

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

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- **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.

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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**

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Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014

Introduced into the House of Representatives on 4 December 2014

Portfolio: Treasury

Background

This bill repeals Part 9 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which provides for the establishment, functions and operation of the Corporations and Markets Advisory Committee.

This bill also makes a number of consequential amendments to the ASIC Act as a result of the repeal of Part 9 and provides for the transitional and savings arrangements that are necessary to reflect the cessation of the agency.

The committee has no comment on this bill.

Commonwealth Electoral Amendment (Donations Reform) Bill 2014

Introduced into the Senate on 4 December 2014

By: Senator Rhiannon

Background

This bill amends the *Commonwealth Electoral Act 1918* to prohibit the following industries from donating to political parties:

- property developers;
- tobacco industry business entities;
- liquor business entities;
- gambling industry business entities;
- mineral resources or mining industry business entities; and
- industry representative organisations whose majority members are those listed above.

Undue trespass on personal rights and liberties—penalties Schedule 1, item 1, proposed sections 314AL and 314AM

Proposed section 314AL provides for a number of offences in relation to proscribed political donations. In each case the penalty is 2 years imprisonment, 800 penalty units or both. Proposed section 314AM provides for an offence for entering into or carrying out a scheme to circumvent a requirement or prohibition relating to prohibited political donations. The penalty is imprisonment for 10 years.

The committee considers that a consistent approach to penalties should be taken across Commonwealth legislation. Where a bill proposes a new offence the committee expects that proposed penalties will be well justified. This is particularly so in relation to significant custodial penalties. It is appropriate that such justifications explain why the proposed penalty is considered appropriate, particularly in comparison to penalties for other similar offences. **As the explanatory memorandum does not address the appropriateness of the proposed penalties (including in comparison to penalties for similar offences in other Commonwealth legislation), the committee seeks the Senator's advice as to the rationale for the proposed approach.**

Pending the Senator'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.

Undue trespass on personal rights and liberties—freedom of expression

Schedule 1, item 1, proposed section 314AL and section 314AM

As is recognised in the statement of compatibility, the creation of offences for the types of political donations specified in the bill may be considered to limit the right to freedom of expression insofar as it may impact on the activities of political parties and those seeking election to engage in electoral advertising and promotion and to express their policy positions to the public. The bill may also be considered to limit the right of prohibited donors to engage in the political process through funding political parties they support.

The statement of compatibility (at p. 4) responds briefly to this objection as follows:

[T]here is no clear legal basis for the argument that the right to donate to a political party is equivalent to the right to freedom of speech. Prohibited donors retain the right to public campaign and articulate their political views on any issues they wish—they are simply prohibited from donating monies to political parties.

These particular sectors [i.e. prohibited donors such as property developers, tobacco industry business entities, liquor business entities, gambling industry business entities, and mineral resources or mining industry business entities] have been singled out because of the frequent nexus between their operations and public policy, and the strong public perception of impropriety associated with political donations and decision making.

The committee notes that this discussion in the explanatory materials does not provide sufficient evidence to enable Senators to fully evaluate the appropriateness of the suggested approach. The committee therefore seeks the Senator's advice as to the rationale for the proposed approach.

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.

Defence Amendment (Fair Pay for Members of the ADF) Bill 2014

Introduced into the Senate on 2 December 2014

By: Senator Lambie

Background

This bill amends the *Defence Act 1903* to link annual wage increases for members of the Australian Defence Force to whichever is the higher of increases in parliamentary allowance or the consumer price index.

The committee has no comment on this bill.

Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Defence

Background

This bill amends the *Defence Act 1903* to:

- clarify the independence, powers and privileges of the Inspector-General ADF;
- provide a statutory basis to support regulatory change including the re-allocation of responsibility for investigation of service-related deaths and the management of the Australian Defence Force redress of grievance process to the Inspector-General ADF; and
- require the Inspector-General ADF to prepare an annual report.

Undue trespass on personal rights and liberties—abrogation of the privilege against self-incrimination

Items 9 and 12

These items make amendments to section 124 of the *Defence Act 1903*.

Item 9 inserts new subsection 124(2AA) which provides that regulations may be made (in relation to Inspector General ADF investigations or inquiries) that require a person to answer questions even if an answer may tend to incriminate the person. Similarly, proposed new subsection 124(2AB) provides that the regulations may make provision for requiring a person appearing as a witness before an Inspector-General ADF appointed inquiry officer or inquiry assistant, or Assistant Inspector-General ADF, to answer a question even if the answer may tend to incriminate the person.

Item 12 inserts new subsection 124(2CA) which provides for a use and derivative use immunity in relation to information and documents which have been required in the course of such investigations or inquiries. This immunity applies in relation to any civil or criminal proceedings in any federal court or court of a State or Territory and to proceedings before a service tribunal. The

immunity does not apply to proceedings by way of a prosecution for giving false testimony at the hearing before the Inspector-General ADF or Inspector-General ADF appointed inquiry officer. Existing subsection 124(2B) will also be amended (see item 11) so it applies in relation to these inquiries and investigations. The effect is that a person cannot be compelled to answer a question where an answer may tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of.

The statement of compatibility (at p. 3) concludes that the abrogation of the common law privilege against self-incrimination should not be considered to unduly compromise the right of people to enjoy a fair trial. It is stated that the government has a 'legitimate interest in making regulations that may require a witness to incriminate themselves in order that the true circumstances and events subject to inquiry by Defence may be ascertained' (p. 3). Further, it is noted that use immunity and the absence of a power to compel witnesses to incriminate themselves in respect of an offence for which they have been charged but not yet tried eliminate 'the possibility of the unfair use of admissions and wrongdoing'.

Although the committee has recognised that the privilege against self-incrimination may, in limited circumstances, be legitimately overridden, it has also regularly insisted that the result is the removal of a privilege that represents a serious loss of personal liberty. As such, the committee's expectation is that explanatory material provides a detailed justification as to why the public benefit in removing the privilege is considered to outweigh this significant loss of liberty. Although the presence of a use and derivative use immunity lessens the harm occasioned by this loss of liberty it does not remove it and the committee therefore expects a clear explanation of the necessity of overriding the privilege even where these immunities are provided.

For these reasons, the committee seeks further elaboration as to why abrogation of the privilege against self-incrimination is considered necessary in these circumstances, including how the public benefit in removing the privilege is considered to outweigh the significant loss of liberty involved.

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

Delegation of legislative power—important matters in regulations Items 9 and 12

The committee further notes that wherever possible any abrogation of important common law rights and principles should be achieved by primary legislation. **The committee therefore also seeks an explanation as to why it is considered appropriate for the abrogation of the privilege against self-incrimination—a matter of considerable importance—to be dealt with in the regulations.**

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.

Enhancing Online Safety for Children Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Communications

Background

This bill:

- establishes the Children's e-Safety Commissioner and the Commissioner's functions and powers;
- provides for complaints systems for cyber-bullying material targeted at an Australian child to be removed quickly from large social media sites; and
- establishes a Children's Online Safety Special Account to fund the Commissioner's activities.

Delegation of legislative power

Paragraph 5(1)(c)

This paragraph provides that the legislative rules may add to the conditions which must be satisfied for material to constitute 'cyber-bullying material targeted at an Australian child'. Clearly the definition of what material constitutes cyber-bullying for the purposes of the bill is a matter of central significance to the operation of the regulatory scheme.

The explanatory memorandum (at p. 67) justifies the inclusion of this rule-making power by suggesting that it may be necessary to include other conditions in the test of what constitutes of cyber-bullying material 'should it become apparent during the course of administering the legislation, that further conditions should be specified'.

The committee notes that although rule-making may, in some contexts, be considered appropriate on account of the need to make frequent regulatory adjustments in consequence of conditions of uncertainty or rapid change, it is not immediately clear why frequent adjustments to the nature of the basic test for cyber-bullying set out in subclause 5(1) are likely to be necessary. In considering the necessity of this rule-making power, the committee notes that paragraph 9(1)(b) provides that the legislative rules may specify an electronic service as a 'social media service' and paragraph 9(4)(b) provides that the

legislative rules may specify that a service is an exempt service. It appears that these rule-making powers provide a mechanism for the regulatory scheme to be adjusted in response to the changing nature of social media.

Overall, it appears that the bill seeks to balance, on the one hand, freedom of expression and, on the other hand, rights protective of honour, reputation and privacy.

Noting the above, and the central importance of the test of ‘cyber-bullying material targeted at an Australian child’ (in clause 5) to the operation of the bill and the fact that this definition is relevant to any consideration of the appropriateness of the balance achieved between competing rights, **the committee seeks the Minister’s advice as to why it is not considered more appropriate that any adjustments to this test be brought directly before the Parliament through proposals to amend the primary Act.**

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.

Insufficiently defined administrative powers

Clause 16

Clause 16 provides that the Commissioner has the power to do all things necessary or convenient to be done for, or in connection with, the performance of his or her functions.

On its face clause 16 may be considered to provide the Commissioner with inadequately defined discretionary power. However the committee notes that this clause may simply be the legislative expression of an implied incidental power (i.e. the power to do whatever may be fairly regarded as incidental to, or consequential upon, things expressly authorised by the legislature).

In order for the committee to be able to assess whether the power conferred on the Commissioner by clause 16 is appropriately defined, the committee seeks the Minister’s advice as to the intended scope of this power.

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

Broad discretionary power

Clause 19

Subclause 19(1) provides that the Commissioner may investigate a complaint made under clause 18. The explanatory memorandum explains that this is a discretionary power and the Commissioner is not obliged to investigate all complaints. Although it may be accepted that there are circumstances in which a decision not to investigate a complaint may be well justified, it is unclear why more guidance about these circumstances cannot be included in the bill. In this respect it is noted that the only avenue to have a decision not to investigate reviewed is by way of judicial review—such decisions are not subject to merits review in the AAT. For this reason, it may be considered desirable that some legislative guidance be given to structure the exercise of this broad discretionary power.

The committee therefore seeks the Minister's advice as to whether consideration has been given to including further legislative guidance about the criteria relevant to the exercise of this power.

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

Insufficiently defined administrative powers—delegation of administrative power

Clause 64

Subclause 64(1) provides that the Commissioner, may, by writing, delegate any or all of his or her functions and powers under Part 3 and 4 (except clauses 35 and 37) of the bill to a body corporate that meets certain criteria—namely, that it is specified in the legislative rules, is registered under Part 2A.2 of the *Corporations Act 2001*, and is a company limited by

guarantee. Subclause 64(3) provides for the exchange of information between a delegated corporate entity and the Commissioner that is relevant to the performance of the functions or exercise of powers of the Commissioner.

This power of delegation thus enables non-statutory entities staffed by persons outside of the Australian Public Service to exercise the Commissioner's powers. The committee notes that, while the power to delegate the functions and powers of the Commissioner under clause 63 to government employees is limited by reference to persons who are employed at least at APS 6 or an equivalent position, no similar restrictions are included in the legislation in relation to the employees of a delegated corporate entity who may exercise the Commissioner's powers or perform his or her functions.

Furthermore, while clause 65 provides that employees of a delegated corporate entity may only act under a sub-delegation if they satisfy the conditions set out in the legislative rules, it is not apparent why necessary restrictions on the persons whom can exercise the Commissioner's powers and functions should not be included the primary legislation.

Finally, the committee notes that a delegate of the Commissioner has coercive information gathering powers similar to those currently possessed by the ACMA under Part 13 of the *Broadcasting Services Act 1992* (see Part 1 of the Enhancing Online Safety for Children (Consequential Amendments) Bill 2014).

Noting the above, and the fact that neither (1) the rationale for this power of delegation (to non-government decision-makers), nor (2) the question of whether appropriate accountability mechanisms will be maintained for the performance of the Commissioner's functions and exercise of the Commissioner's powers are addressed in the explanatory memorandum, the committee seeks the Minister's advice in relation to these matters.

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

Enhancing Online Safety for Children (Consequential Amendments) Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Communications

Background

This bill makes consequential amendments arising from the enactment of the Enhancing Online Safety for Children Bill 2014.

The committee has no comment on this bill.

Excess Exploration Credit Tax Bill 2014

Introduced into the House of Representatives on 4 December 2014

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* to impose the excess exploration credit tax where an exploration company distributes more exploration credits than they are entitled to under the Exploration Development Incentive.

The committee has no comment on this bill.

Higher Education and Research Reform Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Education

A similar bill was introduced into the House of Representatives on 28 August 2014 and the committee dealt with the bill in *Alert Digest 11 of 2014*. The Minister responded to the committee's comments which were published in the committee's *Thirteen Report of 2014*. This similar bill was negatived in the Senate on 2 December 2014.

Background

This bill includes a range of amendments in response to recommendations made by the Senate Education and Employment Legislation Committee following its inquiry into the Higher Education and Research Reform Amendment Bill 2014, tabled on 28 October 2014.

The bill amends various Acts relating to higher education and research.

Schedule 1 makes the following amendments:

- reduces subsidies for new students at universities by an average of 20 per cent and deregulates fees for Commonwealth supported students by removing the current maximum student contribution amounts.
- removes limits currently placed on student contribution amounts providers can charge;
- amends the HELP loan programs currently available to Commonwealth supported and full fee-paying students and removes the FEE-HELP and the VET FEE-HELP lifetime limits and loan fee.

Schedule 2 requires providers with 500 or more equivalent full time Commonwealth supported students to establish a new Commonwealth Scholarship Scheme to support disadvantaged students.

Schedule 3 retains the Consumer Price Index (CPI) as the indexation rate of HELP debts and introduces indexation relief arrangements for primary carers of children aged under five.

Schedule 4 establishes a new minimum repayment threshold for HELP debts of two per cent when a person's income reaches \$50,638 in 2016-17.

Schedule 5 enables universities to charge Research Training Scheme students a capped tuition fee which will be deferrable through HELP. It also amends the ARC Act to allow additional investment in research through the Future Fellowships scheme, apply indexation and add an additional forward estimate amount.

Schedule 6 removes the current lifetime limits on VET FEE-HELP loans and the VET FEE-HELP loan fee.

Schedule 7 discontinues the HECS-HELP benefit from 2015.

Schedule 8 replaces the current Higher Education Grants Index with the (CPI) from 1 January 2016.

Schedule 9 will update the name of the University of Ballarat to Federation University Australia.

Schedule 9A amends the Higher Education Participation Programme requirements and introduces three programmes to increase access and participation in higher education by students from disadvantaged backgrounds.

Schedule 10 allows certain New Zealand citizens who are Special Category Visa holders to be eligible for HELP assistance from 1 January 2015.

Commencement

Schedules 1, 2, 3 and 4; Parts 2, 3 and 4 of Schedule 5; Schedule 6; and Schedule 8

The above schedules will commence on 1 January 2016 (except for Schedule 4, which will commence on 1 July 2016). Although the explanatory memorandum does not address the rationale for this delayed commencement, the Minister provided an explanation to the committee in relation to similar provisions in the previous version of the bill in a letter published in the committee's *Thirteen Report of 2014* (p. 702). The Minister stated that the delayed commencement:

...will allow affected stakeholders to prepare for the new funding environment.

Sufficient time is needed to communicate with students and prospective students about the new arrangements and allow for institutions to finalise and advertise their courses.

Higher education institutions, the Department of Education and the Australian Taxation Office need at least 12 months to implement changes to IT systems and business processes to give effect to the reforms.

In the circumstances, the committee makes no further comment in relation to this matter.

Delegation of legislative power

Schedule 1, item 62, proposed new subsection 41-10(2)

Schedule 1, item 67, proposed new subsection 46-15(3)

Part 2-3 of the *Higher Education Support Act 2003* concerns grants payable to higher education providers and other eligible bodies for a variety of purposes.

Item 62 of this bill repeals and substitutes section 41-10 which deals with which bodies corporate are eligible for Part 2-3 grants. Proposed new subsection 41-10(2) provides that the ‘Other Grants Guidelines’ may prescribe matters that relate to eligibility to receive a grant for the purposes specified in subsection 41-10(1) and, if they do so, a grant can only be awarded in accordance with these Guidelines.

Similarly, item 67 of the bill repeals and substitutes section 46-15 (which concerns the eligibility of higher education providers to receive grants for certain existing Commonwealth scholarships). Proposed new subsection 46-15(3) provides that the ‘Commonwealth Scholarship Guidelines’ may prescribe matters relating to eligibility for grants under subsections 46-15(1) and (2) and, if they do so, providers can only receive grants in accordance with the Guidelines.

When the committee considered the previous version of this bill the committee noted that the explanatory memorandum did not indicate why the eligibility requirements for these important categories of grants could not be provided for in the bill and the committee therefore sought advice from the Minister as to the justification for the proposed approach.

The Minister responded in a letter which was published in the committee's *Thirteenth Report of 2014*. The Minister stated (at p. 703) that:

The Committee is seeking advice about why the eligibility requirements for Other Grants cannot be provided for in the Bill.

Eligibility for Other Grants (section 41-10) and Commonwealth Scholarships (section 46-15) is mostly restricted to Australian universities listed in Tables A and B of the *Higher Education Support Act 2003*. In this way the Act provides for broad eligibility, while a narrower set of eligibility criteria can be determined in legislative guidelines.

The Bill ensures that those providers which are currently eligible for the programmes continue to be eligible, but removes the restrictive requirement that providers be listed on Table A or Table B, as these tables are historical in nature. By removing Table A and B from the eligibility requirements, the Bill allows for the eligibility criteria for each programme to be tailored to meet the programme's unique policy objectives rather than applying a 'blanket' approach. Setting out eligibility criteria in guidelines also provides the Government with the flexibility to respond quickly to the changing needs of the sector and emerging policy priorities.

The Reform Bill makes it clear that existing eligibility for Other Grants programmes and Commonwealth Scholarships will continue until such time as the legislative guidelines are amended. As is the case with all legislative instruments, any amendments that are made to the guidelines must be tabled in Parliament and are subject to a 15 sitting day disallowance period.

In its *Thirteenth Report of 2014* (at p. 704) the committee thanked the Minister for this response, however, the committee indicated that it will generally retain scrutiny concerns where important matters are to be provided for in delegated legislation and the main rationale for such an approach is administrative flexibility. However, the committee further noted that any amendments made to the guidelines under these provisions would be subject to disallowance by either House of Parliament. **The committee left the question of whether the proposed approach is appropriate to the Senate as a whole and does so again on this occasion.**

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.

Delegation of legislative power
Schedule 2, item 1, proposed subsection 36-75(4)

This proposed subsection provides that a provider's 'eligible amount' (i.e. the amount to be used for the new Commonwealth scholarship scheme introduced by this Schedule) is either 20 per cent of the provider's eligible revenue for the financial year or 'if a lower percentage is prescribed by the Commonwealth Grant Scheme Guidelines—that lower percentage'.

When the committee considered the previous version of this bill the committee noted that the explanatory memorandum merely repeated the effect of this provision. The committee considered that reductions in eligible amounts in accordance with any Commonwealth Grant Scheme Guidelines may involve significant policy choices, which arguably should be determined by the Parliament. The committee therefore sought advice from the Minister as to the justification for leaving important material to delegated legislation rather than incorporating (or proposing to incorporate it) into primary legislation.

The Minister responded in a letter which was published in the committee's *Thirteenth Report of 2014*. The Minister stated (at p. 705) that:

The Committee is seeking advice about why detailed matters related to the operation of the new Commonwealth Scholarship Scheme have been delegated to guidelines.

The measure requires institutions to allocate 20 per cent of the additional income received as a result of the deregulation of higher education student fees to a new Commonwealth Scholarship Scheme. These funds are to be allocated to assist disadvantaged students to access and succeed in higher education. Each institution is to manage its own Commonwealth Scholarship Scheme.

The Government included subsection 36-75(4)(b) in the Reform Bill to allow the Minister to determine, by legislative instrument, a lesser proportion of additional income that institutions must allocate to the fund. This provision will allow the Minister discretion to vary the requirement through legislative instrument to take account of circumstances within the sector, should this ever become necessary.

If such a change were required the Minister would table an instrument in Parliament and this would be subject to a 15 sitting day disallowance period.

In its *Thirteenth Report of 2014* (at p. 705) the committee thanked the Minister for this response, however, the committee indicated that it will

generally retain scrutiny concerns where important matters are to be provided for in delegated legislation and the main rationale for such an approach is administrative flexibility. The committee noted that if there were changes in the higher education sector which necessitated a reduction in the allocation of institutions' additional income to the Commonwealth Scholarship Scheme it would be appropriate for the Parliament to consider such matters. However, the committee also noted that such a change would at least be subject to disallowance by either House of Parliament. **The committee drew this issue to the attention of Senators and left the question of whether the proposed approach is appropriate to the Senate as a whole and does so again on this occasion.**

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

Broad discretionary power Schedule 9A, item 9

This item repeals sections 1.40 to 1.85 of the Other Grants Guidelines (Higher Education Participation and Partnerships Program) and substitutes new sections 1.40 to 1.86. These new sections will implement three new participation programs: (1) an Access and Participation Program, (2) a Scholarships Fund, and (3) a National Priorities Pool.

In approving grants (or determining the amount of a grant) under each program it is stated in 'notes' that the Minister may take account of factors, and examples are given of relevant factors. It is further stated that 'it is expected that these factors will be published on the Department's website'. Given the significance of these programs it is not clear why the relevant considerations for making grants (or determining the amount of a grant) should not at least be included in the guidelines so they will be subject to a level of parliamentary oversight. **The committee therefore seeks the Minister's advice as to why it is not possible to structure what appears to be a broad discretionary power to make grants under these programs by including the considerations relevant to the exercise of the grant-making power in the guidelines (which are a disallowable instrument).**

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

Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014

Introduced into the Senate on 3 December 2014

By: Senator Wright

Background

This bill amends the *Independent National Security Legislation Monitor Act 2010* and the *Australian Human Rights Commission Act 1986* to:

- ensure that the Independent National Security Legislation Monitor (the Monitor) can review *proposed* as well as existing national security legislation;
- require the Monitor to consider whether Australia's national security legislation is a *proportionate* response to the national security threat faced;
- enable the Senate Committees on Legal and Constitutional Affairs to refer matters to the Monitor for inquiry;
- enable the Australian Human Rights Commission to refer matters to the Monitor for inquiry;
- ensure that the position of Monitor is a full time position, cannot be left vacant and is supported by appropriate staff; and
- ensure all reports of the Monitor are tabled in Parliament and that the Government is required to respond to the recommendations of the Monitor within six months of tabling; and
- ensure that the Australian Human Rights Commission can refer matters to the Monitor for inquiry.

The committee has no comment on this bill.

Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Measures) Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Industry

Background

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to:

- expand the definition of 'designated coastal waters' to include all waters of the sea landward of the Commonwealth offshore area; and
- provide an alternative mechanism for titleholders to take eligible voluntary actions where there is more than one holder of a single title.

Delegation of legislative power—Henry VIII clause Schedule 1, items 5–8

Items 5–7 amend paragraphs (a)–(f) of the definition of 'State PSLA' (a State PSLA is the relevant Petroleum (Submerged Lands) Act of that State). Similarly, item 8 amends the definition of 'Territory PSLA'. The explanatory memorandum explains that these amendments are to respond to the eventuality that State or Territory legislative change (as has already occurred in Victoria) may mean that State or Territory Petroleum (Submerged Lands) Acts are replaced with new legislation. The amendments in these items will enable such replacement legislation to be prescribed by the regulation for the purposes of the definition of a State or Territory Petroleum (Submerged Lands) Act for the purpose of section 643. This will ensure that the States and Northern Territory can continue to confer powers upon the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) in the event that legislation not presently captured by the definition of State PSLA or Territory PSLA is enacted.

The explanatory memorandum (at p. 8) notes that the amended definition 'technically constitutes a Henry VIII clause' as it enables primary legislation to be modified by delegated legislation, however:

... the scope of this clause is very narrow, and will only be used in the event of a State or NT legislative change to ensure that powers and functions can continue to be conferred on NOPSEMA by that State or the NT. It would, in

effect, preserve the continuing effective operation of that part of the OPGGS Act. The State will still have the ability to decide whether to confer functions on NOPSEMA. In addition, the type of functions that can be conferred on NOPSEMA is limited in scope by section 646 of the OPGGS Act. The regulations will not be able to expand the type of functions that can be conferred on NOPSEMA, or expand the geographical coverage of the conferral beyond the area envisaged by the OPGGS Act, but merely ensure that functions that are appropriately conferred by or under a State or NT Act in accordance with section 646 are conferred effectively. Given the benefits associated with regulatory streamlining, it is preferable to ensure that the names of relevant State or NT legislation, or parts of legislation, can be prescribed quickly if necessary to ensure conferrals of functions on NOPSEMA can be given rapid effect.

Noting this detailed justification for the approach, the committee makes no further comment in relation to these provisions.

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

Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Designated Coastal Waters) Bill 2014

Introduced into the House of Representatives on 3 December 2014

Portfolio: Industry

Background

This bill amends the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* as a consequence of amendments to the definition of 'designated coastal waters', in relation to a State or the Northern Territory in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

The committee has no comment on this bill.

Private Health Insurance Amendment Bill (No. 2) 2014

Introduced into the House of Representatives on 4 December 2014

Portfolio: Health

Background

This bill amends the *Private Health Insurance Act 2007* and the *Ombudsman Act 1976* to:

- transfer the functions of the Private Health Insurance Ombudsman to the Office of the Commonwealth Ombudsman; and
- ensure that provisions of the *Private Health Insurance Act 2007* relating to the calculation of the Australian Government Rebate on private health insurance that were intended to be repealed by the *Private Health Insurance Legislation Amendment Act 2014* will be taken never to have commenced.

Delegation of legislative power

Schedule 1, item 5, proposed subsection 20Y(2)

Proposed subsection 20Y(2) provides that the Private Health Insurance Ombudsman Rules may prescribe matters to which the Private Health Insurance Ombudsman is to have regard when deciding whether or not to give a direction (pursuant to subsection 20Y(1)) requiring participation in mediation. **As the explanatory memorandum does not explain why these matters are not appropriately contained in the primary legislation the committee seeks the Minister's advice as to the rationale 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.

Delegation of legislative power

Schedule 1, item 5, proposed subsection 20ZA(3)

Proposed subsection 20ZA(3) provides that the Private Health Insurance Ombudsman Rules may prescribe matters to which the Private Health Insurance Ombudsman is to have regard before concluding that a matter cannot be settled by mediation. **As the explanatory memorandum does not explain why these matters are not appropriately contained in the primary legislation the committee seeks the Minister's advice as to the rationale 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.

Trespass on personal rights and liberties—information gathering power

Schedule 1, item 5, proposed subsection 20ZE(1)

Subsection 20ZE(1) provides that the Private Health Insurance Ombudsman may require the production of information or records, in certain defined circumstances 'before the end of the period specified in the notice [to produce]'. The *Guide to the Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) adopts the principle that a person should be given a minimum of 14 days to comply with a notice to produce information or documents. **Noting this, the committee seeks the Minister's advice as to the rationale for not providing an appropriate minimum timeframe to comply with a notice to produce in the bill.**

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.

Trespass on personal rights and liberties—information gathering power**Schedule 1, item 5, proposed subsection 20ZE(3)**

Proposed subsection 20ZE(3) provides that a person is not excused from giving information or a PHI record when required to do so under subsection 20ZE(1) on the ground that the information or record might tend to incriminate the person or expose the person to a penalty. This provision is qualified by section 20ZF which, among other things, provides for a use and derivative use immunity in relation to information or documents disclosed (except in relation to offences against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to the *Ombudsman Act 1976*). These exceptions from the immunity of use and derivative use reflect standard exceptions in relation to the provision of false or misleading information or documents and to the obstruction of a Commonwealth official performing public duties.

The statement of compatibility suggests that the use and derivative use immunity ensure that a person ‘furnishing the Private Health Insurance Ombudsman with necessary information is not unfairly disadvantaged by doing so, including by having that information used against them in other proceedings’ (at p. 8).

In the circumstances, 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 trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.

Sex Discrimination Amendment (Boosting Superannuation for Women) Bill 2014

Introduced into the House of Representatives on 1 December 2014

By: Mr Bandt

Background

This bill amends the *Sex Discrimination Act 1984* to provide that discrimination by an employer against a female employee is not unlawful if the discrimination involves the employer making a superannuation contribution that is more than otherwise required by law.

The committee has no comment on this bill.

Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014

Introduced into the House of Representatives on 4 December 2014

Portfolio: Treasury

Background

This bill amends various taxation and superannuation Acts.

Schedule 1 allows individuals the option of being taxed on the earnings associated with their excess superannuation non concessional contribution at their marginal tax rate.

Schedule 2 transfers the Commonwealth Ombudsman's investigative and complaints handling functions relating to tax law matters to the Inspector-General of Taxation.

Schedule 3 ensures the proper functioning of the capital gains tax provisions in relation to life insurance policies.

Schedule 4 ensures that individuals whose superannuation benefits are involuntarily transferred from one superannuation plan to another plan without their request or consent are not disadvantaged through the transfer. It also removes the need for a roll-over benefit statement to be provided to an individual whose superannuation benefits are involuntarily transferred.

Schedule 5 allows taxation officers to record or disclose protected information to support or enforce a proceeds of crime order. It also clarifies that all orders relating to unexplained wealth made under a state or territory law are included in the definition of 'proceeds of crime order'.

Schedule 6 provides for an Exploration Development Incentive.

Schedule 7 makes a number of miscellaneous amendments to taxation and superannuation laws.

Retrospective application Schedule 1

Although the amendments in this schedule apply in relation to non-concessional superannuation contributions for the 2013-14 and later financial years, the explanatory memorandum (at p. 29) explains that taxpayers will not be adversely affected by the proposed amendments.

In the circumstances, the committee makes no further comment in relation to this matter.

Retrospective application Schedule 3

Although the amendments in this schedule apply in relation to CGT events occurring in the 2005-06 and later financial years, the explanatory memorandum states that the amendments will benefit affected taxpayers:

The amendments are consistent with the administrative practice of the Commissioner of Taxation and ensure that taxpayers that could have benefited by relying on the Commissioner's administrative practice are not disadvantaged'. (p. 61)

Importantly, clause 4 of Schedule 3 ensures that section 170 will not prevent the amendment of an assessment made before Royal Assent of this bill if the amendment is made for the purpose of giving effect to Schedule 3 and made within two years of the day the bill receives Royal Assent.

In the circumstances, the committee makes no further comment in relation to this matter.

Retrospective application Schedule 7, item 10

Although this amendment applies retrospectively, in relation to dividends paid on or after 28 June 2010, the explanatory memorandum states that it is 'beneficial to taxpayers' (at p. 135).

In the circumstances, the committee makes no further comment in relation to this matter.

Retrospective application
Schedule 7, item 24

This amendment operates retrospectively so that it operates to allow transfer of expenditure to profit companies from the same time as the amendments in the *Tax Laws Amendment (2013 Measures No. 2) Act 2013*. However, the explanatory memorandum states that it ‘has no adverse effect on companies as it simply corrects a reference and ensures that the amendments apply as intended to allow the transfer of expenditure’ (p. 140).

In the circumstances, the committee makes no further comment in relation to this matter.

Tribunals Amalgamation Bill 2014

Introduced into the Senate on 3 December 2014

Portfolio: Attorney-General

Background

This bill amends a range of Commonwealth Acts to provide for the amalgamation of the Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the Migration Review Tribunal and Refugee Review Tribunal.

Merits review—termination of appointment of AAT member Schedule 1, item 26, proposed new section 13

The current provision in relation to the termination of appointment of an AAT member provides for termination through a procedure involving an address from each House of Parliament on the ground of proved misbehaviour or incapacity. Proposed new section 13 replaces these rules with termination provisions closely based on the standard Commonwealth model for termination provisions, i.e. the Governor-General may terminate an appointment on a number of listed grounds. The provision, however, would not apply to members who are judges.

The explanatory memorandum (at p. 28) states that the new provision balances the need to ensure members have sufficient tenure in their offices to be able to act independently of government, and the need to ensure that officers who behave inappropriately, have irreconcilable conflicts of interests or who are unable to perform their duties can have their appointments terminated.

This amendment appears to diminish the level of AAT members' independence. Given the apparent success of the current termination provisions it is not clear to the committee that the need to alter the current provisions has been established. **The committee therefore seeks further advice from the Attorney-General as to the rationale for this proposed approach which may represent a significant reduction in the level of independence afforded to AAT members.**

Pending the Attorney-General's advice, 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.

Compliance with administrative law requirements in exercising power

Schedule 1, item 27, proposed new subsection 18B(2)

Proposed subsection 18B(1) provides, inter alia, that the AAT President may give written directions in relation to the operations and procedure of the tribunal, and the conduct of reviews. Subsection 18B(2) provides that a failure by the Tribunal to comply with a direction does not invalidate anything done by the Tribunal.

The explanatory memorandum states that new subsection 18B(2) is 'intended to prevent Tribunal decisions being overturned due to minor non-compliance with practice directions' but that the Tribunal would 'nevertheless be required to comply with the provisions of the Act and the requirements of administrative law' (at p. 35). Given this intention, **the committee seeks the Attorney-General's advice as to why this provision should not be limited to minor departures from practice directions. More generally the committee also seeks advice about whether such a provision is common in relation to practice directions of other adjudicative bodies.**

Pending the Attorney-General's advice, 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.

Compliance with administrative law requirements in exercising power

Schedule 1, item 27, proposed new subsection 18B(3)

Proposed new subsection 18B(3) provides that 'if the Tribunal deals with a proceeding in a way that complies with a direction, the Tribunal is not required to take any other action in dealing with the proceeding'.

Given that practice directions may relate to the procedure of the tribunal and the conduct of reviews by the tribunal, it may be that directions intersect with requirements of administrative law, such as the rules of procedural fairness. In these circumstances, the meaning of subsection 18B(3)—which is set out above—could usefully be clarified. As the explanatory memorandum merely repeats the text of the provision, **the committee seeks further clarification from the Attorney-General as to the meaning and operation of proposed new subsection 18B(3).**

Pending the Attorney-General's advice, 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.

Adequacy of merits review Schedule 1, items 64 and 65, section 34J

Under current arrangements affected persons may appeal from an internal review of a Centrelink decision to the SSAT. Such persons have a further right of appeal to the AAT. Where such a right of appeal currently exists, the bill preserves the right to second review of social services and child support matters within the AAT. Nevertheless, the bill provides for at least one significant procedural change to second reviews of such decisions.

The amendments made by items 64 and 65 will enable a second review of social services matters to, at the Tribunal's discretion, be conducted on the papers without the consent of the parties (where the Tribunal is satisfied that the review can be adequately determined in the absence of the parties). Section 34J of the AAT Act currently provides that the consent of the parties is required if a case is to be heard on the papers (i.e. if there is to be no oral hearing).

The explanatory memorandum states that this procedural change 'would assist the Tribunal to ensure second review is conducted efficiently', and further notes that the conduct of a review on the papers 'is clearly limited to those cases where it would be appropriate' (at p. 15, see also p. 54).

Unfortunately, the justification provided does not adequately explain why this procedural change, which may compromise a fair hearing, is required. There

is a risk, for example, that a case may appear without merit merely because applicants (who are unlikely to be well resourced) have not been represented or well advised in the earlier stages of the review process. **The committee therefore seeks further information from the Attorney-General in relation to why this change is considered appropriate and examples of how the exercise of the Tribunal’s discretion to proceed on the papers can be appropriately exercised in practice.**

Pending the Attorney-General’s advice, 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.

Regulation-making power—Henry VIII clause Schedule 9, subitem 16(3)

Item 16 is a regulation-making power with respect to transitional and other matters.

Subitem 16(3) is a Henry VIII clause in that it would empower the Governor-General to make regulations (for the first two years following amalgamation) that would modify the operation of an Act in the context of giving effect to the amalgamation. The explanatory memorandum (at p. 225) states that ‘this provision is necessary in the context of the need to provide detailed transitional arrangements for key practical aspects of the amalgamation’. **The committee draws this provision to the attention of the 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 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.

**Regulation-making power—Retrospectivity
Schedule 9, subitems 16(4) and 16(5)**

Subitem 16(4) would allow for regulations to be made retrospectively for the first two years following amalgamation, however this power would not allow for a regulation to take effect before the commencement of the amalgamated tribunal. A safeguard in relation to this retrospectivity is contained in subitem 16(5) which provides that a court must not convict a person of an offence or impose a pecuniary penalty as a result of the retrospective operation of a regulation made under the power provided in this item. **The committee draws this provision to the attention of the 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 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.

COMMENTARY ON AMENDMENTS TO BILLS

Omnibus Repeal Day (Spring 2014) Bill 2014

[Digest 15/14 – awaiting response]

On 2 December 2014 the Senate agreed to one Opposition amendment and six Australian Greens amendments and the bill was read a third time.

The committee has no comment on these amendments.

Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014

[Digest 13/14 – Report 1/15]

On 1 December 2014 the Parliamentary Secretary to the Minister for the Environment (Senator Birmingham) tabled a correction to the explanatory memorandum. On 2 December 2014 the Senate agreed to 10 Opposition amendments. On the 3 December 2014 the House of Representatives agreed to the Senate amendments and the bill was passed.

The committee has no comment on these amendments or additional explanatory material.

Tertiary Education Quality and Standards Agency Amendment Bill 2014

[Digest 2/14 – no comment]

On 4 December 2014 the Senate agreed to 12 Government amendments and the Minister for Human Services (Senator Payne) tabled a supplementary explanatory memorandum. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

The committee notes that purpose of these Government amendments, among other things, is to:

- restrict TEQSA's delegation power so as to allow TEQSA to delegate its powers and functions only to Commissioners and TEQSA staff; and
- amend the ministerial direction power under section 136 and section 155 of the TEQSA Act to make such directions disallowable

legislative instruments despite section 44 of the *Legislative Instruments Act 2003*.

The committee welcomes these amendments which may be seen to
(a) more appropriately delegate TESQA's administrative powers; and
(b) more appropriately delegate legislative power by making certain ministerial directions disallowable.

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 44th Parliament.

Bills introduced with standing appropriation clauses in the 44th Parliament since the previous *Alert Digest*

Nil

Other relevant appropriation clauses in bills

Nil