

Senate Standing Committee
for the
Scrutiny of Bills

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Terms of Reference

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, 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.

Agricultural and Veterinary Chemicals Legislation Amendment (Removing and Re-registration) Bill 2014

Introduced into the House of Representatives 19 March 2014

Portfolio: Agriculture

Background

This bill seeks to remove the requirement for agricultural chemicals and veterinary medicines re-registration by removing end dates for approvals and last renewal dates for registrations so that approvals will no longer end after a particular period and registrations may be renewed perpetually, and removing redundant provisions that allow applications to re-approve and re-register active constituents and chemical products.

The committee has no comment on this bill.

Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014

Introduced into the House of Representatives 19 March 2014

Portfolio: Social Services

Background

This bill seeks to repeal the *Australian Charities and Not-for-profits Commission Act 2012*, thereby abolishing the Commission.

The bill also provides for transitional arrangements for matters such as transferring to the Chief Executive of a successor agency records held by the Commission, any outstanding Ombudsman investigations, and certain annual reporting requirements.

The committee has no comment on this bill.

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Introduced into the House of Representatives 19 March 2014

Portfolio: Treasury

Background

This bill seeks to amend Part 7.7A the *Corporations Act 2001* (in relation to the financial advice industry) to:

- remove the need for clients to renew their ongoing fee arrangement with their financial adviser every two years;
- make the requirement that financial advisers provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013;
- remove paragraph 961B(2)(g) (the 'catch-all' provision) from the list of steps an advice provider may take in order to satisfy the best interests obligation;
- facilitate the provision of scaled advice; and
- provide a targeted exemption for general advice from the ban on conflicted remuneration in certain circumstances.

Retrospective application

Legislation by press release

The explanatory memorandum (at p. 5) indicates that until the amendments proposed by this bill are in place, ASIC has indicated that it will take 'a facilitative approach to the FOFA reforms until mid-2014'. In particular, 'ASIC has indicated that it will not take enforcement action in relation to the specific FOFA provisions that the government is planning to repeal through this Bill and the associated regulations'. The only explanation of this approach is that it is consistent with ASIC's 'stance during the introduction of other major policy reforms' and that 'ASICs stance does not remove a client's right to take private action against a provider in the event they feel they are disadvantaged'.

The committee has a long-standing concern about the practice of ‘legislation by press release’, where the government treats proposed legislation as being the law from the time the intention to introduce it is made public. This expectation may mean that persons and officials may face uncertainty as to whether they should act on the basis of the law as it is planned to be enacted or the law as it currently exists. The underlying principle at stake is that it is for the Parliament, not the Executive branch of government, to determine persons’ legal rights and obligations. As such the committee is concerned that the regulator has announced that it will not enforce existing legal requirements but will act on the assumption that the bill will be passed in its current form. The committee notes that the bill proposes to remove regulatory requirements and that this may be considered to diminish legal protections currently enjoyed by clients of financial advisers. **The committee therefore seeks the Parliamentary Secretary’s advice as to the justification for the proposed approach.**

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

Delegation of legislative power

Schedule 1, items 29, 34 and 35, subsections 963B(7), 963C(2) and 963D(3)

These items introduce regulation-making powers that will allow for clarification to be made, by regulation, to the operation of existing exemptions to the ban on conflicted remuneration. Under the current provisions, the regulations may allow for certain benefits to be excluded from the ban on conflicted remuneration but do not allow for regulations to clarify the operation of the existing exemptions.

The explanatory memorandum justifies this approach by reference to the ‘complexity of payment arrangements within the financial advice industry,’ noting that ‘there is a possibility that future remuneration structures may be developed that are inadvertently captured by the ban on conflicted remuneration’ (at p. 36). **In light of this explanation, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

In the circumstances, the committee makes no further comment on these items.

Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

Introduced into the Senate 27 March 2014

Portfolio: Defence

This bill is substantially similar to a bill introduced in the previous Parliament. The committee commented on the bill in its *Alert Digest No. 6 of 2013*.

Background

This bill seeks to establish a framework that provides all non-Defence users within the Woomera Prohibited Area, and industry more generally, with a level of certainty over Defence activity in the area and allows users to make commercial decisions with some assurance as to when they will be requested to leave the area because of Defence activity. The bill gives effect to the recommendations in the Final Report of the Review of the Woomera Prohibited Area, released on 3 May 2011.

Undue trespass on personal rights and freedoms—strict liability Schedule 1, item 3, proposed subsection 72TG(2)

This provision imposes an offence of strict liability for failure to comply with conditions placed on a permission to be at a place in the Woomera Prohibited Area. When the committee considered the predecessor to this bill, it sought a further explanation of the approach given there was insufficient detail in the explanatory memorandum for it to assess the appropriateness of the use of strict liability (see *Alert Digest No. 6 of 2013*, p. 27).

The explanatory memorandum accompanying this bill contains a fuller explanation as to the justification for strict liability (at pp 7–8):

Clause 72TG creates an offence for failing to comply with a condition of a permission issued under clause 72TD, clause 72TE or clause 72TF. This is a strict liability offence, however, the defence of honest and reasonable mistake of fact may be raised (*Criminal Code Act 1995* section 9.2).

Permit holders are granted access to the Woomera Prohibited Area on a conditional basis. As the area is used for testing Defence materiel, including weapons, adherence to permit conditions by permit holders is essential to protect the security of Defence activities and to protect the safety of all users

of the range. Access to the Woomera Prohibited Area is only possible on a conditional basis and for this reason it is considered reasonable that breaching a condition of a permission should attract a strict liability offence. A strict liability offence provides a solid deterrent to breaching permit conditions and ensures the integrity of the permit regime, which aims to allow access to the Woomera Prohibited Area by non-Defence users in a safe and secure manner.

Breaching a permit condition will attract a minor penalty of a maximum of 60 penalty units. The conditions that will be attached to each type of permit are set out in Division 3 of the Woomera Prohibited Area Rules 2014. A permission issued under this Part will clearly advise the conditions with which the permission holder will need to comply, including the potential consequences of non-compliance.

The committee thanks the Minister for providing this more detailed justification in the explanatory memorandum, which has assisted in scrutinising the proposed provision. The committee therefore leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

In the circumstances, the committee makes no further comment on this provision.

Retrospective validation of action Schedule 1, item 4, proposed new section 121A

This proposed new section provides that any declaration or past act taken under regulation 35 of the *Defence Force Regulations 1952* in relation to the Woomera Prohibited Area (WPA) is taken to ‘always have been valid’ (explanatory memorandum at p. 11). Pursuant to regulation 35, the Minister may declare a place to be a prohibited area and then authorise access to such a place subject to conditions.

The explanatory memorandum describes this as a ‘technical provision’ which has been inserted ‘to avoid any doubt on the past applicability of the Defence Force Regulations to Woomera Prohibited Area which may arise as a result of the establishment of the new access regime by the Bill’.

The retrospective validation of regulations and administrative actions means that affected persons are unable to seek review of decisions that, at the time they were taken, lacked a valid source of legal authority. This may have the consequence that personal rights are adversely affected. However, the

intention of this provision appears to be to make it certain that some existing users of the WPA ('including pastoralists, Indigenous groups, the Tarcoola–Darwin railway owner and operators and four existing mining operations') will continue to operate under their current access arrangements governed by the *Defence Force Regulations 1952*. The committee notes that the explanatory memorandum (at p. 3) states that the access regime established by the bill 'will apply to new users of the WPA only'. However, noting the possibility that retrospective validation of administrative decisions may adversely affect personal rights and interests, **the committee seeks the Minister's more detailed advice as to the justification for the proposed approach, including whether it is possible that the approach may adversely affect personal rights or interests.**

Pending the Minister's reply, the committee draws Senators' attention to this 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.

Dental Benefits Legislation Amendment Bill 2014

Introduced into the House of Representatives 26 March 2014

Portfolio: Health

Background

This bill seeks to amend the *Health Insurance Act 1973* and the *Dental Benefits Act 2008* to:

- require the Chief Executive Medicare (CEM) to waive certain debts incurred by dentists in relation to the Chronic Disease Dental Scheme (CDDS);
- enable the CEM or their delegate to obtain certain documents from dentists to substantiate the payments of benefits under the Child Dental Benefits Schedule (CDBS);
- delegate ministerial functions and powers;
- amend the definition of ‘dental practitioner’;
- enable the disclosure of certain protected information; and
- make a technical amendment.

Undue trespass on personal rights and liberties—strict liability and onus of proof

Schedule 1, item 2, proposed subsections 20C(2)–(3) and 20E(2) and (4)

Proposed subsection 20C(2) creates a strict liability offence, with a penalty of one penalty unit for a person who fails to comply with a direction under proposed subsection 20B(1), or causes or allows a person acting on his or her behalf to fail to comply. Such directions require that a disqualified or partly disqualified practitioner not perform certain services in relation to which dental benefits will not be payable (because of the disqualification), without first informing the person to whom the service is to be rendered of the disqualification and its effects.

Proposed subsection 20C(3) provides that the offence does not arise if the person has a reasonable excuse. However, in relation to this defence, the defendant bears an evidential burden of proof.

The explanatory memorandum contains a detailed explanation for the use of strict liability and the reversal of the onus of proof in relation to the defence of reasonable excuse (at p. 6). It is stated that strict liability is appropriate 'because it would be difficult to obtain proof of intent to fail to comply with [a] direction'. Further, it is emphasised that failure to comply with a direction will have 'significant adverse effects on consumers', and that 'it is important to have an offence as a deterrent to non-compliance'. In relation to the reversal of onus, the explanatory memorandum states that the defendant alone 'will have knowledge of the circumstances that might reasonably excuse non-compliance'.

The same issues arise in relation to subsections 20E(2) and (4), which concern an offence for failure to comply with a direction to display a notice of disqualification.

In light of the above explanation and the penalty being set at one penalty unit, **the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

In the circumstances, the committee makes no further comment on these provisions.

Merits review Schedule 1, item 28

This item amends the *Health Insurance Act 1973* to make provision for the waiver of certain debts incurred by dentists under the Chronic Disease Dental Scheme. It is not clear whether decisions made in the administration of these debt waivers will be subject to merits review in the Administrative Appeals Tribunal. As the determination of whether or not a person is eligible for a debt waiver appears to be a decision for which merit review should be available, **the committee seeks the Minister's advice as to whether such decisions are reviewable and, if not, why such decisions are not subject to merits review.**

Pending the Minister's reply, the committee draws Senators' attention to this 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.

Undue trespass on personal rights and liberties—reversal of onus of proof

Schedule 1, item 31, proposed subsection 32D(2)

This proposed subsection provides that a person who would otherwise contravene a civil penalty provision requiring them to comply with a notice (to produce information), will have a defence if they can prove (on the balance of probabilities) that the failure to comply with the notice was brought about through circumstances outside of their control or if they could not be reasonably expected to guard against the failure. Other than noting that the provisions in Part 3 of Schedule 1 of the bill are generally modelled closely on equivalent powers set out in the *Health Insurance Act 1973*, the explanatory memorandum does not justify placing a legal burden of proof on persons who seek to rely on this defence. While the committee considers whether similar provisions exist in other legislation, whether the approach is appropriate in the current context depends on the specific circumstances of each case so the committee looks for a comprehensive rationale to be provided in the explanatory memorandum. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to this 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—privilege against self-incrimination

Schedule 1, item 31, proposed section 32E

This provision abrogates the privilege against self-incrimination in relation to a notice to produce a document, extract or copy under section 32C. Proposed section 32C provides that the Chief Executive of Medicare can issue a notice requiring the production of documents if he or she believes on reasonable

grounds that the person has possession, custody or control of documents relevant to ascertaining whether a benefit has been overpaid.

The abrogation of the privilege against self-incrimination is subject to both a use and derivative use immunity in relation to criminal proceedings (other than in relation to specified offences for the provision of false or misleading information) and civil proceedings (other than proceedings under section 32D or Division 4 of Part 6 of the *Dental Benefits Act 2008*). Division 4 of Part 6 of the *Dental Benefits Act 2008* concerns the recovery of amounts paid because of false or misleading statements.

The explanatory memorandum (at p. 10) justifies the abrogation of this important common law principle as follows:

This Part is intended to ensure that benefits may be recovered if they have been incorrectly paid. Excusing persons from producing documents on the basis that they may have to repay benefits would allow persons to retain incorrectly paid benefits by refusing to comply with the request. The public interest in ensuring that benefits under the Act are not paid inappropriately, and that inappropriate payments are recovered, is considered to outweigh the harm to individual rights from encroaching on the privilege against self-incrimination.

In light of this explanation, and the operation of the use and derivative use immunity explained above, **the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

In the circumstances, the committee makes no further comment on this provision.

Merits review

Schedule 1, item 37, proposed section 56D

This section provides for the internal review of decisions made by Medicare to claim a debt against a dentist. These debts arise where a person fails to comply with a notice under proposed section 32C, or where a person complies with the notice, but the information contained in the document does not substantiate the amount of benefit paid.

The explanatory memorandum (at p. 11) states that, consistent with similar provisions in the *Health Insurance Act 1973*, external merits review is not available in relation to these decisions. In justifying this approach, the

explanatory memorandum states that '[e]xperience under that Act has been that the existing internal review processes are rarely used, possibly because the decision to claim a debt is based on largely objective decisions with little scope for discretion on the part of the [Chief Executive of Medicare]'

The committee has a long practice of drawing attention to provisions that fail to provide for effective merits review. The committee notes that (1) the infrequent use of internal review does not, of itself, indicate that external merits review is inappropriate, (2) merits review is able to provide a relatively low cost alternative to court proceedings even in relation to decisions which are based on 'largely objective' criteria, and (3) as debts do not become due if the person concerned 'satisfies the Chief Executive Medicare that the person's non-compliance is due to circumstances beyond the person's control' (see proposed subsections 56A(2), (4), and (6)), it is quite possible that disputes may arise about decisions to claim an amount as a debt.

Based on the information currently available the committee is concerned that the proposed approach may not be justified. **The committee therefore seeks the Minister's further advice as to the justification for the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to this 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.

Export Inspection (Establishment Registration Charges) Amendment Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Agriculture

Background

This bill is part of a package of four bills relating to export services.

This bill seeks to amend the *Export Inspection (Establishment Registration Charges) Act 1985* to make amendments consequential on the definitional changes made to the *Export Inspection and Meat Charges Collection Act 1985* by the proposed *Export Legislation Amendment Act 2014*.

The committee has no comment on this bill.

Export Inspection (Quantity Charge) Amendment Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Agriculture

Background

This bill is part of a package of four bills relating to export services.

This bill seeks to amend the *Export Inspection (Quantity Charge) Act 1985* to make amendments consequential on the definitional changes made to the *Export Inspection and Meat Charges Collection Act 1985* by the proposed *Export Legislation Amendment Act 2014*.

The committee has no comment on this bill.

Export Inspection (Service Charge) Amendment Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Agriculture

Background

This bill is part of a package of four bills relating to export services.

This bill seeks to amend the *Export Inspection (Service Charge) Act 1985* to make amendments consequential on the definitional changes made to the *Export Inspection and Meat Charges Collection Act 1985* by the proposed *Export Legislation Amendment Act 2014*.

The committee has no comment on this bill.

Export Legislation Amendment Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Agriculture

Background

This bill is part of a package of four bills relating to export services.

The bill seeks to ensure that the definition of ‘prescribed good’ in the *Export Inspection Meat Charges and Collection Act 1985* has the same meaning as in the *Export Control Act 1982*. These amendments will ensure consistent cost recovery for services provided by the Department of Agriculture to exporters.

The bill also seeks to amend the *Australian Meat and Live-stock Industry Act 1997* to enable the Department of Agriculture to recover costs relating to the provision of services, such as issuing quota certificates, for export quota that is administered by other countries.

The committee has no comment on this bill.

Health Insurance Amendment (Extended Medicare Safety Net) Bill 2014

Introduced into the House of Representatives 26 March 2014

Portfolio: Health

Background

This bill seeks to amend the *Health Insurance Act 1973* to:

- increase the general threshold of the Extended Medicare Safety Net (EMSN) to \$2000 from 1 January 2015; and
- enable the Chief Executive of Medicare to determine the manner in which families are contacted to confirm their family composition for EMSN purposes.

The committee has no comment on this bill.

Live Animal Export (Slaughter) Prohibition Bill 2014

Introduced into the Senate 27 March 2014

By: Senator Rhiannon

This bill is identical to a bill introduced in the previous Parliament.

Background

This bill seeks to amend the *Export Control Act 1982* to prohibit the export of livestock for slaughter.

The committee has no comment on this bill.

Major Sporting Events (Indicia and Images) Protection Bill 2014

Introduced into the House of Representatives 26 March 2014

Portfolio: Sport

Background

This bill prevents the unauthorised commercial use of certain indicia and images associated with the Asian Football Confederation Asian Cup 2015, the International Cricket Council Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games.

Delegation of legislative power

Schedule 1, item 4

Schedule 2, item 4

Schedule 3, item 4

Item 4 of each of Schedules 1, 2 and 3 allow the rules to prescribe additional expressions or combinations of expressions to be included within the ‘protected indicia’ for the major event dealt with by each schedule. The protection afforded to event sponsors may thus be extended through additional indicia associated with a major event being prescribed by the rules. The committee expects that important matters will be included in primary legislation unless a sound justification for the use of delegated legislation is provided. As the explanatory material does not address why it is necessary to enable the rules to widen the scope of application of the legislative scheme in this way **the committee seeks the Minister’s advice as to the justification for the proposed approach.**

Pending the Minister’s reply, the committee draws Senators’ attention to these 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.

Delegation of legislative power

Schedule 1, item 5

Schedule 2, item 5

Schedule 3, item 5

Item 5 of each of Schedules 1, 2 and 3 provide that the rules can modify when protected indicia and images relate to an event body for the specified major event. The reasons as to why it is necessary to regulate when protected indicia and images relate to an event body in the rules (as opposed to the primary legislation) are not explained in the explanatory memorandum. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

Pending the Minister's reply, the committee draws Senators' attention to these 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.

Migration Amendment (Offshore Resources Activity) Repeal Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Immigration and Border Protection

Background

This bill seeks to repeal the *Migration Amendment (Offshore Resources Activity) Act 2013* to remove the requirement for foreign workers to hold a visa when they participate in, or support, offshore resource activities taken to be in the migration zone.

The committee has no comment on this bill.

Migration Legislation Amendment (No. 1) Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Immigration and Border Protection

Background

This bill seeks to amend the *Migration Act 1958* to:

- clarify the limitations or prohibitions on valid applications by persons who have been refused a visa or who held a visa that was cancelled;
- ensure that a bridging visa application is not an impediment to removal;
- apply debt recovery provisions to all convicted people smugglers and illegal foreign fishers;
- clarify the obligation of the Migration Review Tribunal and the Refugee Review Tribunal to provide documents to an authorised recipient;
- clarify the role of an authorised recipient and the extent of the obligation to notify an authorised recipient of direct communications made with the person who authorised them; and
- clarify the procedural fairness provisions relating to giving of certain information to a visa applicant; and remove redundant references.

The bill also seeks to amend the *Australian Citizenship Act 2007* and *Migration Act 1958* to provide access to, and use of, material and information obtained under certain search warrants.

Undue trespass on personal rights and liberties

Schedule 1

Items 1 to 5 of Schedule 1 propose amendments relating to the rule that non-citizens who are not substantive visa holders and have had a visa refused since last entering Australia, or who have had a visa cancelled, cannot make a further visa application. These proposed provisions ensure that the rule will, in effect, apply even in the cases where the earlier visa application was made on behalf of the non-citizen (for example because of the non-citizen's mental impairment or because the non-citizen was a minor) and the non-citizen neither knew about or understood the nature of the application.

As accepted in the Statement of Compatibility, these amendments engage Australia's obligations under Article 3(1) of the Convention on the Rights of the Child as they may mean that children are barred from making a further visa application even in a situation where allowing a visa application would likely be in the best interests of the minor.

Item 6 of Schedule 1 is an application provision which provides that the amendments in items 1 to 5 of that Schedule apply to an application for a visa that is made by or on behalf of a non-citizen on or after the day this item commences, even if the relevant refusal or cancellation decision that would bar a further visa application occurred before commencement of the amendments. Although this provision is not technically retrospective as the new provision prescribes a rule for the future based on antecedent facts (i.e. the existence of an earlier visa application), there is a question of fairness that arises to the extent affected persons (or their advisers) could not have been in a position to determine the legal consequences of an initial application for a visa that was made on their behalf.

The committee notes the above issues, and the explanatory material provided with the bill, draws the issue 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 these 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.

Undue trespass on personal rights and liberties Schedule 3, item 4

The amendments proposed in Schedule 3 expand the circumstances which lead to a person being liable to pay the Commonwealth for costs associated with their immigration detention and removal. Under the existing provision, detention and removal debts cannot be recovered from illegal foreign fishers and people smugglers who are not initially detained under subsection 250(2) of the *Migration Act* 1958. Under the proposed approach, this requirement is removed.

Subitem 4(1) provides that the amendments apply to a conviction for an offence that occurs on or after the day the amendments commence. However, subitem 4(2) provides that the amendments apply to costs incurred before that day. Although it may be argued that this application provision is not technically retrospective—as the new provision prescribes a rule for the future based on antecedent facts (i.e. costs being incurred for detention)—there is a question of fairness that arises to the extent affected persons could not have been in a position to determine the legal consequences of costs being incurred due to them being placed in immigration detention. Rendering persons liable to pay costs for their detention and removal in circumstances where they have been convicted of an offence may, in practical result, be considered to increase the penalty retrospectively in circumstances where some of those costs have already been incurred. **The committee therefore seeks the Minister’s further advice as to the justification for the proposed approach, particularly in relation to the rationale for applying the new approach to costs incurred prior to the day the amendments commence.**

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.

Paid Parental Leave Amendment Bill 2014

Introduced into the House of Representatives 19 March 2014

Portfolio: Small Business

Background

This bill seeks to remove the requirement for employers to provide government funded parental leave pay to their eligible long-term employees. From 1 July 2014, employees will be paid directly by the Department of Human Services, unless an employer opts in to provide parental leave pay to its employees and an employee agrees for their employer to pay them.

The committee has no comment on this bill.

Privacy Amendment (Privacy Alerts) Bill 2014

Introduced into the Senate 20 March 2014

By: Senator Singh

Background

This bill seeks to amend the *Privacy Act 1988* to establish a framework for the mandatory notification by regulated entities of serious data breaches to the Australian Information Commissioner and to affected individuals.

Delegation of legislative power

Schedule 1, Item 4, proposed paragraph 26X(1)(d)(ii)

This proposed provision allows for regulations to specify particular circumstances where data breaches which, despite falling short of the general test to establish a 'serious data breach', should nevertheless be subject to the obligation on an APP entity to comply with the proposed notification requirements. The circumstances where affected persons should be notified of data breaches raises significant policy questions, especially given that the consequences of failing to comply with the proposed notification requirements will enable the Australian Information Commissioner to use existing enforcement powers under the Privacy Act, such as to initiate own motion investigations, make determinations, seek enforceable undertakings, and pursue civil penalties for serious or repeated interferences with privacy.

The explanatory memorandum (at p. 7) justifies the delegation of legislative power in proposed paragraph 26X(1)(d)(ii) so as to 'provide the flexibility to deal with data breaches that may not reach the threshold of a real risk of serious harm but should nevertheless be subject to notification'. The explanatory memorandum states that these data breaches 'could include the release of particularly sensitive information such as health records which may not cause serious harm in every circumstance but should be subject to the highest level of privacy protection'.

The committee notes that the operation of this proposed paragraph will enable the reach of the significant new notification requirements to be expanded by regulation. Although the explanatory memorandum indicates that 'flexibility' is required to respond to situations where data breaches which do not pose a 'real risk of serious harm but should nevertheless be subject to notification', it

remains unclear why the personal information which is considered to be particularly sensitive cannot be identified and included in the primary legislation.

A similar issue arises in relation to paragraph 26X(2)(d)(ii); paragraph 26Y(1)(d)(ii); paragraph 26Y(2)(d)(ii); paragraph 26Z(1)(d)(ii); paragraph 26Z(2)(d)(ii); paragraph 26ZA(1)(d)(ii); paragraph 26ZA(2)(d)(ii).

The committee seeks the Senator's advice as to why personal information which is considered to be particularly sensitive (or, at least, some such matters) cannot be identified and included in the primary legislation.

Pending the Senator'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.

Private Health Insurance Amendment (GP Services) Bill 2014

Introduced into the Senate 27 March 2014

By: Senator Di Natale

Background

The bill seeks to amend the *Private Health Insurance Act 2007* to clarify that private health insurers may not enter into agreements or arrangements with primary care providers that provide preferential treatment to their members.

The committee has no comment on this bill.

Railway Agreement (Western Australia) Amendment Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Infrastructure and Regional Development

Background

This bill seeks to amend the *Railway Agreement (Western Australia) Act 1961* to:

- enable early repayment of the Commonwealth loan made to the Western Australian Government for the construction of a standard gauge railway, primarily from Kalgoorlie to Perth; and
- repeal the Act 28 days after the loan repayment is made.

The committee has no comment on this bill.

Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014

Introduced into the House of Representatives 19 March 2014

Portfolio: Employment

Background

This bill seeks to amend the *Safety, Rehabilitation and Compensation Act 1988* to:

- remove the requirement for the Minister to declare a corporation to be eligible to be granted a licence for self-insurance, while retaining the ability for the Minister to give directions to the Commission;
- enable corporations currently required to meet workers' compensation obligations under two or more workers' compensation laws of a State or Territory to apply to the Commission to join the Comcare scheme;
- allow a Commonwealth authority that ceases to be a Commonwealth authority to apply directly to the Commission for approval to be a self-insurer in the Comcare scheme and be granted a group licence if the former Commonwealth authority meets the national employer test;
- enable the Commission to grant group licences to related corporations;
- make consequential changes to extend the coverage provisions of the *Work Health and Safety Act 2011* to those corporations that obtain a licence to self-insure under the Act; and
- exclude access to workers' compensation where:
 - injuries occur during recess breaks away from an employer's premises; or
 - a person engages in serious and wilful misconduct, even if the injury results in death or serious and permanent impairment.

The committee has no comment on this bill.

Save Our Sharks Bill 2014

Introduced into the Senate 25 March 2014

By: Senator Siewert

Background

This bill seeks to:

- void the exemption granted on 10 January 2014 in relation to 72 baited drum lines deployed to catch sharks in Western Australia, and
- ensure that no similar declaration or exemption will have any effect.

Commencement

Item 2

Item 2 of this bill provides that ‘This Act is taken to have commenced on 25 March 2014’. The evident purpose is so that the exemption granted on 10 January 2014, pursuant to section 158 of the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the setting up of up to seventy two drum lines deployed to catch sharks ‘is taken to have ceased to have effect on 25 March 2014’. **The committee seeks further information from the Senator in relation to whether this retrospective commencement date may have any adverse consequences for those persons who may have relied on that exemption and, if so, for a justification of the retrospective commencement date.**

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

Social Services and Other Legislation Amendment (Seniors Health Card and Other Measures) Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Social Services

Background

This bill seeks to amend the *Social Security Act 1991* and *Veterans' Entitlements Act 1986* to annually index income thresholds for the Commonwealth seniors health card.

The bill seeks to amend the *Student Assistance Act 1973* to align provisions in relation to the operation of the Social Security Appeals Tribunal (SSAT) with similar provisions in social security and related laws.

The bill seeks to amend the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973* to ensure that a statement of reasons for a SSAT decision is provided to the Administrative Appeals Tribunal if there is to be a review of the decision.

The bill seeks to amend six other Acts to reflect machinery of government changes.

The bill also seeks to make technical amendments to the *Social Security Act 1991*, including a restructure of the Part of the Act that deals with definitions.

The committee has no comment on this bill.

Student Identifiers Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Industry

This bill is substantially similar to a bill introduced in the previous Parliament. The committee commented on the bill in its *Alert Digest No. 5 of 2013*.

Background

This bill establishes a framework for the introduction of a student identifier for individuals undertaking nationally recognised vocational education and training from 1 January 2015 by:

- providing for how the student identifier may be assigned, collected, used and disclosed;
- providing for the creation of an authenticated transcript of an individual's record of nationally recognised training undertaken;
- establishing the Student Identifiers Registrar to administer the scheme; and
- providing for the functions, powers, appointment and terms and conditions of the registrar.

Undue trespass on personal rights and liberties—privacy Various provisions

As recognised in the statement of compatibility, the bill may impact on privacy interests of persons in a number of ways. **In general, the committee leaves the question of whether limitations on privacy are reasonable for achieving the bill's policy objectives to the Senate as a whole. However, the committee is interested to better understand whether further protections of individual privacy have been considered or might be considered in relation to clauses 18 and 25 of the bill (see below).**

**Delegation of legislative power
Parliamentary scrutiny
Clauses 18 and 25**

Clauses 18 and 25 enable the use of disclosure information (that will include personal information) if the use of the information is for the purposes of research and, among other things, that the disclosure ‘meets the requirements specified by the Ministerial Council’.

When the committee considered the predecessor to this bill, it expressed concern that the protocols relied upon to adequately protect privacy interests would not be subject to parliamentary scrutiny. The committee requested a more detailed explanation from the Minister as to why the approach was necessary and considered appropriate (see *Alert Digest No. 5 of 2013*, pp 88–89).

The explanatory memorandum accompanying this bill contains a fuller explanation of the Ministerial Council requirements and indicates that these requirements will ensure the integrity of the scheme and provide a further layer of protection of individual privacy. The statement of compatibility (at p. 7) states that research related use and disclosures will ‘ultimately be for the benefit of students and the wider community’. More particularly, it is argued in the explanatory memorandum (at pp 45–46) that:

Strict protocols governing research will be developed in conjunction with all states and territories through the Ministerial Council, to ensure that the integrity of the scheme is maintained. It is expected that the protocols could require research proposals to demonstrate, for example, that the information is reasonably necessary for the proposed research, or the compilation or analysis of statistics, and that these are in the public interest; provide an assurance that, if the information could reasonably be expected to identify individuals, the information will not be published in generally available publications. The protocols are also expected to provide for an appropriate process to examine and approve disclosures for research purposes on the basis that the public interest in the research substantially outweighs the public interest in the protection of privacy.

The strict protocols governing disclosure of student identifiers for research purposes reflect an appropriate balance between providing a high level of privacy protection for individuals regarding the collection, use and disclosure of student identifiers, and allowing sufficient flexibility to accommodate the wide range of legitimate requests for access to student identifiers by researchers

It remains unclear why protocols designed to protect privacy in relation to research related use and disclosure could not be included in the primary legislation. Further, although it may be accepted that these protocols may have these beneficial outcomes, it is a matter of concern that they are not subject to any form of parliamentary accountability as they are not described as legislative instruments.

The committee thanks the Assistant Minister for providing further information in relation to the Ministerial Council requirements in the explanatory memorandum, however the committee remains concerned that the protocols may not adequately protect privacy interests given that they will not be subject to parliamentary scrutiny. The committee therefore requests a more detailed explanation from the Assistant Minister as to why this approach is considered appropriate. It is noted that if the protocols cannot be subjected to parliamentary scrutiny that consideration could be given to whether the bill could at least require the involvement of the Information Commissioner in the development of the protocols or review of the protocols. (Under clause 24 of the bill the Information Commissioner is given additional functions.)

Pending the Assistant 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 and they may also be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Delegation of legislative power

Clause 22

Clause 22 of the bill provides that an entity is authorised to collect, use or disclose a student identifier of an individual if so authorised by the regulations. Clearly this clause enables the making of regulations that may infringe on an individual's privacy. As such, the committee expects to see a strong justification for departing from the general principle that important matters should be dealt with in primary legislation.

The explanatory memorandum addresses the appropriateness of this clause at pages 47 and 48. It is explained that the regulations made under this clause will authorise RTOs to collect and use student identifiers for the purposes of meeting its reporting obligations under the Australian Quality Training Framework Essential Conditions and Standards for Initial Registration and the Australian Quality Training Framework Essential Conditions and Standards for Continuing Registration. It is apparent that there is a need for the regulations to refer to these documents in order to ensure that the collection and use of student identifiers enables RTOs to comply with their up-to-date reporting obligations. The regulations will be a disallowable instrument and the creation and amendment of the regulations will also require the agreement of the States and Territories through the Ministerial Council. For these reasons, it is concluded in the explanatory memorandum that the clause constitutes an appropriate delegation of legislative powers.

The regulations will, it is noted, provide for collection, use and disclosure to only a limited number of entities (e.g. former and current RTOs, schools whose students undertake a VET course, and other VET related bodies) in specific circumstances (at p. 47). The explanatory memorandum goes on to detail the initial matters it is envisaged will be covered by the regulations. The overall justification for providing for these matters is that permitted uses of student identifiers needs to be responsive to the national VET training system.

Although the need for a regulation making power may be accepted, it is not clear why many of the matters listed on p. 48 of the explanatory memorandum to be dealt with by regulations cannot be dealt with in the primary legislation. However, as the regulations will be disallowable instruments and their making and amendment will require the agreement of the States and Territories through the Ministerial Council, **the committee notes the above comment but leaves the question of whether the overall 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.

Merits review

Clause 27

This clause provides that the CEO may, on request, give an individual who has been assigned a student identifier access to an authenticated VET transcript or extract from such a transcript. Although subclause 27(3) provides

that the CEO must give reasons for any decision to refuse to give access, there does not appear to be any right to have such a decision reviewed.

When the committee considered the predecessor to this bill, it sought advice from the Minister in relation to whether consideration had been given to the appropriateness of providing for merits review of these discretionary decisions and whether it would be appropriate to include more guidance in the legislation as to how this discretionary power is exercised (see *Alert Digest No. 5 of 2013*, p. 90).

The explanatory memorandum accompanying this bill provides a more detailed explanation of the approach. It is argued (at p. 52) that:

While the decision of the Registrar to give access to either an authenticated VET transcript or an extract is discretionary, such decision will be taken only in circumstances where the Registrar has reason to believe that there is a problem with the student identifier that requires investigation and resolution before a correct and complete transcript can be issued. The type of student identifier problem that could lead to the issue of an incorrect or incomplete transcript include where an individual may have more than one student identifier or where more than one individual have the same identifier. In all other cases transcripts will be generated automatically upon request by the individual or someone authorised by the individual. In recognition of the potential impact that not providing an authenticated VET transcript may have on the individual, this clause further provides that the Registrar must give the individual notice of his or her decision and a statement of reasons for that decision.

The committee thanks the Assistant Minister for providing this more detailed explanation in the explanatory memorandum, which has assisted in scrutinising the proposed provision. The committee therefore leaves the question of the appropriateness of providing for merits review of these discretionary decisions to the Senate as a whole.

In the circumstances, the committee makes no further comment on this provision.

Delegation of legislative power

Clause 53

Clause 53 provides that a RTO must not issue a VET qualification or VET statement of attainment to an individual unless the individual has been assigned a student identifier. However, the clause also provides that the

prohibition against an RTO issuing a VET qualification or VET statement of attainment will not apply where the Commonwealth Minister specifies, by legislative instrument, an exemption relating to one or more of:

- the RTO issuing the qualification or statement of attainment;
- the qualification or a statement of attainment being issued; or
- the individual to whom the qualification or a statement of attainment is being issued.

When the committee considered the predecessor to this bill, it noted that there was an insufficiently detailed explanation of the reasons why exemptions need to be available and why these could not be included in the primary legislation. The committee therefore sought a fuller explanation from the Minister (see *Alert Digest No. 5 of 2013*, p. 91).

The explanatory memorandum accompanying this bill provides a more detailed explanation of the approach and indicates (at p. 61) that:

These exemptions will be limited to maintain the integrity of the scheme. It is necessary to provide for limited exemptions in order to be consistent with existing and prospective legislative provisions (for example national security); to allow for interaction with other regulatory instruments in the sector, some of which are under review; and to address issues which may not yet have arisen.

It is preferable to exempt specific RTOs, qualifications and classes of individuals by way of legislative instrument rather than specifying the exemptions in the primary legislation as this will enable the exemptions to be more easily updated as the need arises.

The committee thanks the Assistant Minister for providing this more detailed explanation in the explanatory memorandum, which has assisted in scrutinising the proposed provision. The committee therefore leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

In the circumstances, the committee makes no further comment on this provision.

Delegation of legislative power—incorporating material by reference

Clause 57

Clause 57 enables the Governor-General to make regulations prescribing matters required or permitted by the bill or necessary or convenient for the operation of or giving effect to the bill. Subclause 57(2) provides that the Commonwealth Minister must obtain the agreement of the Ministerial Council to the regulations before the Governor-General makes the regulations. Subclause 57(3) provides that despite subsection 14(2) of the *Legislative Instruments Act*, a regulation made under this clause may make provision in relation to a matter by applying, adopting or incorporating, without modification, a matter contained in an instrument or other writing as in force or existing from time to time.

The Committee routinely expects such provisions which enable regulations to incorporate other instruments as in force from time to time to be accompanied by an informative explanation as they enable legislative changes to be made in the absence of proper parliamentary oversight. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms.

When the committee considered the predecessor to this bill, it noted that there was no explanation provided in relation to the power to incorporate material by reference. The committee therefore sought the Minister's advice as to why the power is necessary; examples of what material is likely to be incorporated by reference and whether it is publicly available; and how people affected by the regulation will be made aware of any changes in the law arising from changes to the incorporated material (see *Alert Digest No. 5 of 2013*, p. 92).

The explanatory memorandum accompanying this bill provides a more detailed justification of the proposed approach and indicates (at p. 64) that:

The vocational education and training (VET) sector is governed by Commonwealth legislation in most jurisdictions and by State legislation in the non-referring states. The national consistency across the sector is maintained through the Australian Quality Training Framework (AQTF), changes to which are agreed by the Ministerial Council. Subsection 14(2) of the *Legislative Instruments Act* would prohibit the regulation referring to, or incorporating, the AQTF as it is amended. Therefore, to ensure that a reference to the AQTF framework is a reference to the AQTF framework as it is amended, a specific clause in the Bill is required to show contrary intention to that prohibition.

Subclause 57(3) of the SI Bill ensures that the regulation, once made, can refer to the documents such as the Standards under the AQTF as they are amended from time to time. It is anticipated that within the proposed regulations, certain entities will be authorised to collect and use an individual's student identifier in order to meet the entity's reporting obligations under the VET Standards. The definition of VET Standards in the proposed regulation includes the AQTF and it is intended that a reference to the AQTF should be a reference to the AQTF as it is amended.

The AQTF comprises a series of public documents which are readily accessed by interested parties. They are widely accessed by RTOs in jurisdictions in which they apply as the basis for obtaining initial and ongoing registration of their businesses.

The committee thanks the Assistant Minister for providing this more detailed explanation in the explanatory memorandum, which has assisted in scrutinising the proposed provision. The committee therefore leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

In the circumstances, the committee makes no further comment on this provision.

Tax Laws Amendment (2014 Measures No. 1) Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Treasury

Background

This bill seeks to amend various taxation laws.

Schedule 1 seeks to amend the *Income Tax Assessment Act 1997* and the *Banking Act 1959* to:

- allow taxpayers to consolidate multiple farm management deposits (FMD) that they might hold with different providers;
- raising the non-primary production income threshold; and
- excluding FMD from becoming unclaimed moneys.

Schedule 2 amends the *A New Tax System (Goods and Services Tax) Act 1999* and the *Taxation Administration Act 1953* to ensure that overpaid GST is refundable only in certain circumstances, and to enable merits review of certain commissioner's decisions.

Undue trespass on personal rights and liberties—retrospective commencement

Schedule 1, subitem 13(2)

Subitem 13(2) of Schedule 1 specifies that the amendment made by item 12 (relating to the tax treatment of farm management deposits that become unclaimed moneys) applies on and after 1 January 2013. There is a detailed explanation of the rationale for this item (see the explanatory memorandum at p. 17), which is said to ensure consistency with the current administration of the law. Further, the Statement of Compatibility (at p. 19) indicates that 'even though it is retrospective, it can have no implications for taxpayer's rights or freedoms' as it 'does not alter the law or the administration of the law'.

In the circumstances, the committee makes no further comment on this provision.

Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014

Introduced into the House of Representatives 27 March 2014

Portfolio: Veterans' Affairs

Background

This bill seeks to enable the expansion of mental health services for veterans and members of the Defence Force and their families.

The bill seeks to amend the *Veterans' Entitlements Act 1986* to:

- expand non-liability health care to include certain mental health conditions and alcohol and substance use disorders;
- expand eligibility for the Veterans and Veterans Families Counselling Service from 1 July 2014;
- provide that the seniors supplement is paid automatically following short periods of overseas travel; and
- make a technical amendment

The bill seeks to amend *Military Rehabilitation and Compensation Act 2004* to:

- expand the circumstances in which an eligible young person is taken to be wholly dependent on a Defence Force member; and
- enable the Chief Executive Officer of Comcare to be nominated for appointment to the Military Rehabilitation and Compensation Commission;

The bill also seeks to amend dispute resolution processes, case management powers and administrative business procedures of the Veterans' Review Board.

The committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Paid Parental Leave Amendment Bill 2014

[Digest 5/14 – no comment]

On the 24 March 2014 a correction to the explanatory memorandum was presented in the House of Representatives. The committee has no comment on this additional material.

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

The Chairs and Deputy Chairs of Commonwealth, State and Territory scrutiny committees have noted (most recently in 2000) difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because 'national scheme' bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the identification of national schemes of legislation, the committee's practice is to note bills that give effect to such schemes as they come before the committee for consideration.

Student Identifiers Bill 2014

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 previous *Alert Digest*.

Bills introduced with standing appropriation clauses since the previous *Alert Digest*

Student Identifiers Bill 2014

Other relevant appropriation clauses in bills

Nil