

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

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Senate Standing Legislation Committee Inquiries

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

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

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Airports Amendment Bill 2015

Introduced into the House of Representatives on 6 June 2015

Portfolio: Infrastructure and Regional Development

Background

This bill amends the *Airports Act 1996* to provide for the determination of an airport plan for Sydney West Airport.

Delegation of legislative power

Item 30, proposed subsection 96B(11)

This subsection provides that an airport plan for Sydney West Airport is not a legislative instrument, which means that disallowance and sunseting provisions of the *Legislative Instruments Act 2003* will not apply. The justification provided for this is:

The status of an airport plan is therefore consistent with major development plans and master plans, which are also not legislative instruments. This is appropriate because, like master plans and major development plans, an airport plan does not determine the content of the law; it just triggers particular legal effects such as an authorisation to implement the airport plan and a sanction for not complying with its conditions. It is the Act, and not the plan, that creates these legal effects. For this reason it is highly likely that, even in the absence of subsection (11), an airport plan would not be a legislative instrument: it is of an administrative character. Subsection (11) is thus declaratory and is designed to make the legal status of the airport plan clear to a reader of the legislation. (See explanatory memorandum, p. 14)

Although it may be accepted that the plan ‘just triggers particular legal effects’ it remains the fact that the legal obligations which are created by the Act are given substance by the plan, that is their content is filled out by the determination of the plan. As such, the determination of a plan is a decision that arguably has legislative elements thus it is one which is difficult to clearly categorise as having only a legislative or administrative character (the courts have recognised this is a difficult line to draw in the context of such cases). **For this reason, the committee seeks the Minister’s advice as to whether consideration has been given to providing at least some level of parliamentary scrutiny of the plan (such as a tabling requirement), even if it is considered that it should not be subject to disallowance.**

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

Merits review

Item 45, proposed paragraphs 242(2)(f)-(fb)

These paragraphs provide that decisions to determine an airport plan for Sydney West Airport, vary such an airport plan, and declare that a specified day is the Sydney West Airport completion day are not reviewable by the AAT.

The explanatory memorandum (at p. 23) contains a detailed explanation of this approach:

The economic and national significance of the Western Sydney Airport project mean that any decision to approve a plan that would provide for the development of an international airport or any variations to that plan, is such as to make them unsuitable for ordinary merits review processes.

Although decisions regarding master plans and major development plans are reviewable by the Administrative Appeals Tribunal, there are a number of clear points of distinction in regard to an airport plan. Major development plans and master plans are submitted for Ministerial approval by an existing private airport-lessee. A lessee should be able to seek merits review of the Minister's decision on such a plan. The airport plan for Sydney West Airport would be different. It will be prepared and determined by the Commonwealth itself, and will be developed in a way as to ensure the Commonwealth's policy objectives for the proposed airport – economic, social and aviation – are achieved. The airport-lessee company that is granted the airport lease for Sydney West Airport will have entered into a contract with the Commonwealth that will require the lessee to implement that plan. Subjecting the plan to independent merits review would cut across the commercial relationship between the Commonwealth and the airport-lessee company and would jeopardise the capacity of the plan to deliver the Government's objectives. It could also result in substantial delays to the project timeframes: susceptibility to litigation in a no-cost jurisdiction would almost certainly mean that construction of the airport could not commence in accordance with the government's preferred timeframes.

The usual courses of judicial review would be available for the Infrastructure Minister's determination of an airport plan or a decision in relation to its variation.

The declaration of a day as the Sydney West Airport completion day will not be a reviewable decision. The effectiveness of the Act requires that once such a decision is made, there is certainty as to its operation. Further, the kinds of considerations that underlie the making of such a decision are uniquely adapted to assessment by a Commonwealth Minister as opposed to an independent tribunal.

In light of this explanation, the committee notes the provision, and 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 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.

Appropriation Bill (No. 5) 2014-2015

Introduced into the House of Representatives on 12 May 2015
Portfolio: Finance

Background

This bill seeks to appropriate additional money out of the Consolidated Revenue Fund for the ordinary annual services of the government, in addition to the appropriations provided for by the *Appropriation Act (No. 1) 2014-2015* and *Appropriation Act (No. 3) 2014-2015*.

Insufficient parliamentary scrutiny of legislative power Various provisions

The general issues considered in the committee's comments on Appropriation Bill (No. 1) 2015-2016 relating to the division of items between appropriation bills (see pages 6–9) apply to all bills appropriating money for the ordinary annual services of the government, including this bill.

The committee has no further comment on this bill.

Appropriation Bill (No. 6) 2014-2015

Introduced into the House of Representatives on 12 May 2015

Portfolio: Finance

Background

This bill seeks to appropriate additional money out of the Consolidated Revenue Fund for services that are not the ordinary annual services of the government, in addition to the appropriations provided for by the *Appropriation Act (No. 2) 2014-2015* and *Appropriation Act (No. 4) 2014-2015*.

The committee has no comment on this bill.

Appropriation Bill (No. 1) 2015-2016

Introduced into the House of Representatives on 12 May 2015

Portfolio: Finance

Background

This bill seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government.

The issues raised in relation to this bill apply generally to bills appropriating money for the ordinary annual services of the government, including Appropriation Bill (No. 5) 2014-2015.

Insufficient parliamentary scrutiny of legislative power

Various provisions

The inappropriate classification of items in appropriation bills as ordinary annual services when they in fact relate to new programs or projects undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (see Senate standing order 24(1)(a)(v)).

By way of background, under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation. Noting these provisions, the Senate Standing Committee on Appropriations and Staffing (now known as the Senate Standing Committee on Appropriations, Staffing and Security) has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years (see 50th Report, p. 3; and recent annual reports of the committee).

The distinction between appropriations for the ordinary annual services of the government and other appropriations is reflected in the division of proposed

appropriations into pairs of bills—odd-numbered bills which should only contain appropriations for the ordinary annual services of the government and even-numbered bills which should contain all other appropriations (and be amendable by the Senate). However, the Appropriations and Staffing Committee has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure (45th Report, p. 2). The Senate has not accepted this assumption.

As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 (in accordance with a recommendation made in the 50th Report of the Appropriations and Staffing Committee), the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
- 2) That appropriations for expenditure on:
 - a) the construction of public works and buildings;
 - b) the acquisition of sites and buildings;
 - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
 - d) grants to the states under section 96 of the Constitution;
 - e) new policies not previously authorised by special legislation;
 - f) items regarded as equity injections and loans; and
 - g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

There were also two other parts to the resolution: the Senate clarified its view of the correct characterisation of payments to international organisations and, finally, the order provided that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as part of ordinary annual services. (*Journals of the Senate*, 22 June 2010, pp 3642–3643).

The committee concurs with the view expressed by the Appropriations and Staffing Committee that if ‘ordinary annual services of the government’ is to include items that fall within existing departmental outcomes then:

...completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas. (45th Report, p. 2).

The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill that is not for the ordinary annual services of the government (45th Report, p. 2).

Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad ‘departmental outcomes’ to categorise appropriations, rather than on individual assessment as to whether an appropriation relates to a new program or project, continues and appears to be reflected in the allocation of some items in the most recent appropriation bills.

For example, it seems that the initial expenditure in relation to the following items in the Finance and Treasury portfolios may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 1) 2015-2016, which is not amendable by the Senate):

- Asia Pacific Project Preparation Facility — Australian contribution (Budget Paper No. 2 2015-16, p. 172)
- Smaller Government — Australian Securities and Investments Commission Registry Function — commercialisation (Budget Paper No. 2 2015-16, p. 93)
- World Bank Global Infrastructure Facility — Australian contribution (Budget Paper No. 2 2015-16, p. 178)

The committee has previously written to the Minister for Finance in relation to this general matter following tabling of its *Alert Digest No. 7 of 2014* (which included consideration of Appropriation Bill (No. 1) 2014-2015) and *Alert Digest No. 2 of 2015* (which included consideration of Appropriation Bill (No. 3) 2014-2015). The Minister’s responses were considered and published in the committee’s *Tenth Report of 2014* (at pp 402–406) and *Fourth Report of 2015* (at pp 267–271). In both reports the committee noted that the government does not intend to reconsider its approach to the classification of

items that constitute ordinary annual services of the government; that is, the government will continue to prepare appropriation bills in a manner consistent with the view that only administered annual appropriations for new outcomes (rather than appropriations for expenditure on new policies not previously authorised by special legislation) should be included in even-numbered appropriation bills.

The committee again notes that this approach is not consistent with the Senate resolution of 22 June 2010 relating to the classification of ordinary annual services expenditure in appropriation bills.

The committee reiterates its agreement with the comments made on this matter by the Senate Standing Committee on Appropriations and Staffing, and in particular that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing outcome should be classified as ordinary annual services expenditure.

The committee draws the 2010 Senate resolution to the attention of Senators and notes that the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to some items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 1) 2015-2016 which is not amendable by the Senate).

The committee draws Senators' attention to this matter, as the current approach to the classification of ordinary annual services expenditure in appropriation bills may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

Appropriation Bill (No. 2) 2015-2016

Introduced into the House of Representatives on 12 May 2015
Portfolio: Finance

Background

This bill seeks to appropriate money out of the Consolidated Revenue Fund for services that are not the ordinary annual services of the government.

Delegation of legislative power

Clause 16

The committee has written to the Minister for Finance on two occasions in relation to clause 14 of Appropriation Bill (No. 4) 2014-2015. Clause 16 of this bill is identical in terms and raises the same issues (relating to the delegation of the power to determine the conditions under which payments are made to the States).

The committee therefore draws Senators' attention to its latest comments in relation to this matter contained in the committee's *Sixth Report of 2015* (at pages 471–475) which are also relevant to this bill.

The committee has no further comment on this bill.

Appropriation (Parliamentary Departments) Bill (No. 1) 2015-2016

Introduced into the House of Representatives on 12 May 2015

Portfolio: Finance

Background

This bill seeks to appropriate money out of the Consolidated Revenue Fund for expenditure in relation to the parliamentary departments.

The committee has no comment on this bill.

Australian Small Business and Family Enterprise Ombudsman Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Treasury

Background

This bill establishes the Australian Small Business and Family Enterprise Ombudsman, and specifies the powers and functions of the Ombudsman.

Merits review

Subclause 92(2)

This subclause provides that decisions by the Ombudsman that it is not in the public interest to delete information, a recommendation or an opinion from a report or advice before it is tabled or published may be appealed to the AAT. However, the relevant provisions (subparagraphs 41(3)(a)(ii), 56(3)(a)(ii), 58(3)(a)(ii), and 63(3)(a)(ii)) provide for a decision to be comprised of two elements: (i) that the information or recommendation would be 'likely to adversely affect the interests of any persons' and (ii) that the Minister reasonably believes that it is in the public interest to delete the information or recommendation'. **The committee seeks the Minister's clarification as to whether both elements of this decision may be challenged in an appeal to the AAT.**

Pending the Minister's reply, 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.

Undue trespass on personal rights and liberties

Subclauses 48(3), 82(2) and 91(5)

The explanatory memorandum does not appear to address the justification for the imposition of an evidential burden on a defendant imposed by this bill in relation to:

- subclause 48(3) – whether or not a person is excused or released from attending a hearing;
- subclause 82(2) – whether an exception to an offence for the use or disclosure of protected information applies; and
- subclause 91(5) – whether an exception to an offence for the secondary disclosure and use of protected information applies.

As discussed in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at p. 50):

A defence reverses the burden of proof that would usually apply in an offence, by requiring the defendant to discharge the burden of proof for one or more elements... Consequently, it is only appropriate to place an issue in a defence in certain circumstances.

...

The fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant.

The committee expects that any proposal to impose an evidential burden on a defendant will be fully justified in the explanatory material accompanying a bill. As the explanatory memorandum does not address this matter, the committee seeks the Minister’s advice as to the justification for the proposed approach in each of the instances outlined above.

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.

Undue trespass on personal rights and liberties—privacy Part 5, Division 2

Part 5, Division 2 deals with the protection of ‘protected information’ and authorises the use or disclosure of protected information in various circumstances. **As neither the explanatory memorandum nor the statement of compatibility consider the justification for, and interaction between, these provisions and the privacy interests of affected persons the committee seeks the Minister’s advice about these matters.**

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.

Possible undue trespass on personal rights and liberties

Delegation of legislative power

Clause 96

Clause 96 provides for the making of rules, but without the standard restrictions now outlined in Office of Parliamentary Counsel Drafting Direction 3.8, which states:

27 If your Bill will contain a power to make instruments other than regulations, and the instructor's policy is that [a significant provision (as described in paragraph 3 of Drafting Direction 3.8)] is not required to be included in the instrument, you should include the following provision:

- (2) To avoid doubt, the [*name of legislative instrument e.g. rules*] may not do the following:
- (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) [*for Acts, but not Ordinances*] set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
 - (e) amend this [*Act/Ordinance*].

28 You should include this provision in this form even if not all paragraphs are relevant to your Bill (such as because your Bill does not contain an appropriation).

29 Alternatively, if the instructor's policy is that a [a significant provision (as described in paragraph 3 of Drafting Direction 3.8)] should be able to be dealt with by subordinate instrument, then you should include a regulation-making power in addition to the instrument-making power, and specifically allow the regulations to provide for that kind of provision.

As this wording includes important safeguards in relation to the use of subordinate legislation that is not in the form of a regulation, **the committee seeks the Minister's advice as to whether the provision can be amended so that it aligns with the requirements in Drafting Direction 3.8.**

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 and to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Treasury

Background

This bill will amend the *Ombudsman Act 1976* to allow the Commonwealth Ombudsman to transfer matters to the Australian Small Business and Family Enterprise Ombudsman (the Ombudsman).

The bill also provides for transitional provisions to allow any work of the Australian Small Business Commissioner to be transferred to the Ombudsman.

The committee has no comment on this bill.

Crimes Legislation Amendment (Penalty Unit) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Attorney-General

Background

This bill amends the *Crimes Act 1914* to:

- increase the amount of the Commonwealth penalty unit from \$170 to \$180 from 31 July 2015; and
- index the penalty unit every three years to the Consumer Price Index from 1 July 2018.

The committee has no comment on this bill.

Customs Amendment (Australian Trusted Trader Programme) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Immigration and Border Protection

Background

This bill amends the *Customs Act 1901* to establish and set up the framework for the Australian Trusted Trader Program.

The bill also makes a consequential amendment to the *Australian Border Force Act 2015*.

Delegation of legislative power

Clause 11

The purpose of this bill is to establish the Australian Trusted Trader Program. The key elements of the program are, however, to be prescribed by rules (that is, by legislative instrument). **As the explanatory material does not address why the core features of the scheme are not contained in the bill (such as eligibility for the program, obligations from which participants are released and relevant considerations for decisions to enter into a trusted trader agreement) the committee seeks the Minister's detailed justification for the proposed approach.**

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

Energy Grants and Other Legislation Amendment (Ethanol and Biodiesel) Bill 2015

Introduced into the House of Representatives on 4 June 2015

Portfolio: Treasury

Background

This bill repeals the *Energy Grants (Cleaner Fuels) Scheme Act 2004* to remove grants for renewable diesel and biodiesel from 1 July 2015.

The committee has no comment on this bill.

Excise Tariff Amendment (Ethanol and Biodiesel) Bill 2015

Introduced into the House of Representatives on 4 June 2015

Portfolio: Treasury

Background

This bill amends the *Excise Tariff Act 1921* to reduce the rates of excise for domestically manufactured biodiesel and fuel ethanol to nil for a one year period commencing on 1 July 2015. The excise rates for these fuels then increase each financial year from 1 July 2016 until 1 July 2020 when the excise rate for:

- fuel ethanol will be approximately 33 per cent of the excise rate for petrol; and
- biodiesel will be equivalent to 50 per cent of the excise rate for diesel.

The committee has no comment on this bill.

Export Charges (Collection) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill will provide authority to collect charges in relation to the export of regulated goods.

Delegation of legislative power

Clause 11

This clause allows for late payment fees to be prescribed by the regulations. While this appears to be technical and administrative content that is generally appropriate for subordinate legislation, the committee is interested in whether consideration has been given to providing parameters in the bill to ensure that the power will be appropriately limited. **The committee therefore seeks the Minister's advice about this matter.**

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

Merits review

Subclause 12(5)

Subclause 12(5) provides authority for the Secretary to give a direction not to give a licence, permission, permit, consent, approval, certificate, notice, registration or accreditation under the Export Control Act, or other directions in relation to the exercise of powers under related legislation, until an export charge or late payment fee is paid. Decisions made under this subclause will not be reviewable by way of internal review or through the AAT. However, there is an explanation provided in the material accompanying the bill, which includes encouraging compliance with the bill and (appropriately) minimising departmental administration costs when a charge or fee is unpaid. In addition, judicial review will be available (see p. 11 of the explanatory memorandum). **In light of the explanation provided for making decisions made under this subclause not subject to merits review, 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 make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Undue trespass on personal rights and liberties—protection from civil proceedings
Clause 20

The explanatory memorandum in relation to this clause states:

This clause provides that the Commonwealth or a protected person exercising powers under the Bill will have protection from civil proceedings for anything done, or omitted to be done, in good faith. Civil proceedings involve legal disputes between individuals based on one person claiming that the other has failed in his or her legal duty. Protection from civil proceedings allows those required under the Bill to make decisions and take action to manage exported goods appropriately, and to do so without the fear of civil proceedings being taken against them.

The term 'in good faith' means without malice or without intent to defraud. Protection from civil proceedings does not extend to criminal offences—for example, theft or intentional destruction of documents or property.

The committee notes this information, but seeks the Minister's more detailed explanation as to why it is considered appropriate that affected persons have their right to bring an ordinary action to enforce their legal rights limited to situations where lack of good faith is shown (especially as bad faith can only be established in very limited circumstances). The committee also seeks examples to illustrate circumstances in which civil liability might ordinarily arise, but will be excluded by this provision.

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.

Export Charges (Imposition—Customs) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill imposes charges only when they are considered a duty of customs.

The committee has no comment on this bill.

Export Charges (Imposition—Excise) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill imposes charges only when they are considered a duty of excise.

The committee has no comment on this bill.

Export Charges (Imposition—General) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill enables cost recovery of corporate and supporting export certification activities provided to those persons that export or deal with regulated exported goods.

The committee has no comment on this bill.

Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015

Introduced into the House of Representatives on 1 June 2015

By: Mr Palmer

Background

This bill seeks to prevent the disclosure of information by public officials in circumstances that may lead to the imposition of the death penalty in foreign countries.

The committee has no comment on this bill.

Freedom of Information Amendment (Requests and Reasons) Bill 2015

Introduced into the Senate on 13 May 2015

By: Senator Ludwig

Background

This bill amends the *Freedom of Information Act 1982* to require agencies and ministers to publish the exact wording of freedom of information requests and a statement of reasons concerning the decision to allow or refuse the release of requested documents.

The committee has no comment on this bill.

Imported Food Charges (Collection) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill will provide authority to collect charges for imported food.

Various provisions

The same issues arise in relation to this bill as in relation to Export Charges (Collection) Bill 2015. **The committee therefore seeks the same advice from the Minister in relation to the relevant provisions in this bill.**

Imported Food Charges (Imposition—Customs) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill enables recovery of costs for activities such as program management and administration, verification, risk and incident management where a charge is considered a duty of customs.

The committee has no comment on this bill.

Imported Food Charges (Imposition—Excise) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill enables recovery of costs for activities such as programme management and administration, verification, risk and incident management where a charge is considered a duty of excise.

The committee has no comment on this bill.

Imported Food Charges (Imposition—General) Bill 2015

Introduced into the House of Representatives on 3 June 2015

Portfolio: Agriculture

Background

This bill is part of a package of bills. The bill enables the recovery of costs for administering the imported food regulatory framework including the development of audit and compliance standards for third party arrangements.

The committee has no comment on this bill.

Iron Ore Supply and Demand (Commission of Inquiry) Bill 2015

Introduced into the House of Representatives on 1 June 2015

By: Mr Katter

Background

This bill seeks to establish a full judicial commission of inquiry into iron ore supply and demand, specifically the increases in production by certain iron ore producing companies at a time when the world-wide demand for iron ore is steadily decreasing.

Undue trespass on personal rights and liberties

Various provisions

This bill introduces coercive information gathering powers and a number of serious offences, which are areas of long-standing scrutiny interest to the committee. However, a justification for the proposed inclusion of these provisions in the bill is not provided in the explanatory memorandum. **The committee therefore seeks the Member's advice as to the rationale for their inclusion and discussion as to whether the provisions are consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

Pending the Member'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.

Marriage Amendment (Marriage Equality) Bill 2015

Introduced into the House of Representatives on 1 June 2015

By: Mr Shorten

Background

This bill amends the *Marriage Act 1961* to allow Australians to marry regardless of their sex, sexual orientation, gender identity or intersex status.

Delegation of legislative power—Henry VIII clause

Undue trespass on personal rights and liberties—retrospective effect Clause 10

This clause will allow subordinate legislation (in this instance, regulations) to amend primary legislation in the context of consequential or transitional matters, including with retrospective effect. In relation to such ‘Henry VIII’ clauses, the committee’s usual expectation is that the necessity for the inclusion of such a power will be justified in the explanatory memorandum. Although there may be good reasons to allow for regulations to modify the operation of statutes, especially when the power is limited to transitional matters and available for a limited period of time, the explanatory memorandum does not address this matter.

In addition, subclauses 10(3) and 10(4) can allow any regulations to take effect from a date before the regulations are registered. The committee also has a long-standing concern when a provision with retrospective effect will, or might, have a detrimental effect on any person. The committee again expects that any such proposal will be justified in the explanatory material accompanying the bill. **The committee therefore seeks the Leader of the Opposition’s advice as to the justification for these matters.**

Pending the Leader of the Opposition’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) and to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee’s terms of reference.

Medical Research Future Fund Bill 2015

Introduced into the House of Representatives on 27 May 2015
Portfolio: Finance

Background

This bill establishes the Medical Research Future Fund (MRFF) from 1 August 2015.

The bill also provides for initial funding of \$1 billion from the uncommitted balance of the Health and Hospitals Fund; and for the MRFF to be managed by the Future Fund Board of Guardians.

The committee has no comment on this bill.

Medical Research Future Fund (Consequential Amendments) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Finance

Background

This bill provides consequential amendments to various Acts to enable the effective operation of the Medical Research Future Fund (MRFF). The bill amends the:

- *COAG Reform Fund Act 2008* to enable grants to the States and Territories through the COAG Reform Fund;
- *DisabilityCare Australia Fund Act 2013*, *Future Fund Act 2006* and *Nation-building Funds Act 2008* so that amounts can be transferred between the MRFF and the Future Fund to allow for proper apportioning of common expenses incurred by the Future Fund Board in managing the MRFF, the Future Fund, the Nation-building Funds and the DisabilityCare Australia Fund Special Account;
- *Future Fund Act 2006* to extend the Future Fund Board's duties to manage the MRFF; and the
- *Nation-building Funds Act 2008* to abolish and Health and Hospitals Fund (HHF).

The bill also makes a number of consequential amendments in relation to the abolition of the HHF.

The committee has no comment on this bill.

National Health Amendment (Pharmaceutical Benefits) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Health

Background

This bill amends the *National Health Act 1953* to implement the Pharmaceutical Benefits Scheme (PBS) Access and Sustainability package by:

- applying a one-off five per cent statutory price reduction for single brand medicines;
- changing price disclosure arrangements for multiple-brand medicines;
- applying flow-on price disclosure reductions from component drugs to multiple-brand combination medicines;
- changing membership arrangements for the Pharmaceutical Benefits Advisory Committee;
- enabling approved pharmacists to discount patient co-payments by a maximum of \$1 for each PBS supply on a prescription;
- extending safety net early supply rules; and
- extending the pharmacy location rules and the role of the Australian Community Pharmacy Authority to 30 June 2020.

The committee has no comment on this bill.

Passports Legislation Amendment (Integrity) Bill 2015

Introduced into the House of Representatives on 4 June 2015

Portfolio: Foreign Affairs

Background

This bill amends the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005* to:

- provide that a travel document may be issued to a person on the Minister's own initiative, to facilitate a lawful requirement to travel;
- align the definition of 'parental responsibility' more closely to that in the *Family Law Act 1975* (Cth);
- provide that the Minister may refuse to process a passport application if there are reasonable grounds to suspect fraud or dishonesty in the application; and
- amend existing offences in response to the fraudulent use of Australian travel documents, whether genuine or false.

The bill also makes minor consequential amendments to a number of other Acts and repeals the *Australian Passports (Transitional and Consequential) Act 2005*.

Undue trespass on personal rights and liberties—evidential burden of proof

Schedule 1, item 48, subsections 33(2), 34(3); and item 49, subsection 36(3)

Each of these provisions provide that a defendant bears an evidential burden in relation to a defence that they had a reasonable excuse in relation to specified elements of an offence. The statement of compatibility (at p. 34) provides an explanation for this reversal of the burden of proof:

To the extent that this evidential burden limits a person's right to be presumed innocent, the limitation is justifiable as the 'reasonable excuse' that must be proven is particularly within the knowledge of the person concerned. If, for example, a person finds a false travel document in the street and has it in their possession for the purpose of handing it in to a police station, it is reasonable

that the burden of proving that set of circumstances falls to the defendant. The rights of the defendant are otherwise not affected by these amendments and it is clearly more practical for the defendant to prove that they had a reasonable excuse for their conduct than for the prosecution to disprove it.

In general, the committee considers that the defence of reasonable excuse is too open-ended and that this will often make it inappropriate to require a defendant to prove a set of circumstances considered to establish the reasonableness of their actions. **However, in light of the explanation provided the committee leaves the question as to whether it is appropriate to place an evidential burden on defendants in relation whether they have a reasonable excuse 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.

Merits review

Schedule 1, item 52, subparagraph 48(b)(i) and item 53, paragraph 48(e)

These items seek to exempt the following two decisions from merits review in the AAT:

- (1) decisions to issue a travel-related document to facilitate a lawful removal (namely, extradition, deportation, removal or prisoner transfer); and
- (2) decisions demanding the surrender of an Australian travel document cancelled in response to a competent authority request.

The statement of compatibility argues, in relation to both exemptions, that merits review would be inappropriate on the basis that the decisions are procedural and that the underlying decisions (i.e. a decision that a person be extradited or that a passport be cancelled) are reviewable decisions (see pp 36–37). **In light of the detailed explanation provided, 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 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.

Broad discretionary power

Merits review

Schedule 1, item 61, new subsection 53(4)

This item confers a broad discretionary power on the Minister to refuse any name or signature of the person that the Minister considers to be unacceptable, inappropriate or offensive. The explanatory memorandum provides a long list of examples of unacceptable, inappropriate or offensive names (see p. 19). The statement of compatibility (at p. 35) gives a detailed justification of the approach:

A person may use the most recent name registered by the person with an Australian Registry of Births, Deaths or Marriages. However, the principal object of the Passports Act is to provide for the issue and administration of Australian passports, to be used as evidence of identity and citizenship by Australia citizens who are travelling internationally. Given that passports are documents which are presented to officials in other countries as evidence of a person's identity and citizenship, a restriction on the use of unacceptable or offensive names and signatures is reasonable and necessary. Examples of unacceptable names include names which are or contain: an expletive; a racial or ethnic slur or implication; an obscene or offensive term; a political statement or slogan; the name of, or reference to, a public institution or public office; a term that could mislead people into believing that the bearer has been awarded or conferred a title, award or decoration; or a string of words that would not commonly be recognised as a name.

A similar situation arises in relation to signatures which contain offensive words or symbols. While a person is entitled to create any signature they wish, there are certain words, phrases and images which are considered inappropriate and should not be included in a signature printed in a Commonwealth document.

Although the rationale for the power may be accepted, the exercise of the power could mean that a person may not use their lawful name for travel purposes. **The committee therefore seeks the Minister's advice as to:**

- **whether consideration has been given to drafting the power so that it is more constrained (by, for example, including a non-exhaustive list of examples of what may constitute an unacceptable, inappropriate or offensive name or signature in the legislation); and**
- **whether the exercise of this power will be subject to merits review by the AAT.**

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

Private Health Insurance (Collapsed Insurer Levy) Amendment Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

Background

This bill is part of a package of five bills. The bill amends the *Private Health Insurance (Collapsed Insurer Levy) Act 2003* to provide for the transfer of responsibility for the administration and collection of the collapsed insurer levy from the Private Health Insurance Administration Council and the Health Minister to the Australian Prudential Regulation Authority and the Treasurer.

The committee has no comment on this bill.

Private Health Insurance (National Joint Replacement Register Levy) Amendment Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Health

Background

This bill amends the *Private Health Insurance (National Joint Replacement Register Levy) Act 2009* to:

- enable the National Joint Replacement Register (NJRR) levy to be imposed on the recording on the NJRR of the provision of a joint replacement prosthesis, rather than for being a sponsor of a joint replacement prosthesis;
- set a cap of \$5000 on the amount of NJRR levy payable for a financial year by a sponsor; and
- make a number of technical amendments.

The committee has no comment on this bill.

Private Health Insurance (Prudential Supervision) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

Background

This bill is part of a package of five bills. The bill seeks to:

- transfer the prudential supervisory functions from the Private Health Insurance Administration Council to the Australian Prudential Regulation Authority (APRA);
- provide for the registration of private health insurers and prohibit unregistered entities from carrying on a health related business;
- require private health insurers to have health benefit funds;
- provide that APRA approves restructures, mergers, acquisitions and terminations of health benefit funds;
- empower APRA to appoint an external manager of a health benefit fund;
- outline duties and liabilities of directors;
- enable APRA to establish prudential standards and to exercise powers under the standards;
- outline obligations of private health insurers;
- provide for the monitoring and investigation of private health insurers;
- provide that APRA can obtain an enforceable undertaking from a person in connection with a matter in relation to which APRA has a power or function;
- provide that APRA may seek remedies for a contravention of an enforceable obligation;
- provide for the Administrative Review Tribunal to review decisions made by APRA; and
- set out matters in relation to approvals, determinations and rules.

Broad discretionary power Subclause 15(1)

This clause provides that APRA may grant an application to be registered as a private health insurer, subject to any terms and conditions it deems appropriate. The explanatory memorandum does not state why it is necessary to frame the power to grant an application and to impose conditions so broadly. Although it is the case that decisions made under this provision are reviewable by the AAT, **the committee seeks the Minister's advice as to whether consideration can be given to including more guidance in the bill itself about how this power is to be exercised (for example, the inclusion of considerations which must be addressed) rather than leaving such questions to be determined in an ad hoc way through the policy which arises from the making of individual decisions.**

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

Undue trespass on personal rights and liberties—reversal of onus of proof Subclauses 73(6), 74(6), 112(4), 116(2) and 142(2)

There is no justification in the explanatory memorandum for placing an evidential burden on the defendant for defences available in circumstances in which records must be provided to external managers or in which APRA can require the provision of specified information. **The committee therefore seeks the Minister's advice as to the justification for the reversal of the onus of proof in these circumstances.**

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

**Delegation of legislative power—Henry VIII clause
Clause 85**

This clause provides that the APRA rules may set out modifications to the Prudential Supervision Act (this bill) or the Private Health Insurance Act, relating to how Chapter 3 of the PHI Act applies in relation to specified matters. The explanatory memorandum (p. 63) states that:

This modification power will allow APRA to ensure that the requirements of Chapter 3 of the PHI Act can, if necessary, be appropriately adjusted to the context of external or terminating management and, if necessary, can be appropriately tailored to those health benefit funds concerned. This power would only be exercised in limited circumstances, such as where strict compliance with a provision in the PHI Act, for example community rating requirements, would be difficult to achieve in the context of terminating a health benefits fund.

APRA must consult with the Health Secretary prior to making any rules under this section.

In light of this explanation, the committee notes this provision, but makes no further comment.

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

**Delegation of legislative power—Incorporation of instruments from time to time
Subclause 92(7)**

This subclause provides that:

A prudential standard may provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time...

A justification for the proposed approach is outlined at p. 69 (5.15) of the explanatory memorandum, which includes the information that the ability to incorporate material from time to time 'will mean that APRA will not need to remake a prudential standard each time the Actuaries Institute updates its standard on financial condition reports for private health insurers'.

In light of this explanation, the committee makes no further comment on the proposed inclusion of this power. **However, the committee seeks the Minister's advice as to whether the standards which will be incorporated will be readily and freely available to the public, and in particular whether consideration has been given to including a requirement in the legislation that such standards be published and updated on APRA's website.**

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

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

Subclauses 112(5) and (6)

The effect of these provisions is that an actuary or former actuary must comply with a notice to give information under subclause (1) even if that information may incriminate them. This abrogation of the privilege against self-incrimination is subject to a use, but not a derivative use, immunity. The explanatory memorandum (at p. 88) contains the following justification for the approach:

In this respect the provision is consistent with self-incrimination provisions in the other legislation administered by APRA, including 156F of the Life Insurance Act. A difficulty with derivative use immunity is that it means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently.

While the committee remains concerned about abrogations of the privilege against self-incrimination, especially without the inclusion of both use and derivative use immunities, in light of the explanation provided, the committee draws the provisions to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Delegation of administrative power

Clause 147

Under subclause 147(1) an inspector may delegate any of the inspector's monitoring and investigation powers under Division 3 to an ARPA staff member. Although subsection 147(2) requires that an inspector must not delegate powers to an APRA staff member unless the inspector is satisfied that the staff member has suitable qualifications and experience to exercise those powers, the necessity and appropriateness of delegation of these significant powers is not addressed in any detail in the explanatory memorandum. **The committee therefore seeks the Minister's further elaboration of the justification for this approach.**

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

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

Clause 149

Subclause 149(1) abrogates the privilege against self-incrimination in relation to information and documents required under Part 6 relating to monitoring and investigations. The explanatory memorandum (at p. 105) provides a detailed elaboration and justification of the approach:

7.61 A person is not excused from providing answers, information, or a report or document, in an investigation on the ground that this might incriminate them or make them liable to a penalty. In order to protect the integrity of the regulatory regime, and protect the interests of policy holders, it is necessary to override the privilege against self-incrimination so that APRA can acquire all relevant information relating to the financial position of a private health insurer and the insurer's and other relevant persons' compliance with the regulatory regime. This is consistent with the approach taken in the

PHI Act (for example, section 214-15, relating to compliance with requirements of inspectors) and other legislation administered by APRA (for example section 287 of the SIS Act). *[Part 6, Division 4, subsection 149(1)]*

7.62 However, if the person is an individual, any information, document or thing obtained because of a person's assistance is not admissible in evidence against them in any proceedings (either criminal or civil) except proceedings in relation to section 137.1 or 137.2 of the Criminal Code (which relate to the provision of false or misleading information) or proceedings under section 120 for disqualification (see subsection 122(4)). This provides immunity in relation to direct use of the information, document or thing in other proceedings (except, as noted, where the other proceedings are for disqualification under section 120). It does not provide for derivative use immunity, that is, immunity in relation to anything obtained as a direct or indirect consequence of the production of the information, document or thing. *[Part 6, Division 4, subsection 149(2)]*

7.63 In this respect the provision is consistent with the majority of self-incrimination provisions in the other legislation administered by APRA, including section 287 of the SIS Act. A difficulty with derivative use immunity is that it means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently. In other respects section 149 offers broader protection than similar provisions in other legislation in that it does not require the person to first state that the answer might tend to incriminate them, and the protection applies to civil proceedings (other than for disqualification) as well as criminal proceedings

While the committee remains concerned about abrogations of the privilege against self-incrimination, especially without the inclusion of both use and derivative use immunities, in light of the explanation provided, the committee draws the provision to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The committee draws Senators' attention to the 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.

Private Health Insurance (Prudential Supervision) (Consequential Amendments and Transitional Provisions) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

Background

This bill is part of a package of five bills. The bill amends the:

- *Australian Prudential Regulation Authority Act 1998* to establish a new special account to administer the collapsed insurer levy;
- *Financial Institutions Supervisory Levies Collection Act 1998* to provide for the collection of the private health insurer supervisory levy and the collapsed insurer levy;
- *Financial Sector (Collection of Data) Act 2001* to provide for the collection of data from private health insurers by the Australian Prudential Regulation Authority;
- *Australian Prudential Regulation Authority Act 1998*, *Ombudsman Act 1976* and *Private Health Insurance Act 2007* to provide for matters relating to the secrecy and sharing of information concerning private health insurers; and

The bill also:

- makes consequential amendments to five Acts;
- repeals the *Private Health Insurance (Council Administration Levy) Act 2003*; and
- provides for a number of transitional arrangements.

The committee has no comment on this bill.

Private Health Insurance (Risk Equalisation Levy) Amendment Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

Background

This bill is part of a package of five bills. The bill amends the *Private Health Insurance (Risk Equalisation Levy) Act 2003* to provide that the Australian Prudential Regulation Authority can determine and administer the risk equalisation levy imposed on bodies registered as private health insurers.

The committee has no comment on this bill.

Private Health Insurance Supervisory Levy Imposition Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

Background

This bill is part of a package of five bills. The bill provides for the imposition of an annual supervisory levy (from the 2016-17 financial year) on bodies registered as private health insurers to recover the Australian Prudential Regulation Authority's costs incurred in regulating that industry.

The committee has no comment on this bill.

Renewable Energy (Electricity) Amendment Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Environment

Background

This bill amends the *Renewable Energy (Electricity) Act 2000* and the *Climate Change Authority Act 2011* to:

- adjust the required GWh of renewable source electricity in each year from 2016 to 2030 with a GWh target of 33,000 GWh in 2020; and
- replace the current partial exemption for electricity used in emissions-intensive trade-exposed activities with a full exemption;
- remove the requirement for the Climate Change Authority to undertake biennial reviews on the operation of the *Renewable Energy (Electricity) Act 2000* and subordinate regulations.

The bill also amends the *Renewable Energy (Electricity) Regulations 2001* to reinstate native forest wood waste as an eligible source of renewable energy.

The committee has no comment on this bill.

Social Services Legislation Amendment (Fair and Sustainable Pensions) Bill 2015

Introduced into the House of Representatives on 4 June 2015

Portfolio: Social Services

Background

This bill amends laws relating to social security and veterans' entitlements.

Schedule 1 introduces from 1 January 2016 a 10 per cent cap on a defined benefit income that can be excluded from the social security income test, but excludes military superannuation schemes.

Schedule 2 reduces from 26 weeks to six weeks the length of time for which recipients of the age pension and a small number of other payments with unlimited portability will be paid their basic means-tested rate while outside Australia from 1 January 2017.

Schedule 3 increases the assets-test free areas and the taper rate by which a pension is reduced once the free areas are exceeded, and amends the eligibility for concession cards from 1 January 2017.

Schedule 4 ceases payment of the seniors supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card from 20 June 2015.

Schedule 5 ceases the pensioner education supplement from 1 January 2016.

The committee has no comment on this bill.

Social Services Legislation Amendment (No. 2) Bill 2015

Introduced into the House of Representatives on 28 May 2015

Portfolio: Social Services

Background

This bill amends the *Aged Care Act 1997*, *Aged Care (Transitional Provisions) Act 1997*, *Social Security Act 1991*, *Social Security (Administration) Act 1999* and the *Income Tax Assessment Act 1997* to:

- amend the income management program by:
 - abolishing certain incentive payments relating to income management;
 - amending the operation of the vulnerable measure of income management; and
 - make minor amendments to remove ambiguities.
- cease the payment of the residential care subsidy for care recipients during a period of leave taken before entering a residential care service; and
- abolish the Aged Care Planning Advisory Committees.

The committee has no comment on this bill.

Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015

Introduced into the House of Representatives on 28 May 2015

Portfolio: Social Services

Background

This bill reintroduces several amended measures previously introduced in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014.

Schedule 1 excludes widow allowance claimants from the one-week ordinary waiting period for all working age payments from 1 July 2015.

Schedule 2 increases from 22 to 25 years the age of eligibility for Newstart Allowance and Sickness Allowance and delays commencement of this provision until 1 July 2016.

Schedule 3 introduces a revised four-week waiting period for youth income support from 1 July 2016.

Schedule 4 ceases the low income supplement from 1 July 2017.

Schedule 5 implements the following changes to Australian Government payments:

- maintains at level for three years from 1 July 2015 the income free areas for all working age allowances (other than student payments) and the single parenting payment; and
- maintains at level for three years from 1 January 2016 the income free areas and other means-test thresholds for student payments, including the student income bank limits.

Delegation of legislative power

Schedule 1, item 5, proposed subsection 19DA(5)

This subsection empowers the Secretary to prescribe, by legislative instrument, circumstances for the purpose of determining whether a person is experiencing a personal financial crisis and for the purpose of waiving the

ordinary waiting period. The statement of compatibility suggests that the use of a legislative instrument provides the Secretary ‘with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences’. As such, the provision is said to allow the Secretary to ‘consider other unforeseeable or extreme circumstances...where it would be appropriate for a person to have immediate access to income support’ (at p. 2).

While the committee remains concerned about the delegation of legislative power in such circumstances as a matter of general principle, in light of the explanation provided the committee draws the provision to the attention of Senators, but leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

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.

Superannuation Guarantee (Administration) Amendment Bill 2015

Introduced into the House of Representatives on 28 May 2015

Portfolio: Treasury

Background

This bill amends the *Superannuation Guarantee (Administration) Act 1992* to remove the obligation for employers to offer a choice of superannuation fund to temporary resident employees, or when superannuation funds merge.

The committee has no comment on this bill.

Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

Background

This bill amends various taxation and superannuation laws.

Schedule 1 repeals the legislation providing for the First Home Saver Accounts Scheme, including the related tax concessions.

Schedule 2 amends the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to:

- abolish the dependent spouse tax offset (DSTO);
- expand the dependant (invalid and carer) tax offset (DICTO) by removing the exclusion in relation to spouses previously covered by the dependent spouse tax offset;
- remove an entitlement to DSTO where it is made available as a component of another tax offset, and replace that component with a component made up of DICTO; and
- rewrite the notional tax offsets covering children, students and sole parents that are available as components of other tax offsets.

Schedule 3 makes a number of reforms to modernise the Offshore Banking Unit regime.

Schedule 4 amends the *Income Tax Assessment Act 1997* to exempt the Global Infrastructure Hub Ltd from liability to pay income tax on ordinary income and statutory income.

Schedule 5 amends the *Income Tax Assessment Act 1997* to update the list of specifically listed deductible gift recipients.

Schedule 6 makes a number of miscellaneous amendments to taxation, superannuation and other laws.

Schedule 7 amends the income tax laws to implement the final element of the investment manager regime.

Retrospective application Schedule 6, various provisions

This Schedule makes a number of miscellaneous amendments, including amendments concerning style and formatting changes, the repeal of redundant provisions, the correction of anomalous outcomes and corrections to previous amending Acts. The explanatory material, states that '[w]hile some of these amendments have retrospective application, taxpayers should not be adversely impacted' (at p. 6). While the committee notes this effort to address the question of possible disadvantage as a result of the retrospective application of certain provisions, the committee seeks the Assistant Treasurer's clarification as to whether or not there may be any circumstances in which it is possible that taxpayers will be adversely affected.

Pending the Assistant Treasurer'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.

Tax and Superannuation Laws Amendment (2015 Measures No. 3) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* and the *Shipping Reform (Tax Incentives) Act 2012* to:

- abolish the seafarer tax offset; and
- reduce the rates of the tax offset available under the research and development tax incentive for the first \$100 million of eligible expenditure by 1.5 percentage points.

The committee has no comment on this bill.

Tax and Superannuation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2015

Introduced into the House of Representatives on 27 May 2015

Portfolio: Treasury

Background

This bill amends the *Medicare Levy Act 1986* and the *A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Tax 1999* to increase the Medicare levy low-income thresholds for singles, families and single seniors and pensioners in line with increases in the consumer price index.

The committee has no comment on this bill.

Tax Laws Amendment (Small Business Measures No. 1) Bill 2015

Introduced into the House of Representatives on 28 May 2015

Portfolio: Treasury

Background

This bill amends the *Income Tax Rates Act 1986* to reduce the company tax rate from 30 per cent to 28.5 per cent for companies that are small business entities with an aggregated turnover of less than \$2 million.

The committee has no comment on this bill.

Tax Laws Amendment (Small Business Measures No. 2) Bill 2015

Introduced into the House of Representatives on 28 May 2015

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* and *Income Tax (Transitional Provisions) Act 1997* to:

- temporarily increase the threshold under which certain depreciating assets, costs incurred in relation to depreciating assets and general small business pools can be written off; and
- make consequential amendments; enable primary producers to claim an immediate deduction for capital expenditure on water facilities and fencing assets; and deduct capital expenditure on fodder storage assets over three years.

The committee has no comment on this bill.

Water Amendment Bill 2015

Introduced into the House of Representatives on 28 May 2015
Portfolio: Environment

Background

This bill amends the *Water Act 2007* to impose a statutory limit of 1500 gigalitres on Commonwealth purchases of surface water across the Murray-Darling Basin.

The bill will also amend the Murray-Darling Basin Plan 2012 to provide increased flexibility in the recovery of 450 gigalitres of water through efficiency measures funded under the Water for the Environment Special Account.

The committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Biosecurity Bill 2014

[Digest 2/15 – Reports 4 & 5/15]

On 12 May 2015 the Senate agreed to eight Government amendments and Senator Colbeck tabled a supplementary explanatory memorandum. On 14 May 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

Government amendment (4) on sheet ES125 (new clause 568)

The committee notes that new clause 568 provides the Inspector-General of Biosecurity with the power to require a person to answer questions or provide documentation if the Inspector-General believes on reasonable grounds that the person has information or documents relevant to a review. A person who contravenes a requirement to answer questions, give information or produce documents is liable to a civil penalty (the maximum penalty is 30 penalty units).

The committee notes that this civil penalty provision has been drafted in accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The need for these information gathering powers is addressed in the supplementary explanatory memorandum, which states that the powers are necessary to ensure that a reviewer has access to the information that is necessary to appropriately review processes within the biosecurity system and that this will allow for continual improvement in the assessment and management of biosecurity risk (p. 10). The statement of compatibility also considers the potential impact of the provision on the right to privacy and the right to be free from self-incrimination in some detail (pp 4–5).

Noting the information provided in the explanatory materials and the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment in relation to this matter.

Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015

[Digest 3/15 – no comment]

On 12 May 2015 the Senate agreed to one Opposition and two Independent (Senator Xenophon) amendments. On 13 May 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

The committee has no comment on these amendments.

National Water Commission (Abolition) Bill 2015

[Digest 13/14 – no comment]

On 13 May 2015 the Senate agreed to eight Government amendments, Senator Birmingham tabled 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.

Safety, Rehabilitation and Compensation Legislation Amendment (Exit Arrangements) Bill 2015

[Digest 3/15 – no comment]

On 12 May 2015 the House of Representatives agreed to 18 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.

Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015

[Digest 3/15 – no response required]

On 13 May 2015 the Senate agreed to seven Government amendments, the Minister for Employment (Senator Abetz) tabled a supplementary explanatory memorandum, and the bill was read a third time. On 14 May 2015 the House of Representatives agreed to the Senate amendments and the bill was passed.

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

Tribunals Amalgamation Bill 2014

[Digest 1/15 – Report 3/15]

On 11 May 2015 the Senate agreed to 21 Government, six Opposition and one Australian Greens amendments and the Attorney-General (Senator Brandis) tabled a supplementary explanatory memorandum. On 13 May 2015 the

House of Representatives agreed to the Senate amendments and the bill was passed.

Government amendment (7) on sheet EH158 (Schedule 1, items 64 and 65 to be opposed)

In the committee's *Third Report of 2015* the committee expressed concern that the rights of appellants may be diminished by a proposal in the bill to allow the determination of second reviews of social services matters to be conducted on the papers without the consent of the parties (pp 251–253).

The committee notes that this amendment, which removed this proposed change from the bill, addresses the committee's concerns in relation to this matter.

Opposition amendment (1) on sheet 7696 (new subsection 13(1))

In the committee's *Third Report of 2015* the committee expressed concern about the changes proposed in the bill to the provisions for the termination of members of the AAT (pp 244–247). The committee noted that the AAT forms an important part of the federal system of independent adjudication and that concerns about independence are of particular relevance where the function of a statutory decision-maker is to adjudicate disputes between citizen and government. In this context, the committee noted that termination provisions are an important part of the suite of statutory and other techniques to maintain tribunal independence.

This amendment provides that members of the AAT may only be terminated where an address praying for the termination is presented to the Governor-General by each House of the Parliament in the same session.

The committee notes that this amendment addresses the committee's concerns 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 44th Parliament.

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

Medical Research Future Fund Bill 2015

Medical Research Future Fund (Consequential Amendments) Bill 2015

Private Health Insurance (Prudential Supervision)(Consequential Amendments and Transitional Provisions) Bill 2015

Other relevant appropriation clauses in bills

Nil