

**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**

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.

## **A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Treasury

### **Background**

This bill is part of a package of eight bills to reform the legal and governance framework for Norfolk Island. The bill makes consequential amendments to the *A New Tax System (Medicare Levy Surcharge—Fringe Benefits Act) 1990* as a result of the repeal of the Medicare levy exemptions that currently apply to residents.

*The committee has no comment on this bill.*

## **Aged Care (Accommodation Payment Security) Levy Amendment (Norfolk Island) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Infrastructure

### **Background**

This bill is part of a package of eight bills to reform the legal and governance framework for Norfolk Island. The bill amends the *Aged Care (Accommodation Payment Security) Levy Act 2006* to extend the levies in relation to certain obligations on approved providers to refund accommodation payment balances to Norfolk Island.

*The committee has no comment on this bill.*

## **Charter of Budget Honesty Amendment (Regional Australia Statements) Bill 2015**

Introduced into the House of Representatives on 24 March 2015

By: Ms McGowan

### **Background**

This bill amends the *Charter of Budget Honesty Act 1998* to include an obligation to publicly release and table a regional Australia statement together with each budget economic and fiscal outlook report and each mid-year economic and fiscal outlook report.

*The committee has no comment on this bill.*

## **Communications Legislation Amendment (SBS Advertising Flexibility and Other Measures) Bill 2015**

Introduced into the House of Representatives on 25 March 2015

Portfolio: Communications

### **Background**

The bill amends the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* to:

- increase the restriction of no more than five minutes per hour of advertising to 10 minutes of advertising in any hour of broadcasting on the Special Broadcasting Service (SBS);
- clarify SBS's ability to earn revenue through the broadcast of programs containing product placement;
- provide consistency between the Acts;
- repeal redundant provisions; and
- add a reference to digital media services.

The bill also repeals 26 Acts and redundant provisions in four Acts in the Communications portfolio.

*The committee has no comment on this bill.*

## **Construction Industry Amendment (Protecting Witnesses) Bill 2015**

Introduced into the Senate on 25 March 2015

*This bill was read a third time in the Senate on 11 May 2015*

Portfolio: Employment

### **Background**

This bill amends the *Fair Work (Building Industry) Act 2012* to extend by two years the period during which the Director of the Fair Work Building Industry Inspectorate can apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for an examination notice.

### **Trespass on personal rights and liberties—privacy and the privilege against self-incrimination**

Under the *Fair Work (Building Industry) Act 2012* the Director of the Fair Work Building Industry Inspectorate may apply to a presidential member of the AAT for the issue of an examination notice in order to obtain information relevant to an investigation into a suspected contravention of the *Fair Work (Building Industry) Act* or a related law. An examination notice may require a person to give certain information or documents to the Director, or attend before the Director to answer questions. This bill seeks to extend the period during which the Director can apply for an examination notice by two years.

It is important to consider whether the proposed extension of the examination notice scheme is justified in light of the potential adverse impact that the issuing of an examination notice may have on the right to privacy and the privilege against self-incrimination. In this regard, the statement of compatibility sets out the original justifications provided for the provisions, and notes several accountability mechanisms, including the matters upon which an AAT presidential member must be satisfied before issuing an examination notice and the requirement for review by the Ombudsman. The statement of compatibility (pp v–vi) also states that:

It is considered that the examination notice powers remain essential to allow the regulator to act rapidly when required. This is particularly so in light of the interim report of the Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission) released by Commissioner

Heydon in December 2014. In this report the Heydon Royal Commission recommended that the interim report and any other relevant materials be referred to the relevant authorities to consider whether criminal or civil proceedings should be brought against named persons or organisations, or whether other investigations should be undertaken. This included allegations against certain Construction, Forestry, Mining and Energy Union (CFMEU) officials for such things as:

- intimidation and coercion;
- blackmail; and
- breaches of the *Corporations Act 2001*.

The Heydon Royal Commission concluded that there is a ‘culture of wilful defiance of the law which appears to lie at the core of the CFMEU’.<sup>1</sup>

The information obtained through examination notices allows the regulator to determine whether breaches of the law have occurred and to make an informed judgment about whether to commence proceedings or take other steps to ensure compliance with the law. The Fair Work Building Industry Inspectorate has advised that information obtained through the examination notice process has been important in around a quarter of its decisions to initiate proceedings. In other cases, the information obtained through the notice has led to a decision not to proceed with court action, thereby sparing the proposed respondent from the burden of court proceedings and avoiding unnecessary use of the regulator’s and the court’s resources.

**The committee notes that this bill has already passed the Senate. The committee therefore makes no further comment in relation to this matter other than to reiterate its view that where it is proposed to extend the operation of coercive provisions which may trespass on personal rights and liberties the committee considers that such an extension must be fully justified in the explanatory material accompanying the bill.**

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

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<sup>1</sup> *Interim Report of the Royal Commission into Trade Union Governance and Corruption* (2014), Volume 1, Page 26

## **Copyright Amendment (Online Infringement) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Attorney-General

### **Background**

This bill amends the *Copyright Act 1968* to enable the owner of a copyright to apply to the Federal Court of Australia for an order requiring a Carriage Service Provider to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright.

*The committee has no comment on this bill.*

## **Defence Legislation (Enhancement of Military Justice) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Defence

### **Background**

This bill amends the *Defence Act 1903*, *Defence Force Discipline Act 1982* (DFD Act), and the *Military Justice (Interim Measures) Act (No. 1) 2009* to:

- clarify the character and status of service convictions for Commonwealth purposes;
- remove the provisions in respect of the trial of ‘old system offences’;
- create service offences of ‘assault occasioning actual bodily harm’ and ‘unauthorised use of a Commonwealth credit card’;
- clarify the elements of the service offence of ‘commanding or ordering a service offence to be committed’;
- enable the fixing of non-parole periods by service tribunals to overcome the problems associated with recognisance release orders;
- correct technical errors in the charge referral process and Discipline Officer scheme;
- replace dollar amounts as maximum fines in the DFD Act with the more contemporary penalty units system;
- statutorily recognise the Director of Defence Counsel Services; and
- extend the period of appointment of the current Chief Judge Advocate and full-time Judge Advocate.

*The committee has no comment on this bill.*

## **Food Standards Amendment (Fish Labelling) Bill 2015**

Introduced into the Senate on 26 March 2015

By: Senator Xenophon

### **Background**

This bill amends the *Food Standards Australia New Zealand Act 1991* to require Food Standards Australia New Zealand to develop and approve within 12 months, a labelling standard to prescribe how the food services sector must identify the country of origin of fish offered for immediate consumption in Australia.

*The committee has no comment on this bill.*

## **Health and Other Services (Compensation) Care Charges Amendment (Norfolk Island) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Infrastructure

### **Background**

This bill is part of a package of eight bills to reform the legal and governance framework for Norfolk Island. The bill amends the *Health and Other Services (Compensation) Care Charges Act 1995* to ensure that Medicare benefits, nursing home benefits or residential care subsidies are recoverable from persons on Norfolk Island who receive compensation or damages through a judgement or settlement.

*The committee has no comment on this bill.*

## **Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment (Norfolk Island) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Infrastructure

### **Background**

This bill is part of a package of eight bills to reform the legal and governance framework for Norfolk Island. The bill amends the *Health Insurance (Approved Pathology Specimen Collection Centres) Tax Act 2000* to ensure that the tax on the grant of an approval for specimen collection centre also applies to persons who reside on Norfolk Island.

*The committee has no comment on this bill.*

## **Health Insurance (Pathology) (Fees) Amendment (Norfolk Island) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Infrastructure

### **Background**

This bill is part of a package of eight bills to reform the legal and governance framework for Norfolk Island. The bill amends the *Health Insurance (Pathology)(Fees) Act 1991* to extend to Norfolk Island the requirement for fees to be payable for certain purposes under the *Health Insurance Act 1973*.

*The committee has no comment on this bill.*

## **Judiciary Amendment Bill 2015**

Introduced into the Senate on 26 March 2015

Portfolio: Attorney-General

### **Background**

This bill amends the *Judiciary Act 1903*, the *Director of Public Prosecutions Act 1983* and the *Freedom of Information Act 1982* in relation to the consolidation of the Australian Government Solicitor into the Attorney-General's Department.

*The committee has no comment on this bill.*

## **Law Enforcement Legislation Amendment (Powers) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Justice

### **Background**

This bill amends the *Australian Crime Commission Act 2002* (the ACC Act) and the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act) to clarify the powers of Australian Crime Commission examiners to conduct examinations, and the Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity, to conduct hearings.

### **Trespass on personal rights and liberties—privacy and the privilege against self-incrimination**

#### **Various provisions**

This bill relates to the powers of the Australian Crime Commission (ACC) and the Integrity Commission to conduct examinations and hearings. The bill responds to a number of Federal and High Court decisions by more clearly setting out the circumstances in which the ACC and Integrity Commissioner are able to use their powers to conduct examinations and hearings, to disclose information obtained directly and indirectly from examinations and hearings and the uses to which such information may be put.

The ACC and Integrity Commissioner's powers to conduct examinations and hearings allow:

- ACC examiners to compel a person to answer questions about matters, or produce documents or things, relating to an ACC special operation or special investigation into serious and organised criminal activity; and
- the Integrity Commissioner to compel a person to answer questions about matters, or produce documents or things, relating to an investigation into law enforcement corruption.

A person cannot refuse to answer a question, or produce a document or thing, in an examination or a hearing on the basis that it might incriminate them, or expose them to a penalty. However, there are limitations on the circumstances

in which answers can be used in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty (see statement of compatibility, p. 6).

**The committee notes that these powers represent a significant encroachment on the right to privacy and the privilege against self-incrimination. However, as the statement of compatibility (particularly pp 15–25) outlines the rationale for the approach in considerable detail, the committee leaves the general 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.*

### **Retrospective application**

#### **Schedule 1, item 37**

#### **Schedule 2, item 38**

Pursuant to sub-item 37(1), the amendments made by Part 1 of Schedule 1 will generally apply to all uses and disclosures of examination material and derivative material that are made, and summonses that are issued, at or after the amendments commence. However, in the case of the use and disclosure of examination material and derivative material (which may adversely impact on the rights of individuals), 'the amendments are intended to apply irrespective of whether the relevant examination occurred before or after the commencement of Part 1' (explanatory memorandum, p. 62). The explanatory memorandum does not address the fairness of the application of the proposed amendments to examination material and derivative material that was generated from examinations conducted prior to the commencement of the provisions.

The committee notes that the same issue arises in relation to the application of amendments made by Schedule 2 (see sub-item 38(1) of Schedule 2, which relates to the use and disclosure of hearing material and derivative material).

**The committee therefore seeks the Minister's advice as to the rationale for applying these amendments to material that was generated from**

**examinations (or hearings) conducted prior to the commencement of the provisions.**

*Pending the Minister's advice, 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.*

## Norfolk Island Legislation Amendment Bill 2015

Introduced into the House of Representatives on 26 March 2015

Portfolio: Infrastructure

### Background

This bill is part of a package of eight bills to establish a new framework for the governance and legal arrangements of Norfolk Island. The bill amends the following:

- the *Norfolk Island Act 1979* and 28 Acts to provide interim measures to implement the reform, including abolishing the Norfolk Island Legislative Assembly and Executive Council, and establishing an Advisory Council as an interim consultative body;
- the *Norfolk Island Act 1979* and 115 Acts to provide for the final governance arrangements, including: the application of New South Wales (NSW) State law to Norfolk Island as Commonwealth law and to allow the Commonwealth to enter into arrangements with the NSW Government for the delivery of state level services; and
- certain social security, immigration, health and census arrangements in relation to Norfolk Island.

*The committee has no comment on this bill.*

## **Private Health Insurance (Risk Equalisation Levy) Amendment (Norfolk Island) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Infrastructure

### **Background**

This bill is part of a package of eight bills. The bill amends the *Private Health Insurance (Risk Equalisation Levy) Act 2003* to impose a risk equalisation levy on private health insurers.

*The committee has no comment on this bill.*

## **Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015**

Introduced into the House of Representatives on 25 March 2015

Portfolio: Employment

### **Background**

This bill amends the *Safety, Rehabilitation and Compensation Act 1988* (the Act) in relation to:

- eligibility requirements for compensation;
- financial viability of the Comcare scheme;
- medical expense payments;
- requirements for determining compensation payable;
- household and attendant care services;
- suspension of compensation payments for certain citizens absent from Australia;
- taking or accruing leave while on compensation leave;
- calculation of compensation payments;
- the compulsory redemption threshold;
- legal costs for proceedings before the Administrative Appeals Tribunal;
- compensation for permanent impairment;
- single employer licences;
- gradual onset injuries and associated injuries;
- obligations of mutuality;
- exception of defence-related claims from certain changes; and
- definitions.

The bill amends the *Military, Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation Act 1988* and *Seafarers Rehabilitation and Compensation Act 1992* in relation to the vocational nature of rehabilitation services and return to work outcomes.

The bill also amends the *Administrative Decisions (Judicial Review) Act 1977* to provide that decisions relating to compensation paid for detriment caused by defective administration are not subject to review.

## **Delayed commencement**

### **Various provisions**

A number of provisions in this bill will commence on a day to be fixed by proclamation or, if the provisions do not commence within 12 months after Royal Assent they will commence on the day after the end of that period (see clause 2). Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 23 of Drafting Direction No. 1.3.

In this instance the explanatory memorandum addresses the delayed commencement in a satisfactory manner. The delay is justified by reference to the need for Comcare to put in place appropriate systems or to develop necessary principles as required by the proposed amendments.

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

## **Exclusion of ADJR Act review**

### **Schedule 3, item 1**

Proposed new section 70C of the Act provides that Comcare can pay compensation for detriment caused by defective administration. As explained by the explanatory memorandum, this ‘provision replicates, in statutory form, the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA scheme) which is generally available to non-corporate Commonwealth entities under the *Public Governance, Performance and Accountability Act 2013*’ (p. 27).

Item 1 of Schedule 3 has the effect of excluding decisions made in pursuance of section 70C from being reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). The explanatory memorandum and statement of compatibility suggest that this approach is justified for a number of reasons:

1. Decisions made under the CDDA scheme, on which proposed new section 70C is modelled, are not subject to review under the ADJR Act, and thus it would be ‘anomalous to provide for judicial review of Comcare’s decisions under a CDDA-like scheme’ (p. 27; see also statement of compatibility, p. 28).
2. The envisaged scheme (like the CDDA) is permissive in nature and provides for *discretionary* authority to compensate. Compensation is based on the recognition of a ‘moral as distinct from legal obligation’ (p. 27; statement of compatibility, p. 28).
3. Judicial and merits review may encourage a legalistic approach which would ‘blur the distinction between the moral and legal obligation that is central to the scheme’ and, relatedly, the administration of the scheme may become mired in adversarial disputes and legal principles which are inconsistent with the purpose of the scheme (statement of compatibility, p.28).
4. The proposed scheme, like the CDDA scheme, is within the jurisdiction of the Ombudsman’s office and may be subject to judicial review under section 75(v) of the Constitution (or the similar jurisdiction given to the Federal Court and Federal Circuit Court by section 39B(1) of the *Judiciary Act 1903*).

In making these arguments reference is made to report of the Commonwealth Ombudsman, ‘Putting Things Right: Compensating for Defective Administration’ (August 2009).

The committee notes the benefits of the introduction a ‘compensation for detriment caused by defective administration’ scheme in proposed new section 70C. However, a number of objections to the exclusion of ADJR Act review may be identified.

First, there is no general justification for the exclusion of permissive, discretionary powers from judicial review. For example, where individuals are adversely affected (in a direct and immediate way) by an administrative decision it is generally the case that they are due a fair hearing. Judicial review can play an important role in ensuring that procedural fairness is achieved. Broad discretionary powers generally work to diminish the likely applicability of many of the normal grounds of judicial review, but this is not itself a sufficient justification for excluding the availability of review.

Second, although it is the case that decisions made under the CDDA scheme are not subject to ADJR Act review, the reason for this is that the scheme is a non-statutory scheme. The ADJR Act only applies to decisions or conduct made or undertaken ‘under an enactment’. Thus, the Parliament has not made a specific decision that such decisions should not be reviewable; non-reviewability is a consequence of a decision made by the executive to set up the CDDA scheme as a non-statutory scheme.

Third, although in its report on the CDDA scheme the Ombudsman’s office accepted ‘that government would be unlikely to...make CDDA decisions reviewable by the AAT or the Federal Court under the ADJR Act’ and gives reasons why that approach may be taken, the report also emphasised the importance of independent review and recommended that an inter-agency review panel be established. Further the report also notes that the ‘customary approach of the Ombudsman’, in overseeing the CDDA scheme, ‘is to focus primarily on the fairness and consistency of the process by which CDDA decisions are made and notified to claimants’ (2.52). The inter-agency review panel was recommended to bolster the ‘limited oversight’ provided by the Ombudsman and to ‘inject an element of fairness...that is presently lacking’ (2.58).

Fourth, the potential availability of review under section 75 of the Constitution or section 39B(1) of the *Judiciary Act 1903* (which the explanatory memorandum acknowledges will face limitations in relation to a scheme that does not impose legal duties on decision-makers) may have no applicability in relation to decisions under proposed section 70C decisions. This jurisdiction is available only if the impugned decision is made by an ‘officer of the Commonwealth’ and there have been some cases which have, on this basis, held that decisions made by Commonwealth corporate bodies are not reviewable.

**As a matter of general principle, the committee does not accept the broad proposition that judicial review should not be available in relation to discretionary schemes for compensation, and remains unpersuaded as to why a scheme for the compensation for defective administration should be excluded from judicial review. However, in light of the detailed justification provided for the approach in the explanatory materials, the committee leaves the question of whether ADJR Act review should apply to the proposed scheme to the Senate as a whole.**

*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.*

**Trespass on personal rights and liberties—strict liability  
Schedule 7, item 7, proposed subsection 120(8)**

This item seeks to make amendments to the existing notice requirements that apply to a compensation recipient who proposes to leave Australia.

Proposed subsection 120(7) provides that a person commits an offence if they breach the notification requirements. Proposed subsection 120(8) specifies that the offence is a strict liability offence. There is, however, no explanation as to justification for the application of strict liability to the offence. **The committee therefore seeks the Minister's advice as to the rationale for proposed approach.**

*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—reversal of onus  
Schedule 7, item 7, proposed subsection 120(9)**

As noted above, this item seeks to make amendments to the existing notice requirements that apply to a compensation recipient who proposes to leave Australia.

Proposed subsection 120(7) provides that a person commits an offence if they breach the notification requirements. Proposed subsection 120(9) provides that the offence does not apply if the person has a reasonable excuse; however a defendant bears an evidential burden in relation to this matter. As there is no explanation as to the justification for placing an evidential burden on the defendant, **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 trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

## Merits review

### **Schedule 11, item 2, proposed section 62A**

This item introduces a new section 62A which enables a determining authority to reimburse a claimant for costs they have reasonably incurred in connection with a favourable reconsideration by the determining authority. However, proposed subsection 62A(1) states that the reimbursement is subject to the claimant giving an undertaking not to seek a review of the reconsideration by the AAT. Thus, in these circumstances, claimants will not be able to apply to the AAT for review of the reconsideration.

The statement of compatibility (p. 45) suggests that this is justified because the amendment is designed:

...to control and reduce costs of the Comcare scheme associated with disputes before the AAT. The Review (at 9.101) identified that the process for resolving workers' compensation disputes before the AAT is slower than any other jurisdiction in Australia. The legitimate objective of the amendments is to provide an incentive and mechanism for parties to resolve disputes at the reconsideration stage and thereby reduce the number of matters reaching the AAT.

The statement of compatibility (p. 45) also notes that where reconsideration results in an unfavourable outcome, the claimant retains their right to seek review from the AAT. Similarly, if the claimant is dissatisfied with a favourable outcome, they may elect not to receive the reimbursement payment and proceed to review before the AAT. In addition, subsection 62A(3) provides that the claimant may later apply to the AAT for review of the determination if they withdraw the earlier undertaking in writing and repay the reimbursement to the determining authority.

**In light of the above justification, the committee leaves the question of the appropriateness of this measure (which makes reimbursement for costs contingent upon the giving of an undertaking not to seek AAT review) to the consideration of the Senate as a whole.**

*The committee draws Senators' attention to the provisions, as they 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.*

## Merits review

### Schedule 11, item 7, proposed subsection 67(10B)

Proposed subsection 67(10B) will empower the AAT to make orders requiring a claimant to pay the costs of another party to the proceedings if:

- the claimant instituted the proceedings under Part VI of the Act;
- those proceedings were dismissed under section 42B of the *Administrative Appeals Tribunal Act 1975* (this section permits the AAT to dismiss proceedings in certain circumstances, including where an application is frivolous or vexatious); and
- the other party has applied for an order that the costs of the proceedings incurred by that party be paid by the claimant.

As the statement of compatibility (p. 46) notes ‘the prospect of costs orders may discourage some claimants from pursuing certain proceedings’. The statement of compatibility suggests, however, that empowering the AAT to make costs orders in these circumstances is appropriate because it would:

...remove any incentive for employees to participate in unnecessarily drawn out proceedings and to discourage frivolous and vexatious claims. Currently, there are insufficient disincentives to discourage claimants from pursuing vexatious claims and drawn out proceedings impact on an employee’s recovery and rehabilitation and result in employers or Comcare incurring unreasonable costs.

The statement of compatibility (p. 46) also notes that the AAT will have full discretion in deciding whether to award costs in a particular case and this ‘will provide further protections for vulnerable applicants and will ensure that costs are only awarded where warranted’.

**In light of the above justification, the committee leaves the question of the appropriateness of this measure (which empowers the AAT to make costs orders in certain circumstances) to the consideration of the Senate as a whole.**

*The committee draws Senators’ attention to the provisions, as they 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.*

## **Social Services Legislation Amendment Bill 2015**

Introduced into the House of Representatives on 25 March 2015  
Portfolio: Social Services

### **Background**

This bill amends the *Social Security Act 1991* to cease social security payments to certain people who are in psychiatric confinement because they have been charged with a serious offence.

*The committee has no comment on this bill.*

## **Tax and Superannuation Laws Amendment (Employee Share Schemes) Bill 2015**

Introduced into the House of Representatives on 25 March 2015

Portfolio: Treasury

### **Background**

This bill amends the *Income Tax Assessment Act 1997* to:

- reverse some of the changes made in 2009 to the taxing point for rights for employees of all corporate tax entities;
- introduce a further taxation concession for employees of certain small start-up companies; and
- develop and approve safe harbour valuation methods and standardised documentation that will streamline the process of establishing and maintaining an Employee Share Scheme.

*The committee has no comment on this bill.*

## **Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Bill 2015**

Introduced into the House of Representatives on 26 March 2015

Portfolio: Treasury

### **Background**

This bill is part of a package of eight bills to reform the legal and governance framework for Norfolk Island. The bill amends taxation and superannuation legislation and will see the taxation system apply to Norfolk Island as it currently applies to mainland Australia, with the exception of indirect taxes including GST, customs and excise duties.

The bill also establishes transitional arrangements for superannuation guarantee and in respect of capital gains tax.

*The committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Migration Amendment (Protection and Other Measures) Bill 2014**

*[Digest 8/14 – Report 10/14]*

On 19 March 2015 the Assistant Minister for Immigration and Border Protection (Senator Cash) tabled an addendum to the explanatory memorandum; a supplementary explanatory memorandum and a further supplementary explanatory memorandum. On 25 March 2015 the Senate agreed to 12 Government and two Opposition amendments. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

**The committee thanks the Assistant Minister for tabling an addendum which adds information to the explanatory memorandum as requested by the committee in its *Tenth Report of 2014*.**

### **Public Governance and Resources Legislation Amendment Bill (No. 1) 2015**

*[Digest 2/15 – no comment]*

On 24 March 2015 the House of Representatives agreed to eight Government amendments, the Parliamentary Secretary to the Minister for Finance (Mr McCormack) presented a supplementary explanatory memorandum and the bill was read a third time.

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

### **Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015**

*[Digest 3/15 – no response required]*

On 24 March 2015 the House of Representatives agreed to two Government amendments, the Assistant Minister for Employment (Mr Hartsuyker) presented a supplementary explanatory memorandum and the bill was read a third time.

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

**Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014**

*[Digest 16/14 – Report 1/15]*

On 19 March 2015 the House of Representatives agreed to 74 Government amendments and the Minister for Communications (Mr Turnbull) tabled supplementary and replacement explanatory memoranda.

**The committee notes that the government amendments to this bill sought to implement the recommendations made by the Parliamentary Joint Committee on Intelligence and Security in its report on the bill.**

**In this committee’s *First Report of 2015*, the committee noted that it considered that the following provisions of the bill (as introduced) delegated legislative powers inappropriately:**

- **subsections 110A(3) and 176A(3) (which empowered the minister to declare, by legislative instrument, further authorities or bodies to be a ‘criminal enforcement agency’ or ‘enforcement agency’ thereby enabling those agencies to access data retained under the scheme);**
- **paragraph 187A(1)(a) (which provided that the types of data to be retained under the scheme could be set out in regulations); and**
- **subparagraph 187A(3)(b)(iii) (which provided that the types of communications services providers that would be subject to the data retention obligations could be expanded by regulation).**

**The committee concluded that these aspects of the data retention scheme should be provided for in the primary legislation, although if this was not agreed to, the committee recommended that the bill be amended to ensure that the relevant regulation or instrument should not come into effect until it had been positively approved by each House of the Parliament or, at a minimum, that such instruments should not come into effect until after the disallowance period has expired.**

**The committee welcomes the fact that the government amendments mean that the above aspects of the scheme (i.e. the list of agencies able to access data retained under the scheme, the types of data to be retained and the**

types of services providers that are subject to the data retention obligations) will be provided for in the primary legislation. However, the committee notes that the amendments also allow the Minister to make declarations (which can come into force immediately) in relation to the above matters. These declarations cease to be in force after 40 sitting days of either House of Parliament after the declaration comes into force.

The committee notes that the ability of the Minister to make declarations which are able to come into force immediately (even where they are time-limited) constitutes a significant delegation of legislative power in relation to these important aspects of the data retention scheme. This is because the declaration power allows significant changes to the scheme to be made (and to come into force) without *prior* parliamentary oversight. However, the committee notes that the bill (incorporating the relevant amendments) has already passed both Houses of the Parliament and therefore makes no further comment in relation to this matter.

## 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**

Nil