

**Senate Standing Committee**  
**for the**  
**Scrutiny of Bills**

**Alert Digest No.3 of 2014**

**19 March 2014**

**ISSN 1329-668X**



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Senator the Hon Kate Lundy	ALP, Australian Capital Territory
Senator the Hon Ian Macdonald	LP, Queensland
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## **Terms of Reference**

### **Extract from Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, 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 upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



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### **Senate Standing Legislation Committee Inquiries**

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

- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.  
Any Senator who wishes to draw matters to the attention of the  
Committee under its terms of reference is invited to do so.

## **Civil Aviation Amendment (CASA Board) Bill 2014**

Introduced into the House of Representatives on 6 March 2014

Portfolio: Infrastructure and Regional Development

### **Background**

This bill amends the *Civil Aviation Act 1988* to:

- increase the size of the Civil Aviation Safety Authority (CASA) Board;  
and
- make two minor amendments consequential to increasing the size of the Board.

*The committee has no comment on this bill.*

## **Commonwealth Electoral Amendment (Reducing Barriers for Minor Parties) Bill 2014**

Introduced into the Senate 4 March 2014

By: Senator Rhiannon

### **Background**

This bill amends the *Commonwealth Electoral Act 1918* to reduce the registration fees for minor parties and individuals.

*The committee has no comment on this bill.*

## **Competition and Consumer Amendment (Misuse of Market Power) Bill 2014**

Introduced into the Senate 6 March 2014

By: Senator Xenophon

### **Background**

This bill amends the *Competition and Consumer Act 2010* (the Act) to provide the court with the power to give directions to order a corporation to reduce its market share, where the corporation has been found to have contravened subsections 46(1) or 46(1AA) of the Act.

*The committee has no comment on this bill.*

## **Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014**

Introduced into the House of Representatives 5 March 2014

Portfolio: Justice

### **Background**

This bill amends the *Proceeds of Crime Act 2002* (the POC Act) to implement recommendations made by the Parliamentary Joint Committee on Law Enforcement (the PJC-LE) in its final report on its inquiry into Commonwealth unexplained wealth legislation and arrangements.

Schedule 1 of the Bill amends the POC Act to implement the PJC-LE's recommendations to:

- include a statement in the objects clause about undermining the profitability of criminal enterprise;
- ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- streamline affidavit requirements for preliminary unexplained wealth orders;
- allow the time limit for serving notice of applications for certain unexplained wealth orders to be extended by a court in appropriate circumstances;
- amend legal expense and legal aid provisions for unexplained wealth cases with those for other POC Act proceedings so as to prevent restrained assets being used to meet legal expenses;
- allow charges to be created over restrained property to secure payment of an unexplained wealth order, as can occur with other types of proceeds of crime order;
- remove a court's discretion to make unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are satisfied; and

- require the AFP Commissioner to provide a report to the PJC-LE annually on unexplained wealth matters and litigation, and to empower the PJC-LE to seek further information from federal agencies in relation to such a report.

Schedule 1 also amends the POC Act in ways that do not relate to specific recommendations of the PJC-LE, which include:

- clarifying that unexplained wealth orders may be made where a person who is subject to the order fails to appear at an unexplained wealth proceeding;
- ensuring that provisions in the POC Act that determine when restraining orders cease to have effect take account of the following matters: the new provisions allowing charges to be created and registered over restrained property to secure the payment of unexplained wealth amounts; and the fact that unexplained wealth restraining orders may sometimes be made *after* an unexplained wealth order (not only *before*);
- further streamlining the making of preliminary unexplained wealth orders where an unexplained wealth restraining order is in place (or has been revoked under section 44 of the POC Act);
- removing redundant affidavit requirements in support of applications for preliminary unexplained wealth orders;
- ensuring that a copy of the affidavit relied upon when a preliminary unexplained wealth order was made must be provided to the person who is subject to the order in light of changes to the affidavit requirements for preliminary unexplained wealth orders outlined above; and
- amending the POC Act to extend the purposes under section 266A for which information obtained under the coercive powers of the POC Act can be shared with a State, Territory or foreign authority to include a proceeds of crime purpose.

### **Undue trespass on personal rights and liberties—fair hearing Schedule 1, item 3**

This item would repeal subsections 20A(3A) to (3C) of the *Proceeds of Crime Act 2002*. These provisions allow a court to order that restrained property be disposed of for the purposes of paying a person’s reasonable legal expenses.

The explanatory memorandum includes a detailed explanation of the approach (at p. 20):

People who are subject to proceeds of crime proceedings (other than unexplained wealth proceedings) are not entitled to meet their legal costs from restrained property.

The ability of a person to dispose of restrained property to meet their legal costs weakens the effectiveness of the unexplained wealth provisions by allowing the wealth suspected to have been unlawfully acquired to be used to contest proceedings. This may lead to fewer assets being available for confiscation if an unexplained wealth order is successful and is likely to cause more protracted litigation.

This amendment will harmonise provisions relating to the payment of legal expenses for unexplained wealth cases with those for other proceedings under the POC Act.

Legal aid commissions will continue to be entitled to be reimbursed for legal costs incurred in representing people whose property is covered by a restraining order under the POC Act. Matters under the POC Act have also been established as a priority civil law area for the allocation of Commonwealth funded legal services by State and Territory legal aid commissions under the National Partnership Agreement on Legal Assistance Services. As a matter of practice, many jurisdictions' legal assistance guidelines provide that, when determining whether legal assistance should be provided in relation to Commonwealth POC Act matters, any of a person's property that is covered by a restraining order, or is likely to be covered by a restraining order, should be disregarded for the purposes of means tests.

This amendment implements Recommendation 10 of the PJC-LE's final report.

The statement of compatibility considers whether the repeal of these provisions engages the right to legal representation under Article 14(3) of the ICCPR which provides that everyone shall be entitled to communicate with counsel of his or her own choosing in the preparation of his or her defence, and to have legal assistance assigned in any case where the interests of justice require, if he or she is unable to pay for it. The argument is that '[to] the extent that the Bill may limit a person's right to legal representation, such limitations are necessary and reasonable in ensuring that wealth is not dissipated on legal expenses to frustrate potential unexplained wealth orders that the Commonwealth's unexplained wealth laws operate effectively' (at

10). The SOC also emphasises the matters raised in the explanatory memorandum set out above.

The committee also notes that existing subsections 20A(3A) to (3C) of the POC Act currently only allow restrained property to be disbursed on legal expenses if a court makes an order that this be allowed on the basis that the expenses are ‘reasonable’.

**In the circumstances, and in light of the detailed explanation provided in the explanatory memorandum, the committee draws the provisions to the attention of the Senate and leaves the question of whether there is any undue trespass on the right to a fair hearing to the Senate as a whole.**

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

**Undue trespass on personal rights and liberties—privacy  
Item 31, proposed subsection 266A(2) (after table item 2A)**

This item inserts new table item 2C, which will expand the circumstances in which authorities are able to share ‘information with foreign authorities for the purpose of identifying, locating, tracing, investigation or confiscating proceeds or instruments of crime under a law of the country’ (at p. 37 of the explanatory memorandum). The material that is able to be shared is that obtained from a person compelled to provide a sworn statement or to produce certain information under relevant provisions of the *Proceeds of Crime Act*.

The justification for the proposed increased sharing of information is that investigations into, and litigation over, proceeds of crime increasingly involve transnational elements ‘due to the international nature of serious and organised crime’ (also at p. 37). For this reason, the explanatory memorandum argues that it ‘is essential that a proceeds of crime authority has the ability to share information for such purposes’.

The explanatory memorandum explains that disclosure is only authorised for the purpose of identifying, locating, tracing, investigation or confiscating proceeds or instruments of crime under a law of the country if the proceeds of crime concerned ‘would be capable of being confiscated under Australian laws’ (at p. 38) (a dual criminality requirement).

However, from a scrutiny point of view it is of concern that there do not appear to be limits on the ability for foreign authorities to further disclose information because there is no control over whether the circumstances in which material is released are appropriate, and additional recipients may not be subject to appropriate legal limits.

The committee also notes that the existing provisions for sharing information in table items 2 and 2A include a requirement that the relevant offence 'is punishable on conviction by imprisonment for at least 3 years or for life', but there is no similar requirement for the new provisions.

**The committee is therefore concerned about the apparent absence of adequate safeguards for the process and seeks the Minister's advice as to whether consideration has been given to including a requirement similar to the minimum 3 year imprisonment punishment threshold and to limiting any disclosure to foreign agencies based on whether they are subject to legal obligations not to make further disclosure of the material or that such further disclosures are contingent on the existence of appropriate accountability arrangements.**

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

## **Undue trespass on personal rights and liberties—retrospective application**

### **Item 34**

This item relates to the application of amendments in part 1 of schedule 1 of the bill.

The explanatory memorandum states that although amendments to the relevant sections of the POC Act will only apply to restraining orders, unexplained wealth orders and preliminary unexplained wealth orders on or after commencement, they may be applied in relation to offences committed before commencement and to wealth that was acquired before commencement. The explanatory memorandum concedes that the operation of these amendments is thus 'partially retrospective'.

The reason for this is that the provisions relate to unexplained wealth and property that may have been accumulated prior to the commencement of the amendments. It is argued that this approach is justified on the basis that unexplained wealth orders are civil asset confiscation orders and do not result in any finding of criminal guilt or expose people to criminal sanctions (see the explanatory memorandum at page 40-41). For this reason it is concluded that:

...while the amendments may apply retrospectively with respect to a person's wealth, they do not create retrospective criminal liability.

Further, it is argued that it may be difficult, if not impossible, to ascertain specifically when property or wealth was acquired. In this context unexplained wealth orders could, it is argued, be frustrated as property may have been accumulated over decades and it will often be difficult, if not impossible, to ascertain specifically when property or wealth was acquired.

In relation to the application of the amendments to offences regardless of when they are suspected to have been committed, the explanatory memorandum argues that:

...the criminal conduct from which a person may have profited or gained property may continue over several years (including over the time of commencement), may not be discovered immediately, or may not be able to be attributed to a specific date. This is especially relevant for unexplained wealth proceedings which aim to target the heads of organised crime organisations who may have committed and/or profited from multiple offences over many years.

**While provisions that have retrospective application are of concern to the committee when they involve detriment to any person, in light of the detailed explanation provided, the committee draws the provisions to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

## **Export Market Development Grants Amendment Bill 2014**

Introduced into the House of Representatives 6 March 2014

Portfolio: Trade and Investment

### **Background**

This bill amends the *Export Market Development Grants Act 1997* to:

- increase the number of grants able to be received by an applicant from seven to eight;
- reduce the minimum expenses threshold required to be incurred by an applicant from \$20,000 to \$15,000;
- reduce the current \$5,000 deduction from the applicant's provisional grant amount to \$2,500;
- prevent the payment of grants to applicants engaging an EMDG consultant assessed to be a not fit and proper person; and
- enable a grant to be paid more quickly where a grant is determined before the 1 July following the balance distribution date.

*The committee has no comment on this bill.*

## **Farm Household Support Bill 2014**

Introduced into the House of Representatives 6 March 2014

Portfolio: Agriculture

### **Background**

The bill will replace the *Farm Household Support Act 1992* and provides for:

- up to three cumulative years of income support for farmers and their partners in hardship without the need for a climatic trigger;
- a requirement for a person to meet a means test, composed of an asset and income test, to qualify for payment;
- an assets test that is higher than mainstream asset limits in recognition that farm assets are relatively illiquid;
- a requirement for a person to enter into, and comply with, a financial improvement agreement to qualify for payment;
- a requirement for a person to have a farm financial assessment conducted;
- a farm financial assessment supplement and an activity supplement for the purpose of partially or wholly funding the farm financial assessment and compulsory activities, respectively;
- ancillary benefits such as a health care card, telephone allowance, remote area allowance, clean energy supplement, pharmaceutical allowance and rent assistance, subject to a recipient meeting certain requirements; and
- an income support payment for farmers and their partners that aligns with social security law where possible.

### **Delegation of Legislative power – *Henry VIII* clause Subclauses 5(2) and (3)**

Subclause 5(2) of the bill provides that an ‘expression that is used in the Social Security Act or a part of that Act has the same meaning, when used in this Act, as in that Act or part (subject to subsection 5(1) and Part 5 of this Act)’. The effect of this provision is that expressions used in the Social

Security Act have the same meaning as in this Bill, except where they are in conflict.

Subclause 5(3) of the bill provides that the Minister's rules 'may prescribe expressions to which subsection (2) does not apply'. Provisions which enable delegated legislation to override or modify primary legislation may constitute an inappropriate delegation of legislative power and the committee's practice is to seek a justification for such provisions. **As this subclause, in effect, enables the rules to modify the operation of the primary legislation the committee seeks the Minister's advice as to the justification for the necessity of this delegation of power.**

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

### **Delegations of Legislative power**

**Various: subclauses 13(1), 15(2), 19(2), 21(4), 24(2), 31(2) and 76(3)**

There are a number of instances where the bill provides for the making of rules to guide or determine significant aspects of decision-making for the administration of this scheme. The committee expects that important matters will be included in primary legislation unless a persuasive justification is provided in the explanatory memorandum. Regrettably, the explanatory memorandum does not indicate why the various matters are appropriately dealt with in the rules, rather than the primary legislation. **To assist the committee to better assess whether the approach in these provisions is appropriate, the committee seeks the Minister's justification for these delegations of power.**

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

## **Merits Review**

### **Subclause 20(2)**

This subclause has the effect that a decision made by the Secretary not to approve a registered training organisation for the purpose of providing training to participants in the scheme will not be a reviewable decision under the social security law. The explanatory memorandum contains a justification for this approach at page 33:

This is because the Secretary's decision takes account of the relevance of the training in relation to improving an individual's capacity for self-reliance, rather than a training organisation's compliance against an accepted standards framework. A third party could not test the appropriateness of the Secretary's determination against this objective.

Although it may be accepted that the appropriateness of training for the improvement of capacity for self-reliance requires an exercise of judgment rather than the application of clear or accepted standards, it not clear why, as a general matter, the making of discretionary decisions or decisions which require judgement to be exercised are matters in relation to which merits review should not be available. It is not clear why the objectives being pursued by this scheme could not be properly understood by tribunal members. It is also the case that if the Secretary were to adopt policy to guide the making of these decisions that policy would be likely to be applied by the merit review tribunal unless there were cogent reasons to the contrary. **The committee therefore seeks the Minister's further explanation for the exclusion of merits review in relation to these decisions.**

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

## **Delegation of Legislative power—Henry VIII clause**

### **Clause 92**

This clause provides that the Minister's Rules can modify the operation of Part 5 of the bill or the Social Security Act or the Social Security Administration Act for the purposes set out in section 91 of the bill, which relates to payments to be made under the proposed Farm Household Act.

Part 5 of the bill modifies the *Social Security Act* and *Social Security Administration Act* so that those Acts apply in relation to payments made under the FHS scheme. The explanatory memorandum states, at page 58, that this delegation is required to enable the Minister's Rules:

...to correct unintended consequences of the substantial interaction between the Bill as passed with the Social Security Act. This ensures that any modifications that are required for the efficient and effective operation of FHA are provided for without the need for further legislative change.

**In light of this explanation, and given that the power to modify the operation of primary legislation is limited to giving effect the purpose of applying the social security legislation to payments provided for under the Bill and the complexity of that task, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

### **Delegation of Legislative Power – standing appropriation Clause 105**

Clause 105 provides for the payment to qualifying farmers of farm household allowances, activity supplements and farm financial assessment supplements to be made out of the Consolidated Revenue Fund. In its *Fourteenth Report of 2005*, the committee stated, at page 272, that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

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.

The committee is not generally questioning the ability for payments to be made, only whether the use of a standing appropriation is an appropriate mechanism. In scrutinising standing appropriations, the committee looks to the explanatory memorandum for an explanation of the reason for the proposed approach. In addition, the committee considers whether the bill:

- places a limitation on the amount of funds that may be so appropriated; and
- includes a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

In this instance the explanatory memorandum simply repeats the effect of the provision and does not address the matters outlined above. **The committee therefore seeks the Minister's advice as to the justification for including a standing appropriation in the bill and the exclusion of that appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations processes.**

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

## Delegation of Legislative Power Clause 106

This clause provides that both the Minister and the Secretary may prescribe rules by legislative instrument. The committee notes that the provision of a power to prescribe rules rather than regulations is consistent with the Office of Parliamentary Counsel's recently revised *Drafting Direction 3.8*. For example, paragraph 2 states:

OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so.

The committee understands that the making of *regulations* is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and also to the Federal Executive Council approval process (currently detailed in the *Federal Executive Council Handbook*, September 2009). To the extent that these requirements appear to provide an additional layer of scrutiny when matters are proposed to be prescribed by regulation, it is not clear whether they will also apply to legislative *rules* (such as those provided for in clause 106) and, if not, whether there are any implications for both the quality, and level, of executive scrutiny applied to such instruments.

Given that delegations of Parliamentary power to the executive already result in a modified level of parliamentary scrutiny and reverse the commencement process (through the disallowance procedure), the committee is concerned to ensure that delegations of power are appropriate, including that adequate levels of scrutiny will continue to apply to the making of legislative instruments other than regulation.

**The committee therefore requests the Minister's advice about the above matters, and particularly as to the scrutiny implications, if any, in relation to these powers to prescribe rules rather than regulations.**

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

## **Farm Household Support (Consequential and Transitional Provisions) Bill 2014**

Introduced into the House of Representatives 6 March 2014

Portfolio: Agriculture

### **Background**

This bill is a companion bill to the Farm Household Support Bill 2014.

The bill repeals the *Farm Household Support Act 1992* and amends other Acts. The bill also includes transitional provisions to ensure recipients of non-legislated income support payment, including the new Interim Farm Household Allowance, can transition to the Farm Household Allowance.

### **Delegation of Legislative power—Henry VIII clause Schedule 3, subitem 2(2)**

This subitem provides that transitional rules may provide that the Farm Household Support Act, the SSA, and the SSA Act have effect with any modifications prescribed by the rules. Although the committee may appreciate the reasons for enacting such a rule in this context, it expects that an explanation be given for the use of *Henry VIII* clauses. Given that the result of this provision is that primary legislation may be amended by the rules, **the committee requests the Minister's advice as to the justification for the proposed approach.**

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

## **Flags Amendment Bill 2014**

Introduced into the Senate 6 March 2014

By: Senators Madigan and Xenophon

### **Background**

This bill amends the *Flags Act 1953* to ensure that Australian flags flown, used or supplied by the Commonwealth are only manufactured in Australia from Australian materials.

*The committee has no comment on this bill.*

## **National Broadband Network Companies Amendment (Tasmania) Bill 2014**

Introduced into the Senate 5 March 2014

By: Senator Urquhart

### **Background**

This bill amends the *National Broadband Network Companies Act 2011* to require NBN Co to only make fixed line connections to the NBN in Tasmania using fibre to the premises.

*The committee has no comment on this bill.*

## **Native Title Amendment (Reform) Bill 2014**

Introduced into the Senate 4 March 2014

By: Senator Siewert

### **Background**

This bill amends the *Native Title Act 1993* to:

- provide for the right to negotiate provisions of the Act to apply to offshore areas;
- clarify the meaning of negotiations in good faith in relation to the right to negotiate provisions in the Act;
- provide for extinguishment over nature reserves including national parks to be disregarded, and for extinguishment to be disregarded by agreement;
- inserts a presumption of continuity in relation to the observance of traditional laws and customs; and
- specifically provides that native title rights and interests may be of a commercial nature.

*The committee has no comment on this bill.*

## **Qantas Sale Amendment Bill 2014**

Introduced into the House of Representatives 6 March 2014

Portfolio: Infrastructure and Regional Development

### **Background**

This bill amends the *Qantas Sale Act 1992* to remove the foreign ownership and other restrictions that apply to Qantas but do not apply to other airlines based in Australia.

The bill also amends the *Air Navigation Act 1920* to allow Qantas to be included in the definition of an Australian international airline.

*The committee has no comment on this bill.*

## Quarantine Charges (Collection) Bill 2014

Introduced into the House of Representatives 6 March 2014

Portfolio: Agriculture

### Background

This bill forms part of a package of four bills. The bill provides:

- for the authority to collect charges imposed under the Quarantine Charges (Imposition–General) Bill 2014, the Quarantine Charges (Imposition–Excise) Bill 2014 and the Quarantine Charges (Imposition–Customs) Bill 2014 (the Imposition Bills);
- that regulations will determine the time the charge is due and payable;
- the Commonwealth with powers to refuse service in relation to a person who is liable to pay a charge or late payment fee. Such services include the suspension and revocation of import permits; and
- the Commonwealth with enforcement powers to deal with goods and vessels to recover unpaid charges and late payment fees. In doing so the Commonwealth may create a charge on a good or vessel and withhold goods that are subject to a charge.

### Undue trespass on personal rights and liberties—fair notice

#### Clause 14

This clause empowers the Director of Quarantine to suspend or revoke a number of approvals or authorisations made under the Quarantine Act when a person has not paid a quarantine charge or late payment fee which is due and payable. Although the explanatory memorandum indicates that subclause 14(3) requires the Director to ‘provide written notice that a charge or late payment fee is outstanding before invoking these powers’ (at p. 12), this does not appear to correctly state the proposed legal position: subclause 14(3) provides for a revocation power, but it does not require that prior written notice be given before invoking the power. **The committee therefore seeks clarification about this from the Minister. In particular, if the position in the bill is correct and a ‘fair notice’ provision is not to be included in the bill the committee seeks the Minister’s justification for this omission.**

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

## **Undue trespass on personal rights and liberties—reversal of burden of proof**

### **Clauses 19 and 25**

Subclause 19(2) provides an exception to the offence of moving or interfering with withheld goods. The exception applies: if the person is authorised to move or interfere with the goods under section 46A of the Quarantine Act or a compliance agreement, has been given a direction by a quarantine officer or permission under this Act or the Quarantine Act. The explanatory memorandum contains a justification of this approach in which it is stated that it is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The justification, at page 15, is that the shift:

...in evidential burden is considered reasonable because it would be significantly more difficult for the prosecution to prove this element, since the relevant information is known particularly to the defendant.

On the other hand, the committee notes that the penalty for the offence is significant (2 years imprisonment or 120 penalty units), which does not appear to be consistent with the *Guide* to the extent that it states that creating a defence is more readily justified if the offence carries a relatively low penalty (see page 50). In addition, it is not clear why business practices could not be adopted which would enable the prosecution to establish whether a person has been authorised to move or interfere with goods so that the exception would not need to apply.

The same issues also arise in relation to subclause 25(2).

**The committee therefore seeks the Minister's further advice in relation to the justification for reversing the burden of proof in these provisions.**

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

## **Broad discretionary power**

### **Merits review**

#### **Clause 38**

This clause empowers the Minister to remit or refund the whole or part of a quarantine charge or a late payment fee that is payable, or already paid, if he or she is satisfied that there are ‘exceptional circumstances that justify doing so’. As noted in the explanatory memorandum (at p. 23) this is a discretionary power. The terms of the clause are quite broad and the explanatory memorandum does not provide examples of ways in which it is intended that the power will be used, nor does it further elaborate the justification of the power.

In addition, while it is apparent that the positive exercise of the power will be of benefit to the persons afforded relief from a fee or charge, a decision not to exercise the power will have a significant impact on the rights of applicants and there is no provision for merits review. The explanatory memorandum also does not address this aspect of the proposed approach.

**The committee therefore seeks the Minister's advice as to justification for the breadth of the discretion and to ask whether consideration has been given to the inclusion of relevant matters that must be considered by the Minister when exercising the power and/or to whether the exercise of the power should be subject to merits review.**

*The committee draws Senators’ attention to the provision as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) and to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee’s terms of reference.*

## **Delegation of legislative power**

### **Subclause 45(2)**

This subclause provides that the regulations may prescribe matters relating to the giving of a notice or direction, or the making of any other requirement, under this Act and the manner in which any notice, direction, requirement or other instrument granted, given or made under this Act may be produced to a person or body.

Given that an element of some of the serious offences created by this bill include failure to comply with directions and that the availability of exceptions to some offences depend on whether actions have been authorised by a direction (or perhaps another instrument), these matters appear to be of significance.

In general, the committee expects, in line with the principles set out in the *Guide to Framing Commonwealth Offences*, that the content of an offence should only be delegated to another instrument where there is a demonstrated need to do so and that the explanatory memorandum will include a detailed justification for the proposed approach. **As there is no explanation as to why these matters are more appropriate for delegated legislation rather than being included in the primary legislation the committee seeks the Minister's advice as to this matter.**

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

## Quarantine Charges (Imposition-General) Bill 2014

Introduced into the House of Representatives 6 March 2014

Portfolio: Agriculture

### Background

This bill forms part of a package of four bills.

The bill enables cost-recovery of activities that provide benefits to users of the biosecurity system – particularly the recovery of costs for indirect biosecurity services, such as scientific analysis, intelligence and surveillance.

### Delegation of Legislative power—setting a levy or charge in regulation

#### Clause 8

Subclause 8(1) provides that a regulation may prescribe a charge in relation to a prescribed matter connected with the administration of the *Quarantine Act 1908* (subclause 7(1)). Clause 9 also allows the regulations to prescribe who is liable to pay a charge and that one or more persons may be liable to pay a specified charge prescribed under subsection 7(1). The charges are imposed as taxes for the purposes of cost recovery.

The scheme thus involves the following matters being prescribed by regulation: the matters on which charges will be imposed, the amount or the method for calculating the amount of the charge, and the persons liable to pay the charge. The explanatory memorandum (at p. 3) indicates that the bill enables cost-recovery of activities that provide benefits to users of the biosecurity system—particularly the recovery of costs for indirect biosecurity services, such as scientific analysis, intelligence and surveillance. The justification for setting the charges through delegated legislation is that this ‘will allow the Minister for Agriculture to make appropriate and timely adjustments to the charges, avoiding future over or under recoveries’ (at 3).

The committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by regulation as this creates a risk that the levy may, in practical effect, become a tax. It is considered that it is for the parliament to set a rate of tax. Thus, although it is accepted that the rate of a levy may appropriately be dealt with by regulation where it may need to be

changed frequently and expeditiously, the committee expects that there will be a limit on the exercise of this power, for example, the setting of a maximum rate in the legislation or a formula by which the levy is to be calculated.

In this instance, subclause 8(2) of the bill provides that before a regulation is made under subsection 7(1) prescribing a charge in relation to a matter, the Minister:

...must be satisfied that the amount of the charge is set at a level that is designed to recover no more than the Commonwealth's likely costs in connection with the matter.

According to the explanatory memorandum:

...this ministerial oversight provides assurance to those liable to pay a charge or charges under the Act, that the amount charged reflects the likely costs to the Commonwealth in connection with the matter.

The explanatory memorandum adds that 'any charges set out in the regulations will be consistent with the *Australian Government Cost Recovery Guidelines*'. Although not detailed in the explanatory memorandum, these guidelines require Ministers administering significant cost recovery arrangements to undertake appropriate stakeholder consultation and for agencies to prepare a Cost Recovery Impact Statement (CRIS). It should be noted, however, that this particular safeguard is non-statutory.

Despite subclause 8(2) and the safeguards identified in the explanatory memorandum, the committee has some concerns about the adequacy of Parliamentary scrutiny given that all of the key elements of the administration charges under this bill are dealt with by regulations. **The committee therefore seeks the Minister's advice as to whether the administration of the scheme is subject to annual or other reporting requirements that would facilitate an appropriate level of parliamentary scrutiny. This request also applies to the related quarantine bills.**

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

## Undue trespass on personal rights and liberties—retrospective validation of charges levied

### Clause 11

The explanatory memorandum, at page 10, explains that this clause:

...provides that where a charge has been imposed under the Quarantine Act and it was done so in a manner that may be found to be invalid, the charge is validly imposed under this Act.

The purpose of the clause is to ensure that the government's intention to recover the costs of providing services is done so validly under law.

Although the explanatory memorandum explains the legal effect of this clause, it does not provide any material which explains the necessity of retrospectively validating fees that may have been invalid at the time they were levied. It is a fundamental principle that no pecuniary burden can be imposed upon individuals without clear and distinct legal authority. Retrospective validation of the imposition of fees and charges undermines this principle. In this regard it may be noted that the operation of the proposed validation clause is not confined to a specific problem with a particular fee, but will apply generally. **The committee therefore seeks the Minister's advice as to a detailed and compelling justification for this provision.**

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

## **Quarantine Charges (Imposition-Customs) Bill 2014**

Introduced into the House of Representatives 6 March 2014

Portfolio: Agriculture

### **Background**

This bill forms part of a package of four bills.

The bill enables cost-recovery of activities that provide benefits to users of the biosecurity system – particularly the recovery of costs for indirect biosecurity services, such as scientific analysis, intelligence and surveillance where a charge is considered a duty of customs as defined by section 55 of the Constitution.

**This bill raises identical issues to the *Quarantine Charges (Imposition-General) Bill 2014* discussed above.**

## **Quarantine Charges (Imposition-Excise) Bill 2014**

Introduced into the House of Representatives 6 March 2014

Portfolio: Agriculture

### **Background**

This bill forms part of a package of four bills.

The bill enables cost-recovery of activities that provide benefits to users of the biosecurity system – particularly the recovery of costs for indirect biosecurity services, such as scientific analysis, intelligence and surveillance where a charge is considered a duty of excise as defined by section 55 of the Constitution.

**This bill raises identical issues to the *Quarantine Charges (Imposition-General) Bill 2014* discussed above.**

## **Social Security Amendment (Caring for People on Newstart) Bill 2014**

Introduced into the Senate 6 March 2014

By: Senator Siewert

This bill is substantially similar to a bill introduced in the previous Parliament.

### **Background**

This bill amends the *Social Security Act 1991* to:

- increase the single rates of Newstart by \$50 a week;
- increase the single independent rates of Youth Allowance by \$50 a week; and
- provide the same indexation arrangements for certain pensions and allowances, being the higher of CPI, MTAWA or pensioner and beneficiary living cost index amount.

*The committee has no comment on this bill.*

## **Trade and Foreign Investment (Protecting the Public Interest) Bill 2014**

Introduced into the Senate 5 March 2014

By: Senator Whish-Wilson

### **Background**

This bill prevents the Commonwealth from entering into an agreement with one or more foreign countries that includes investor-state dispute settlement provisions.

*The committee has no comment on this bill.*

## SCRUTINY OF STANDING APPROPRIATIONS

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

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

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42<sup>nd</sup> Parliament.

### **Bills introduced with standing appropriation clauses in the 43rd Parliament since the previous *Alert Digest***

Farm Household Support Bill 2014

### **Other relevant appropriation clauses in bills**

Nil