

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

**Alert Digest No. 4 of 2015**

**25 March 2015**

**ISSN 1329-668X (Print)**

**ISSN 2204-4000 (Online)**



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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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### 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.



## **Amending Acts 1980 to 1989 Bill 2015**

Introduced into the House of Representatives on 18 March 2015

Portfolio: Attorney-General

### **Background**

This bill repeals over 850 amending and repeal Acts.

*The committee has no comment on this bill.*

# **Charter of Budget Honesty Amendment (Intergenerational Report) Bill 2015**

Introduced into the Senate on 17 March 2015

By: Senator Milne

## **Background**

This bill requires intergenerational reports to be prepared by the Parliamentary Budget Officer, instead of Treasury, as part of the Parliamentary Budget Officer's statutory obligations every five years.

*The committee has no comment on this bill.*

## **Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015**

Introduced into the House of Representatives on 18 March 2015

Portfolio: Treasury

### **Background**

This bill amends the *Competition and Consumer Act 2010* (the Act) to:

- remove the requirement for businesses to report serious injuries, illnesses or deaths associated with food products under the Australian Consumer Law's (ACL) product safety law;
- permit private parties to take action for extra-territorial breaches of the Act without seeking ministerial consent under section 5 of the Act;
- extend the jurisdiction of State and Territory courts to hear actions under the Act in relation to pyramid selling and unsafe goods liability;
- remove the redundant requirement for the Australian Competition and Consumer Commission (ACCC) to keep a register of certain records when they hold conferences for product safety bans;
- permit the disclosure of certain information by the ACCC to specific agencies where it is reasonably necessary to protect public safety;
- clarify requirements in the ACL regarding the cooling off period for unsolicited consumer agreements;
- permit the ACCC to seek a court order directing a person to comply with a notice given under the Act; and
- correct minor drafting errors.

Measures relating to the ACL were agreed by a majority of States and Territories as required under the *Intergovernmental Agreement for the Australian Consumer Law* signed on 2 July 2009 by the Council of Australian Governments.

*The committee has no comment on this bill.*

## Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

Introduced into the House of Representatives on 19 March 2015

Portfolio: Attorney-General

### Background

This bill amends various Commonwealth Acts to:

- amend the operation of serious drug and precursor offences in the *Criminal Code Act 1995* (Criminal Code);
- clarify the scope and application of the war crime offence of outrages upon personal dignity in non-international armed conflict;
- expand the definition of forced marriage and increase penalties for forced marriages in the Criminal Code;
- amend the Criminal Code to insert ‘knowingly concerned’ as an additional form of secondary criminal liability;
- introduce mandatory minimum sentences of five years imprisonment for firearm trafficking;
- make technical amendments to the *Crimes Act 1914* (Crimes Act) in relation to sentencing, imprisonment and release of federal offenders;
- allow the interstate transfer of federal prisoners to occur at a location other than a prison;
- facilitate information sharing about federal offenders between the Attorney-General’s Department and relevant third party agencies;
- amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to clarify internal operations and procedures of the Australian Transaction Reports and Analysis Centre;
- amend the *Law Enforcement Integrity Commissioner Act 2006* by clarifying the Integrity Commissioner functions and duties;
- amend the definition of ‘eligible person’ and clarify an examiner’s power to return ‘returnable items’ during an examination under the *Australian Crime Commission Act 2002*;

- amend the *Proceeds of Crime Act 2002* (POC Act) to increase penalties for failing to comply with a production order or with a notice to a financial institution in proceeds of crime investigations;
- make minor and technical amendments to the POC Act;
- allow ICAC SA the ability to access information from Commonwealth agencies that relates to its investigations;
- update existing references to the Queensland Crime and Misconduct Commission to reflect its new name;
- amend the Crimes Act to clarify the operation of the controlled operations provisions in Part IAB; and
- make technical corrections to the *Classification (Publications, Films and Computer Games) Act 1995*.

### **Undue trespass on personal rights and liberties—presumption of innocence**

#### **Schedule 1, item 2**

The purpose of this item is to make recklessness the fault element for attempted drug and precursor offences. As acknowledged in the statement of compatibility, the proposed amendment engages the presumption of innocence because it changes the fault element of the second physical element of an attempted drug and precursor offences from intention and knowledge...to the lower standard of recklessness (at p. 14).

**In light of the discussion and justification of this amendment in the statement of compatibility (pp 14–15) the committee notes the issue and leaves the question of whether this ‘recklessness measure’ is a proportionate means of achieving the objective sought to the Senate as a whole** (noting that the bill will also be considered by the Parliamentary Joint Committee on Human Rights in accordance with its terms of reference).

*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—presumption of innocence**

**Schedule 1, items 3–7**

The purpose of the amendments proposed by these items is to remove the ‘intent to manufacture’ element of the border controlled precursor offences in sections 307.11 to 307.13 of the *Criminal Code*. Removing this requirement for the prosecution to prove that a person who imports or exports a border controlled precursor did so with the intention to use it to manufacture a controlled drug (or the belief that another person intends to do so), will ‘cause more people to rely on the defence of lawful authority under section 10.5 of the Criminal Code’ (see p. 16 of the statement of compatibility). The measure narrows the opportunity for a person to demonstrate that their conduct was not intended to assist in the manufacture of drugs.

**In light of the discussion and justification of this amendment in the statement of compatibility (pp 16–17) the committee notes the issue and leaves the questions of whether this ‘intent to manufacture measure’ is a proportionate means of achieving the objective sought to the Senate as a whole** (noting that the bill will also be considered by the Parliamentary Joint Committee on Human Rights in accordance with its terms of reference).

*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—reversal of burden of proof**

**Schedule 4, item 3**

The purpose of the amendments in schedule 4 ‘is to increase protections against forced marriage of children and persons with a disability who do not have the capacity to provide free and full consent to marriage’ and to increase penalties for forced marriage offences to ‘reflect the seriousness of forced marriage as a slavery-like practice’(statement of compatibility, p. 20).

Item 3 has the effect of creating ‘a presumption that a person under the age of 16 does not understand the nature and effect of a marriage ceremony’. The

result is that a defendant bears a legal burden of proof to establish the contrary on the balance of probabilities.

The **presumption of innocence** is a fundamental principle of the common law. In light of its significance, the committee has long taken the view that imposing a **legal burden** of proof on a defendant should be kept to a minimum. The committee also routinely raises concerns even about the imposition of an evidential burden on a defendant, though such provisions are easier to justify as the defendant need only adduce or point to evidence that suggests a reasonable possibility that the matter either does exist or does not exist and is thus easier to discharge. If the defendant discharges an evidential burden, the prosecution must then disprove the relevant matters beyond reasonable doubt.

The committee therefore expects any proposed imposition of a legal burden on defendants to be thoroughly justified and to address the relevant principles contained in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the *Guide*).

As a general proposition, it may be easier to justify imposing a burden of proof on the defendant where ‘a matter is peculiarly within the defendant’s knowledge and not available to the prosecution’ (*Guide*, at p. 50). The *Guide* (at p. 50) also suggests that ‘creating a defence is also more readily justified if:

- the matter in question is not central to the question of culpability for the offence;
- the offence carries a relatively low penalty; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.’

In some cases, the *Guide* further notes that it has been argued that reversal of the onus of proof may be justified where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused.

The statement of compatibility and explanatory memorandum both provide some justification for the imposition of a legal burden on defendants. However, no attempt is made in the explanatory materials to justify the

proposed approach on the basis that matter is peculiarly within the defendant's knowledge and not available to the prosecution.

The offence also carries very substantial penalties and the capacity of a person to consent to marriage is central to the question of culpability for the offence. The explanation offered does, however, refer to difficulties which may arise if only an evidential burden was imposed and to the gravity of the offences and the importance for the protection of the rights of children and persons with a disability that effective prosecution of the offences occur. The explanatory memorandum argues as follows (at p. 59):

The imposition of a legal burden rather than an evidential burden is appropriate in this context. If an evidential burden applied, consistent with subsection 13.3(6) of the Criminal Code the defence would need only adduce or point to evidence that suggested the child was capable of understanding the nature and effect of a marriage ceremony. This low threshold might easily be discharged if the defendant adduced evidence that, for example, the child had been sexually active in the past or was otherwise mature for his or her age.

Under Part II of the *Marriage Act 1961* (Cth), the marriageable age, or age at which a person can consent to marriage, is 18 years old. While there is an exception for a person between 16 and 18 years of age to marry a person over the age of 18, this relies on required consent (usually parental) and that an Australian court order is in force from a judge or magistrate authorising a marriage. Depending on the jurisdiction, the age at which a person is considered capable of consenting to sexual intercourse is generally 16 or 17 years old.

In this context, it is reasonable and proportionate to place a legal burden on the defendant to prove, on the balance of probabilities, that a person under the age of 16 was capable of understanding the nature and effect of the marriage ceremony.

The application of a legal burden is consistent with similar offences in the Criminal Code, including slavery and child sex offences outside Australia.

The statement of compatibility argues (at pp 22–23) that:

The amendments also engage with the right to a fair trial, protected by Article 14 of the ICCPR. The amendments place a legal burden on the defendant to prove, on the balance of probabilities, that a person under the age of 16 was capable of understanding the nature and effect of a marriage ceremony. Laws which shift the burden of proof to the defendant can be considered a limitation on the presumption of innocence under Article 14(2) of the ICCPR, but will not violate that right so long as they are within reasonable limits which take into account the importance of the objective and maintain the rights of defence.

The increase in the penalties for forced marriage may also be considered a limitation on the presumption of innocence under Article 14(2) of the ICCPR, as it imposes a more serious penalty for an offence where the burden of proof has been shifted to the defendant. The increase in the penalties for the forced marriage offences reflects the seriousness of forced marriage as a slavery-like practice, a form of gender-based violence and an abuse of human rights which puts people at risk of emotional and physical abuse, loss of autonomy and loss of access to education. It also ensures that the penalties for forced marriage align with the penalties for the most serious slavery-related facilitation offence of deceptive recruiting for labour or services, while keeping them lower on the continuum of seriousness than forced labour, which involves the ongoing exploitation of the victim. However, as noted above, in this context it is justified as it is necessary, reasonable and proportionate.

While there is an exception under the Marriage Act for a person between 16 and 18 years of age to marry a person over the age of 18, this relies on required consent (usually parental) and that an Australian court order is in force from a judge or magistrate authorising a marriage. Depending on the jurisdiction, the age at which a person is considered capable of consenting to sexual intercourse is generally 16 or 17 years old. While the imposition of a legal burden may be considered a limitation on the presumption of innocence, in this context it is justified as it is necessary, reasonable and proportionate.

**In light of these justifications the committee leaves the *general question of whether the creation of a presumption that a person under the age of 16 does not understand the nature and effect of a marriage ceremony is appropriate to the Senate as a whole.* However, the committee also emphasises its continuing view that applying a legal burden to displace a presumption should only be imposed in rare instances.**

**While the committee is aware of the significance of the conduct this provision is intended to address, the committee seeks the minister's more detailed explanation as to why an evidential burden is considered insufficient. The only justification provided is that this lower threshold 'might easily be discharged if the defendant adduced evidence that, for example, the child had been sexually active in the past or was otherwise mature for his or her age'. The committee is interested in whether this has actually occurred and in any other considerations relevant to the imposition of a legal burden.**

*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.*

**Trespass on personal rights and liberties—‘knowingly concerned’  
measure  
Schedule 5**

This measure reintroduces a form of secondary criminal liability into section 11.2, which will mean that ‘where persons are knowingly and intentionally involved in the commission of an offence, they will be liable for the offence’. The explanatory memorandum argues (at p. 61) that:

This measure will supplement existing forms of secondary liability, such as the aiding, abetting, counselling or procuring of an offence. This additional form of secondary criminal liability will enable the Commonwealth Director of Public Prosecutions (CDPP) to more effectively prosecute federal criminal offences, including offences regarding illegal substances (such as importation and trade in drugs), fraud, corruption and insider trading, which traditionally rely on the involvement of secondary persons. This form of secondary criminal liability previously existed in the *Crimes Act 1914* (Crimes Act). The CDPP has advised that the absence of this prosecuting option is a significant impediment, and has rendered certain prosecutions more complex and less certain. This form of secondary criminal liability previously existed in the *Crimes Act 1914* and will ensure that criminal liability can be effectively established for an accused’s knowing involvement in the commission of an offence.

A decision was previously taken not to include this approach as part of the Model Criminal Code on account of its uncertainty and open-ended nature. The explanatory memorandum acknowledges this, but outlines a case for reintroduction (at pp 61–63), including that:

This concept was not included in the drafting of the Criminal Code. Members of the Model Criminal Code Officers Committee (MCCOC) did not consider the concept necessary, finding that it added little in substance to the other forms of derivative liability, and was too open ended and uncertain than was appropriate for a general provision in a model code.<sup>1</sup>

However, the absence of a ‘knowingly concerned’ form of criminal liability in Commonwealth legislation has since attracted judicial comment. In particular, Justice Weinberg of the New South Wales Court of Criminal Appeal stated in *Campbell v R* [2008] NSWCCA 214 that:

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<sup>1</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: General Principles of Criminal Responsibility* (Final Report, December 1992), i.

‘the decision to omit the phrase ‘knowingly concerned’ from the various forms of complicity available under federal criminal law...appears to me to have left a lacuna in the law that was certainly never intended.’<sup>2</sup>

The committee notes the reasons why this approach was not originally included in the Model Criminal Code (outlined above and further in the explanatory memorandum). However, the justification for now reintroducing this form of secondary criminal liability into the Commonwealth Criminal Code does not give a detailed response to the view that this form of derivative liability is too open ended and uncertain. **While there is some discussion in paragraph 367 of the explanatory memorandum relating to the scope of the measure, given that uncertainty in the application of criminal offences means that the limits of liberty are not known with clarity, the committee seeks the Minister’s more detailed advice about the scope, application and justification for the proposed approach.**

*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.*

## **Trespass on personal rights and liberties—mandatory minimum penalties**

### **Schedule 6**

The explanatory memorandum (at pp 25 and 65) describes the effect of schedule 6 as follows:

Schedule 6 will amend the Criminal Code to implement the Government’s election commitment made in the Government’s *Policy to Tackle Crime*, released in August 2013, to introduce mandatory minimum sentences of five years imprisonment for firearm trafficking.

Schedule 6 will give effect to this by introducing a mandatory minimum five year term of imprisonment for:

- the existing offences of trafficking firearms and firearm parts within Australia (in Division 360 of the Criminal Code), and

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<sup>2</sup> *Campbell v R* [2008] NSWCCA 214, 173.

- the new offences of trafficking firearms into and out of Australia in Division 361 of the Criminal Code (included in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015*).

There is a detailed justification for the proposed approach of in the statement of compatibility (at pp 25–26), which:

- argues that the objective of ‘ensuring offenders receive sentences that reflect the seriousness of their offending’ is legitimate;
- outlines the perceived serious social and systemic harms associated with firearms trafficking;
- notes that the amendments do not apply mandatory minimum penalties to children (those under the age of 18); and
- argues that judicial discretion is maintained because the penalties do not impose a minimum non-parole period on offenders.

**In light of the discussion and justification of this proposal in the statement of compatibility, the committee draws the matter to the attention of Senators and leaves the question of whether the introduction of mandatory minimum penalties is appropriate to the consideration of the Senate as a whole** (noting that the bill will also be considered by the Parliamentary Joint Committee on Human Rights in accordance with its terms of reference).

*The committee draws Senators’ attention to the schedule, 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—abrogation of the privilege against self-incrimination**

#### **Schedule 10**

The effect of the amendments in schedule 10 may be considered to represent a further abrogation of the privilege against self-incrimination. As the explanatory material states:

Subparagraph 169(1) of the AML/CTF Act provides that a person is not excused from giving information or producing a document under paragraph 167 on the grounds that compliance might be incriminating. However, subparagraph 169(2) provides that such disclosed information cannot be used as evidence against the person who disclosed that information, whether

directly or indirectly (a ‘use immunity’ and ‘derivative use’ immunity), except by way of:

- civil proceedings instituted under the POC Act that relate to the AML/CTF Act, or
- prosecutions for an offence against subparagraphs 167(3), 136, or 137 of the AML/CTF Act, or
- prosecutions for an offence against subparagraphs 137.1 or 137.2 of the Criminal Code as they relate to Part 14 of the AML/CTF Act.

The proposed amendments to subparagraphs 169(2)(c)-(d) extend these exceptions to civil proceedings instituted for an offence against the AML/CTF Act, and criminal proceedings for an offence against the AML/CTF Act or against the Criminal Code as it relates to the AML/CTF Act (and any subsequent appeals).

To the extent that this limited broadening of the exceptions represents a further abrogation of the privilege against self-incrimination, it is considered to be reasonable, necessary and proportionate for the following reasons:

- The amendments are precise and narrow in scope and do not abrogate the privilege entirely but seek only to narrowly extend the range of proceedings from which the right is excluded. This mirrors the existing approach to self-incrimination that is taken in subparagraph 205(2) of the AML/CTF Act and provides greater consistency in the operation and interpretation of the Act.
- The public benefit derived from the abrogation of the privilege outweighs any potential harm to individual rights. The amendments meet a legitimate public interest by enabling a regulatory agency to access and effectively utilise the information it needs to be able to perform its functions. Any harm to individual rights is minimised by the provision of use immunities.

**In light of the discussion and justification of this proposal in the statement of compatibility (outlined above), the committee draws the matter to the attention of Senators and leaves the question of whether this abrogation of the privilege against self-incrimination is appropriate to the consideration of the Senate as a whole.**

*The committee draws Senators’ attention to the schedule, 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—penalty and reversal of onus of proof**  
**Schedule 13**

This schedule raises the penalty for failing to comply with a production order or with a notice to a financial institution in a proceeds of crime investigation from 6 months (or 30 penalty units) to 2 years (or 100 penalty units).

*The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* relevantly states (at p. 93):

If non-compliance with a notice to produce or attend is to be an offence, the maximum penalty for non-compliance should generally be six months imprisonment and/or a fine of 30 penalty units.

However there is a detailed justification for the proposed approach outlined in the explanatory memorandum (at p. 104), including that the penalties will (a) align with the relevant approach in the *Australian Securities and Investments Commission Act 2001*, (b) indicate the severity of the offence, (c) may act as a deterrent, and that:

The information-gathering powers in Chapter 3 of the POC Act are necessary to enable law enforcement authorities to effectively trace proceeds of crime. Strengthening the penalties imposed under sections 211 and 218 of the POC Act for non-compliance with a production order or a notice to a financial institution will help ensure that where a benefit has been granted to a person in relation to the commission of an offence, information concerning the movement of that benefit can be more efficiently obtained. Greater compliance with orders and notices issued under sections 202 and 213 will reduce the need for relevant law enforcement agencies to utilise more intrusive investigatory tools, such as search warrants, during investigations of proceeds of crime matters.

In addition to the level of penalty, as noted in the statement of compatibility (at p. 40), the defendant bears an evidential burden of proof in relation to the defence to these offences that all reasonable steps were taken to comply. The statement of compatibility argues this is appropriate on the basis that the relevant information is peculiarly within the knowledge of the defendant (see paragraph 204).

**In light of the discussion and justification of this proposal in the statement of compatibility and explanatory memorandum, the committee draws the matter to the attention of Senators and leaves the question of**

**whether the level of penalty and reversal of the onus of proof is appropriate to the consideration of the Senate as a whole.**

*The committee draws Senators' attention to the schedule, 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—retrospectivity Schedule 14**

This schedule makes what are described as a series of 'technical and procedural amendments' to the Proceeds of Crime Act '...to address ambiguity in the provisions, to streamline the appointment of proceeds of crime examiners and to support the administration of confiscated assets by the Official Trustee' (pp 7 and 8 of the statement of compatibility).

In relation to various provisions, such as those associated with the proposed change to the definition of 'related offence', the explanatory memorandum argues that while the amendments may apply retrospectively with respect to certain conduct, the provisions do not create retrospective criminal liability and therefore 'do not breach the prohibition in Article 15 of the *International Covenant on Civil and Political Rights*' (see pp 42 and 43, and also pp 107– 112, of the explanatory memorandum).

However, the Scrutiny of Bills Committee does not limit its assessment of retrospectivity to instances of criminal liability. The committee looks at whether provisions that have effect retrospectively might operate to the detriment of any person. (The committee also comments on provisions that are not technically retrospective, but nonetheless rely on antecedent facts in a way that might give rise to unfairness)

**As the issues of detriment and any potential unfairness associated with retrospectivity outside the context of criminal liability are not addressed in the explanatory material, the committee seeks the Minister's advice about these matters in relation to all relevant provisions in schedule 14.**

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

## **Fair Work (Registered Organisations) Amendment Bill 2015 [No. 2]**

Introduced into the House of Representatives on 19 March 2015

Portfolio: Employment

### **General comment**

A version of this bill was first introduced into the House of Representatives on 14 November 2013 and the committee commented on it in *Alert Digest No. 9 of 2013*. The Minister's response to the committee's concerns was then published in its *Fourth Report of 2014*.

An identical bill was introduced into the Senate on 17 July 2014 and the committee commented on it in *Alert Digest No. 7 of 2014*. The Minister's response to the committee's concerns was then published in its *Ninth Report of 2014*.

This bill is also in identical terms to the bills mentioned above. As the committee's earlier comments are still relevant to this bill, the committee repeats relevant information from *Alert Digest No. 7 of 2014*. The committee also notes that in relation to some provisions it had requested that the Minister include additional information in the explanatory memorandum. **The committee notes its disappointment that the Minister did not take the opportunity to include this information in the explanatory memorandum before the current bill was introduced. In requesting that important information be included in an explanatory memorandum, the committee's intention is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill.**

### **Background**

This bill amends the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

- establish an independent body, the Registered Organisations Commission, to monitor and regulate registered organisations with amended investigation and information gathering powers;

- amend the requirements for officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- amend existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

### **Trespass on personal rights and liberties—penalties (civil penalties) Various**

One of the clear objectives of the bill is to increase maximum penalties for breaches of civil penalty provisions across the RO Act and to introduce criminal offences for serious breaches of officers' duties as well as in relation to offences associated with the conduct of investigations. At various points in the explanatory material (e.g. the statement of compatibility at page 5) it is suggested that the approach to obligations and penalties has been 'modelled' on the approach taken under the Corporations legislation. Although the explanatory memorandum does not explain how this is achieved or the extent to which particular amendments are similar to or different from those in the context of corporate regulation, the statement of compatibility does seek to justify the approach at a general level.

In relation to the increase of **civil penalties**, it is noted in the statement of compatibility that:

- (1) the 'maximum penalty is equivalent to that applicable under the Corporations Act and many organisations have command of considerable resources similar to that of many companies';
- (2) the maximum penalty is subject to a threshold test which mirrors the protection in subsection 1317G(1) of the Corporations Act, such that only 'serious contraventions' of civil penalty provisions will attract the maximum penalty (see item 4 schedule 2 of the bill); and
- (3) there is no provision for imprisonment for non-payment of a penalty. (see page 8)

**In light of these matters, the committee leaves the question of whether the increases to civil penalties in the bill are appropriate to the consideration of the Senate as a whole.**

*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.*

### **Trespass on personal rights and liberties—penalties (new offence provisions)**

#### **Various**

In the committee's consideration of the previous bill, the committee noted that the statement of compatibility lists the **new offence provisions** which the bill proposes to introduce into the RO Act (at page 8, under the heading 'Right to the presumption of innocence and other guarantees), but unfortunately the explanatory material provided little explanation of the specific proposals included in the bill. The committee therefore sought clarification from the Minister as to (1) the extent of similarities between these offences and offences under the Corporations Act, (2) whether the penalties are in any instance higher than in relation to offences under the Corporations Act; and (3) particularly whether the increase proposed by item 228 (proposed subsection 337(1)) for the offence of failing to comply with a notice to attend or produce to 100 penalty units or imprisonment for 2 years, or both is higher than other similar offences and the justification for the proposed approach.

In the *Guide to Framing Commonwealth Offences* it is suggested that the maximum penalty for non-compliance with attend or produce notices should 'generally be 6 months imprisonment and/or a fine of 30 penalty units'. As further noted in the *Guide* this is the penalty imposed by, for example, subsection 167(3) the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* and section 211 of the *Proceeds of Crime Act 2002*. In this context the term of imprisonment in the current bill is proposed to be increased to four times the recommended level.

In response to the committee's request for clarification the Minister provided a table which sets out the proposed new offence provisions and their corresponding provisions in the Corporations Act or the ASIC Act. The Minister stated that the relevant provisions of the bill largely replicate the

provisions of these Acts. The table is available on pages 26–32 of the Minister's correspondence which was attached to the committee's *Fourth Report of 2014*.

The Minister also provided a table which compares the penalties for the proposed offences in the bill and corresponding offences under the Corporations Act and the ASIC Act. The Minister stated that the penalties are largely the same for the corresponding offences under the Corporations Act or ASIC Act. However, the Minister noted that the penalties for strict liability offences under item 223 (relating to the conduct of investigations) have not replicated imprisonment terms but have instead increased the maximum pecuniary penalty to 60 penalty units. The Minister also stated that the penalty in relation to item 223 (proposed subsection 335F(2)) and item 230 (proposed subsection 337AA(2)) is greater than the equivalent ASIC Act penalty (5 penalty units) to 'ensure consistency with other similar offences under the Bill'. The table is available on page 33 of the Minister's correspondence which was attached to the committee's *Fourth Report of 2014*.

Finally, the Minister stated that the penalties for the offences proposed by item 228 (proposed subsection 337(1)) are the same as those for almost identical offences under subsection 63(1) of the ASIC Act. The Minister stated that this 'approach is consistent with the Government's policy for the regulation of registered organisations, namely that the penalties and offences under the ASIC Act are appropriate to enforce obligations arising from the RO Commissioner's proposed information gathering powers.'

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 131). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

*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.*

**Trespass on personal rights and liberties—strict liability  
Schedule 2, item 230, proposed section 337AA**

Proposed subsections 337AA(1) and (2) provide that certain offences in relation to the conduct of an investigation are strict liability offences. These are offences for:

- (a) failure to comply with a requirement to take an oath or affirmation (subsection 335D(1));
- (b) contravention of a requirement that questioning take place in private (subsection 335E(2));
- (c) failure to comply with a requirement in relation to a record of a statement made during questioning (paragraph 335G(2)(a));
- (d) contravention of conditions on the use of copies of records of statements made during questioning (section 335H); and
- (e) failure to comply with a requirement to stop addressing an investigatory or questioning an attendee (subsection 335F(2)).

In justification of the use of strict liability, the statement of compatibility (at p. 9) argues that:

1. each offence relates to a person's failure to comply with a requirement made of them relating to the conduct of an investigation;
2. there is a defence of reasonable excuse (though the evidential burden of proving this is placed on the defendant), and
3. the offences are 'regulatory in nature' and not punishable by a term of imprisonment.

The maximum penalty (60 penalty units) is the maximum recommended by the *Guide to Framing Commonwealth Offences* for strict liability offences.

Although the points made in the statement of compatibility are noted and the defence of reasonable excuse does ameliorate the severity of strict liability (point 2 above), the committee notes that the vagueness of this defence may make it difficult for a defendant to establish (this is also identified in the *Guide to Framing Commonwealth Offences*). In addition, given that the

offences occur within the context of an investigator questioning a person (point 1 above) it is not clear why a requirement to prove fault would undermine the enforcement of the obligations (e.g. why strict liability is necessary).

In its consideration of the previous bill, the committee therefore sought a more detailed explanation from the Minister as to why strict liability is required to secure adequate enforcement of these obligations and, if the approach is to be maintained, whether consideration had been given to placing a requirement (where relevant) on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence.

The Minister stated in his response to the committee that the proposed strict liability offences replicate offences relating to enforcement of identical obligations under the ASIC Act (see item 230, proposed section 337AA of the Bill and sections 21, 22, 23, 24, 26 and 63 of the ASIC Act). The Minister noted that it is the government's view that a strict liability approach, following the ASIC Act, is appropriate to enforce obligations arising from the Registered Organisations Commissioner's proposed information gathering powers. In this respect, having regard to the *Guide to Framing Commonwealth Offences* (p.24), the Minister stated that it is worthwhile to note that:

- the offence is not punishable by imprisonment and the fine does not exceed 60 penalty units; and
- taking into account the similarities between the regulation of the corporate governance of companies and registered organisations, strict liability is appropriate as it is necessary to ensure the integrity of the regulatory framework for registered organisations.

In relation to whether consideration had been given to placing a requirement on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence the Minister stated that the manner in which the RO Commission undertakes its investigations will be a matter for its own supervision. However, the Minister expects that the RO Commission will develop materials, such as guidelines, standard forms and educational material to deal with its approach to investigations, similar to the approach currently taken by ASIC.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee noted the Minister's expectation

that the RO Commission will develop materials, such as guidelines, standard forms and education materials to deal with its approach to investigations. The committee also requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 133). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

*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.*

**Trespass on personal rights and liberties—reversal of onus of proof  
Schedule 2, items 229, proposed subsections 337(2) to (4) and  
230, proposed subsection 337AB(2)**

The proposed subsection provides for a 'reasonable excuse' defence in relation to 'obstructing a person' in the exercise of a number of powers of investigation. The use of a defence shifts the burden of proof from the prosecution to the defence, and as noted above, the vagueness of the 'reasonable excuse' defence may make it unclear what a person must prove to rely on this defence. The explanatory material does not include a justification for placing an evidential burden of proof.

Similarly, defences proposed by item 229 (proposed subsections 337(2)-(4)) which relate to offences for failing to adequately comply with a notice to produce or attend do not explain the justification for placing an evidential burden of proof on the defendant.

The committee therefore sought the Minister's advice as to the justification for reversing the onus of proof for these provisions. In the Minister's response he

noted that proposed subsections 337(2)–(4) and 337AB(2) replicate subsections 63(5)–(8) of the ASIC Act and that this aligns with the government’s policy for the regulation of registered organisations (which is to ensure that the defences to the offences are the same as their parallel provisions under the ASIC Act, which also have an evidential burden of proof). In this respect the Minister noted that the *Guide to Framing Commonwealth Offences* (at p. 51) provides that an evidential burden of proof should generally apply to a defence.

The Minister stated that it is appropriate that the matters in proposed subsections 337(2)–(4) be included as offence-specific defences, rather than elements of the offence, as these matters are both peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters.

Further, the Minister stated that it is important that the committee have regard to the fact that these new offences (including proposed section 337AC, addressed below) are central to the investigative framework of the RO Commission. In this regard the Minister suggested that:

...recent investigations of the Fair Work Commission (FWC) into financial misconduct within certain registered organisations have demonstrated that the existing regulatory framework is not sufficient. Having an investigatory body with powers to prevent unnecessary frustrations of its legitimate functions as an investigator is central to remedying the insufficient framework and restoring the confidence of members that the management of registered organisations is sufficiently accountable and transparent and that their membership contributions are being used for proper purposes.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 135). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

*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.*

**Trespass on personal rights and liberties—reversal of onus of proof  
Schedule 2, item 230, proposed subsection 337AC(2)**

The subsection provides for a defence for a contravention of the offence of concealing documents relevant to an investigation if 'it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation under this Part'. In addition to placing the burden onto the defendant, a justification for placing the higher standard of a *legal* burden of proof was not located in the explanatory material. The committee therefore sought the Minister's advice as to the justification for these matters.

The Minister noted in his response to the committee that, in accordance with the government's policy, section 337AC replicates section 67 of the ASIC Act, which provides for a defence in identical terms to subsection 337AC(2) and a legal burden of proof. The Minister stated that the offence in proposed subsection 337AC(1) is very important in terms of the integrity of the investigations framework under the bill, which is central to the bill's objectives and that the maximum penalty under subsection 337AC(1) reflects the seriousness of the offence.

The Minister further stated that it is appropriate that the matter referred to in proposed subsection 337AC(2) be included as an offence-specific defence with a legal burden of proof rather than an element of the offence as it is both peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish this matter.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory

memorandum (see *Fourth Report of 2014*, p. 136). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

*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.*

**Trespass on personal rights and liberties—privilege against self-incrimination**  
**Schedule 2, item 230, proposed section 337AD**

Subsection 337AD(1) provides that for the purposes of powers conferred under Part 4, Chapter 11 (as proposed to be amended), it is not a reasonable excuse for a person to fail or refuse to give information or produce a document or sign a record that doing so might tend to incriminate a person or make them liable to a penalty.

This abrogation of the important common law privilege against self-incrimination is justified on the basis that it pursues the objective of ensuring that offences under the RO Act can be properly investigated and that the limitation on the privilege is proportionate and reasonable to this objective because a *use* and *derivative use* immunity is provided for. It is noted however, that these immunities will only be applicable if a person 'claims that the information, producing the document, or signing the record might tend to incriminate the person or make the person liable to a penalty' (proposed subsection 337AD(2)).

This justification in the explanatory memorandum does little more than assert the importance of the objective of enforcing the legislation. The committee notes that it does not normally take the view that the inclusion of a *use* and

*derivative use* immunity mean that no further justification for abrogation of the privilege is required. In addition, the requirement that a person 'claim' the privilege before responding to a request for information, a document or record is unusual and is not explained or justified in the explanatory memorandum or statement of compatibility. The committee therefore sought the Minister's further advice as to the justification for the proposed approach.

The Minister noted in his response to the committee that, in accordance with the government's policy, proposed new section 337AD closely follows the privilege against self-incrimination in section 68 of the ASIC Act. The Minister stated that the proposed abrogation is necessary in order to ensure the RO Commissioner has all available evidence to enforce obligations under the RO Act. If the RO Commissioner is constrained in their ability to collect evidence, the entire regulatory scheme may be undermined.

In relation to the inclusion of a use immunity but not a derivative use immunity in proposed section 337AD the Minister stated that:

The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (ASC) (now ASIC) were amended to remove derivative use immunity. The explanatory memorandum to the Corporations Legislation (Evidence) Amendment Bill 1992 [at p. 1] provides that derivative use immunity placed:

*...an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity...*

The Minister stated that the government believes that the absence of a derivative use immunity, in relation to the information-gathering powers of the RO Commission, is reasonable and necessary for the effective prosecution of matters under the RO Act.

In response to the committee's question about the requirement that a person 'claim' the privilege before responding to a request for information the Minister stated that:

Following section 68 of the ASIC Act, the requirement to claim the privilege is procedurally important as it allows the RO Commissioner to obtain all information relevant to an investigation while still protecting the person the subject of the relevant notice against the 'admissibility' of the information

provided pursuant to the notice in evidence in proceedings against the person under proposed subsection 337AD(3).

Generally, concerns about the requirement to claim an immunity focus on the assertion that failure to claim the privilege (either forgetting or being unaware of the privilege) could result in self-incrimination. There are, however, important safeguards which limit this risk. Proposed new subsection 335(3) provides that a person required to attend the RO Commission for questioning must be provided with a notice prior to the giving of information that:

- provides information about the ‘general nature of the matters to which the investigation relates’ (subsection 335(3)(a)); and
- informs the person that they may be accompanied by another person who may, but does not have to be, a lawyer (subsection 335(3)(b)); and
- sets out the ‘effect of section 337AD’ (subsection 335(3)(c)).

As individuals are informed about the type of questions they will be asked and the effects of section 337AD, they will know that they have the right to claim use immunity. Further, the fact that a person can have a lawyer present during questioning provides the person with the additional support needed if they are unsure whether a question presented to them may elicit self-incriminating information.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee noted the safeguards outlined by the Minister, but stated that it remains concerned about the requirement to claim the privilege or lose the ability to rely on it. The committee also requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 139). **The committee notes that this information is not in the explanatory memorandum to the current bill and requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

**In relation to the substantive issues about these provisions, the committee draws this provision to the attention of Senators (particularly the requirement to claim the privilege or lose the ability to rely on it) and leaves the question of whether the proposed approach is appropriate to the consideration of 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.*

**Trespass on personal rights and liberties—rules of evidence  
Schedule 2, item 230, proposed section 337AF-337AK**

These provisions establish rules relating to the admissibility of, and weight to be given, to specified evidence. The explanatory memorandum essentially restates the terms of the provisions and does not provide information as to the justification for the provisions or comparative information about their effect. In the committee's consideration of the previous bill the committee was particularly interested in whether the provisions are designed to broaden the scope of admissible evidence against a defendant and, if so, the rationale for the proposed approach. The committee therefore sought the Minister's advice as to the effect of, and rationale for, these provisions.

In response to the committee's request the Minister stated that these provisions replicate sections 76 to 80 of the ASIC Act, which have a long history in corporations legislation (see *Securities Industry Act 1980*, s 10A, 21, 23, 24, 25, 26 and 27, *Companies Act 1981*, s 299–301). The Minister further contended that, similar to the ASIC Act, it is not intended that these provisions will render evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding had proposed new Division 7 not been enacted (item 230, proposed section 337AL, which reflects section 83 of the ASIC Act).

The Minister's response explained that the proposed new sections 337AF and 337AG provide a means for the admissibility of statements made on oath or affirmation by an attendee in an examination pursuant to paragraph 335(2)(c) of the Act. These provisions are facilitative and supplement the means available to adduce evidence of statements made at an examination as original evidence to prove the fact contained in the statement or to prove another fact in issue in the proceedings.

In relation to proposed section 337AF, the Minister stated that the section provides for the admissibility in evidence of statements made by an attendee in an examination pursuant to paragraph 335(2)(c) where the proceedings are against the attendee. The response pointed out that the admissibility of the

statement in evidence is subject to the limitations in proposed paragraphs 337AF(1)(a)–(d), which protect the attendee against:

- self-incrimination;
- irrelevance;
- the statement being misleading by virtue of associated evidence not having been tendered; and
- the statement disclosing a matter in respect of which the person could claim legal professional privilege.

With regard to proposed section 337AG, the Minister's response restated that the explanation in the explanatory memorandum that the proposed section provides that if evidence by a person (defined as the 'absent witness') of a matter would be admissible in a proceeding, a statement that the absent witness made in an examination during an investigation that tends to establish that matter is admissible if it appears that the absent witness is unable to attend as a witness for the reasons set out in proposed subparagraphs 337AG(1)(a)(i)–(iii). The Minister added that such evidence will not be admissible if the party seeking to tender the evidence of the statement fails to call the absent witness as required by another party and the court is not satisfied of one of the matters in proposed subparagraphs 337AG(1)(a)(i)–(iii).

The response to the committee's concerns over proposed sections 337AH–337AJ again restated the information provided in the explanatory memorandum. The Minister explained that the proposed section 337AH provides for the weight a court is to give to evidence of a statement admitted under proposed section 337AG, and proposed section 337AJ provides for a pre-trial procedure for determining objections to the admissibility of statements made on oath or affirmation during an investigation.

In relation to proposed section 337AK the Minister's expanded on the explanation provided in the explanatory memorandum by stating that the proposed section facilitates admission into evidence of copies or extracts from documents relating to the affairs of an organisation as if the copy was the original document or the extract was the relevant part of the original document. The response argued that the proposed provision, which is based on section 80 of the ASIC Act, is important as where it is convenient to copy and return or take extracts from documents produced pursuant to a request made under paragraph 335(2)(b) of the RO Act, this can be done without difficulties relating to the admissibility of the copy or extract.

After considering the Minister's response to the committee's questions about the first version of this bill, the committee requested that the additional information provided by the Minister be included in the explanatory memorandum (see *Fourth Report of 2014*, p. 141). **The committee notes that this information is not in the explanatory memorandum to the current bill and therefore requests the Minister's advice as to why the key information was not included before reintroduction of the bill and whether it can now be included in the explanatory memorandum, noting that this process can usually be undertaken without affecting the timing of parliamentary consideration of the bill.**

**In relation to the substantive issues about these provisions, the committee leaves the question of whether the proposed approach is appropriate to the consideration of 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.*

### **Trespass on personal rights and liberties—coercive powers Various**

The coercive powers contained in the bill are significant, including forced entry to premises. However, the statement of compatibility contains a relatively detailed justification of the investigation and information gathering powers, including the search and seizure powers contained in the bill. As detailed in the statement of compatibility (1) the powers are modelled on ASICs powers (though the extent of any departures is not clearly stated) and (2) there are a number of safeguards built into the exercise of the powers.

**In light of the discussion of these powers provided in the statement of compatibility and the safeguards, 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 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.*

## **Food Standards Australia New Zealand Amendment Bill 2015**

Introduced into the House of Representatives on 18 March 2015

Portfolio: Health

### **Background**

This bill amends the *Food Standards Australia New Zealand Act 1991* (the Act) to remove references to the former Australia and New Zealand Food Regulation Ministerial Council and replace this with references to the Australia and New Zealand Ministerial Forum on Food Regulation.

The bill also makes minor amendments to clarify the operation of the legislation.

*The committee has no comment on this bill.*

# **Governance of Australian Government Superannuation Schemes Legislation Amendment Bill 2015**

Introduced into the House of Representatives on 19 March 2015

Portfolio: Finance

## **Background**

The bill merges ComSuper, the provider of administration services in relation to the Australian Government civilian and military defined benefit superannuation schemes, with CSC, the trustee of the Australian Government schemes.

## **Delegation of legislative power—Henry VIII clause Schedule 2, Part 7, item 22**

The explanatory material (at p. 33) notes that subitem 22(3) of Schedule 2 makes express provision for rules made for the purpose of subitem 22(2) to modify the operation of:

- the Fair Work Act;
- the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009;
- the *Public Service Act 1999*;
- the *Governance Act*;
- the *LSL Act*.

The explanatory memorandum continues to explain (also at p. 33) that:

This may be considered a ‘Henry VIII clause’ in that it may potentially allow the Minister to modify the operation of the above Acts by making rules. That is, it may result in the operation of primary legislation being expressly or impliedly amended by subordinate legislation. This provision is included to allow the Minister to deal with any unintended or unforeseen consequences for CSC employees or transferring ComSuper staff arising out of the transfer of employment arrangements. The intention is that, to the extent possible and practical, there is no enhancement or reduction in the accrued entitlements of CSC employees and transferring ComSuper staff. Where a rule under **subitem 22(3)** could potentially modify the application of an Act, which

another Minister is responsible for, it is intended for such rules to be made only after that other Minister has been consulted.

In light of the purpose of the clause, namely, to ensure to the extent possible and practical that ‘there is no enhancement or reduction in the accrued entitlements of CSC employees and transferring ComSuper staff’, **the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

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

### **Delegation of legislative power Schedule 3, subitem 4(2)**

The explanatory material (at p. 36) notes that:

**Subitems 4(2) and (3) of Schedule 3** provide that the first instrument amending the Trust Deed will not be subject to disallowance. If the instrument to amend the Trust Deed was disallowed this would mean that whilst CSC would be required to pay administration costs from the PSSAP Fund, they would have no way of attributing those costs to PSSAP members through fees. The note under **subitem 4(2)** alerts the reader that the Legislative Instruments Act is to be renamed the Legislation Act by the Acts and Instruments (Framework Reform) Act 2015.

In light of this explanation for the disapplication of section 42 of the *Legislative Instruments Act 2003*, the committee makes no further comment.

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

### **Delegation of legislative power Schedule 3, subitem 4(4)**

The explanatory material (at p. 36) notes that:

**Subitem 4(4) of Schedule 3** provides that the first instrument amending the Trust Deed may take effect before the date the instrument is registered.

For implementation reasons it is necessary that changes to the Trust Deed that relate to costs of administration of the 2005 Act and Trust Deed are able to

operate from the same time that the new section 34 of 2005 Act commences. This is necessary to ensure that from the time administration costs are to be paid out of the PSSAP Fund (as required by new section 34) CSC, under the Trust Deed will be able to determine the applicable fees to be paid by PSSAP members and also be able to deduct these fees from PSSAP members' accounts.

If this was not the case then an impossible situation would arise where subsection 34(1) of the 2005 Act would require administration costs to be paid from the PSSAP Fund but CSC would not be able to attribute these costs to PSSAP members and make deductions from members' accounts.

In light of this explanation (for the disapplication of section 12(2) of the *Legislative Instruments Act 2003*, the committee makes no further comment.

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

## **Omnibus Repeal Day (Autumn 2015) Bill 2015**

Introduced into the House of Representatives on 18 March 2015

Portfolio: Prime Minister

### **Background**

This bill amends or repeals legislation across seven portfolios.

This bill also includes measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements the measures included in the Statute Law Revision Bill (No.1) 2015 and the Amending Acts 1980 to 1989 Repeal Bill 2015.

*The committee has no comment on this bill.*

## **Statute Law Revision Bill (No. 2) 2015**

Introduced into the House of Representatives on 18 March 2015

Portfolio: Attorney-General

### **Background**

This bill proposes to:

- correct technical errors that have occurred in laws as a result of drafting and clerical mistakes;
- clarify on the face of Acts that in addition to binding each of the States, or the Crown in right of each of the States, the Crown in right of the Australian Capital Territory and of the Northern Territory is bound and to amend the form of provisions concerning whether the Crown is liable to be prosecuted for an offence;
- replace references to 'reference base' with references to 'index reference period' and remove gender-specific language; and
- repeal spent and obsolete provisions and Acts, which will result in the repeal of approximately 85 pages of spent and obsolete provisions, including 6 spent Acts.

*The committee has no comment on this bill.*

## **Provisions of bills which impose criminal sanctions for a failure to provide information**

The committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The committee notes that imprisonment is still prescribed as a penalty for some such offences.

<b>Bill/Act</b>	<b>Section/Subsection</b>	<b>Offence</b>	<b>Penalty</b>
Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015	Schedule 13	Failing to comply with a production order or with a notice to a financial institution in a proceeds of crime investigation	Increase from 6 months or 30 penalty units to 2 years and 100 penalty units.

## **BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION**

The Chairs and Deputy Chairs of Commonwealth, and 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.

### **Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015**

## 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 44<sup>th</sup> Parliament.

### **Bills introduced with standing appropriation clauses in the 44<sup>th</sup> Parliament since the previous *Alert Digest***

Nil

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

**Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2]** — Schedule 1, Part 1, item 88, section 329EA (**SPECIAL ACCOUNT:** CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*)

**Governance of Australian Government Superannuation Schemes Legislation Amendment Bill 2015** — Schedule 1, Part 1, item 2, section 29E (**SPECIAL ACCOUNT:** CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*)

