not acknowledged by the Aviation and Maritime Acts.

In practice, because the Aviation and Maritime Acts cannot predict exactly what the Aviation and Maritime Regulations might say in the future, specific references to the ASIC and MSIC may be too specific and could become ineffective if the Aviation and Maritime Regulations change. Alternatively, if the reference is too general, it may have unintended consequences.

The practical protection provided by amendments (8) and (14) as agreed by the Senate would be limited by the fact that they refer expressly to decisions 'in relation to a security identification card'. If technological developments lead to access to areas and zones being regulated by a mechanism not involving security cards, such as the use of biometrics, then the proposed requirements in relation to reconsideration and review would not apply.

Further, the proposed provisions are drafted to apply the protections to every possible decision under the regulations relating to a security identification card. The regulations will be amended over time to respond to the changing environment and technology, and it is possible that this broad reference could require the regulations to provide for reconsideration or review of decisions where this is clearly inappropriate.

It is important to note that a comprehensive appeals process for ASIC and MSIC applicants and cardholders exists in the current Aviation and Maritime Regulations. The appeals process is essential to the administrative transparency of the schemes.

As you know, every regulatory amendment is scrutinised by the Senate Standing Committee on Regulations and Ordinances (SSCRO). The SSCRO is responsible for ensuring, among other matters, that legislative instruments do not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal. On this basis, it is expected that any future amendment to the Aviation and Maritime Regulations seeking to remove or reduce appeal rights would be at the control of Parliament and would stand a high chance of disallowance.

I would also note, should the Bill be passed by the Parliament, it is the Australian Government's intention to expand aspects of review for all ASIC applicants to mirror the reconsideration mechanism currently available for all MSIC applicants.

Thank you again for taking the time to write to me on this matter.

DARREN CHESTER

The Hon Dan Tehan MP

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Minister for Defence Personnel
Minister Assisting the Prime Minister for Cyber Security
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MB17-000128

24 MAY 2017

Senator Helen Polley
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Dear Senator Helen,

Thank you for the letter from your Committee Secretary, dated 11 May 2017, requesting information about issues identified with the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017* (Omnibus Bill.)

I am pleased to provide my advice in relation to the two issues identified by the Standing Committee for the Scrutiny of Bills and thank the Committee for the opportunity to provide this further information.

Delegations:

The amendments were drafted to align *the Military Rehabilitation and Compensation Act 2004* (MRCA) delegation powers with those of the *Veterans' Entitlements Act 1986* (VEA) delegation powers.

The existing Ministerial powers in the VEA are not subject to any specific restrictions. Therefore in practice, it would be preferred that a similar approach would be adopted in respect to the MRCA.

However, in light of the concern expressed by the SCSB, it is proposed to make Government amendments to the Bill, subject to approvals being obtained, to appropriately limit the delegation of certain functions and powers to certain senior staff in the Department, such as officers at the SES or equivalent level.

Incorporation by reference:

Currently the Treatment Principles, MRCA Treatment Principles, Repatriation Pharmaceutical Benefits Scheme and the MRCA Pharmaceutical Benefits Scheme incorporate documents by reference.

The incorporation of such documents benefits veterans as it enables a service provider to provide treatment using the most up to date information available. An exemption for these legislative instruments would not disadvantage veterans and other eligible persons.

Service providers will be familiar with all of the incorporated documents that are relevant to them and the location of the documents on the Department's website or the website of the relevant Department (usually the Department of Health).

The Department is currently creating a legislation webpage that will include details about new legislation. The site will be commence with details of the Omnibus Bill and will be online this week.

In addition, the Department proposes to use this webpage to provide links to legislative instruments, including the documents incorporated by reference into those legislative instruments. In this way, such documents will be freely available to the public.

At the present time, no documents are incorporated by reference into the remaining legislative instruments for which an exemption to subsection 14(2) of the *Legislation Act 2003* has also been sought:

- the Guide to the Assessment of Rate of Veterans' Pensions (made under section 29 of the VEA with the equivalent made under section 67 of the MRCA);
- the Repatriation Private Patent Principles (made under section 90A of the VEA and the MRCA Private Patient Principles under section 286 of the MRCA).

The exemption for those documents was sought on the basis that there may be a future need to incorporate by reference non-legislative documents as in force from time to time. It is envisaged that such documents would be of a type that is readily available and not restricted by subscription.

Thank you again for raising these issues in relation to the Omnibus Bill with me. I trust that my advice addresses the Committee's concerns and would be happy to provide any further information the Committee considers useful.