

**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.

## **Broadcasting Legislation Amendment (Primary Television Broadcasting Service) Bill 2015**

Introduced into the House of Representatives on 19 August 2015

Portfolio: Communications

### **Background**

This bill amends the *Broadcasting Services Act 1992* to allow commercial and national free-to-air broadcasters to provide their primary television broadcasting services in either standard definition or high definition.

*The committee has no comment on this bill.*

## **Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015**

Introduced into the House of Representatives on 20 August 2015

Portfolio: Environment

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) to repeal section 487 which extends the meaning of ‘person aggrieved’ in the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act).

### **Rights, liberties or obligations unduly dependent on non-reviewable decisions—limitation on standing to seek judicial review**

#### **General comment**

This bill proposes to repeal section 487 of the EPBC Act. Under the ADJR Act, only persons who are ‘persons aggrieved’ have ‘standing’ to apply for judicial review. However, section 487 of the EPBC Act extends the meaning of ‘persons aggrieved’ for the purposes of the ADJR Act and, in so doing, expands the standing rule under the ADJR Act in relation to environmental decisions made under the EPBC Act. Section 487 enables individuals who are Australian citizens or residents, and organisations or associations established in Australia or an external territory, to seek judicial review if, in the two years prior to the decision they seek to challenge, they have engaged in a series of environmental conservation or research activities in Australia or an external territory.

The traditional approach to the question of standing (i.e. the question of who is entitled to seek judicial review of government action) focuses on whether individual interests have been affected by the impugned decision. This approach is reflected in the way the courts have interpreted the ‘person aggrieved’ test in the ADJR Act. The result of the proposed amendment is that standing to bring proceedings in relation to decisions under the EPBC Act will be restricted to the general standing requirement under the ADJR Act. In so doing the availability of judicial review is limited.

It is well accepted that restrictive standing rules pose particular problems in the area of environmental decision-making. Although environmental decisions affect the public generally insofar as the protection of the environment is a matter of established public interest, there may be no single person or group who can show that their interests are affected in a special way that is distinct from the interests of other members or classes of the public. The result is that there may be cases where decisions that breach important legal obligations which have been placed on government decision-makers (enacted to protect the public interest in the environment) cannot in practice be reviewed because no person or group's interests are affected in a manner which is distinct from the public generally. As environmental regulation often raises matters of general rather than individual concern, restrictive standing rules may therefore mean that such decisions are, in practice, beyond effective judicial review to ensure that the decisions comply with the law. From a scrutiny perspective, it is a matter of concern that the introduction of more restrictive standing rules may result in the inability of the courts, in at least some cases, to undertake their constitutional role (i.e. to ensure that Commonwealth decision-makers comply with the law).

The difficulty encountered by the focus on individual interests in the law of standing in the context of environmental decision-making explains why, in a significant number of cases, the courts have appeared to avoid applying the 'person aggrieved' test strictly or appear to have interpreted the test in a more liberal way. Indeed, environmental non-government organisations (environmental NGOs) have been given standing on the basis of a number of factors. For example in the case of *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 49 standing was granted on the basis that the group was a 'peak' body representing many groups, had been recognised by state and federal government agencies and departments in various ways (which included grant funding) and had conducted research into and made submissions on issues relevant to the particular decision. Although this approach to standing in environmental cases has been influential, it has also created uncertainty and it is fair to say that the case law lacks clear principles for determining when environmental NGOs will be accorded standing under the general law and under the 'person aggrieved' test of the ADJR Act. Considered against this background, the effect of the proposed amendment may not be to eliminate litigation but to refocus it—i.e. away from the question of whether there has been a breach of legal requirements towards the question of standing. There is a risk, therefore, that this

amendment will not substantially reduce litigation given the uncertainty as to the circumstances in which environmental NGOs will be granted standing.

The committee is concerned that the explanatory memorandum does not include any detailed justification for the proposed amendment. The Report of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) stated that section 487 had ‘created no difficulties and should be maintained’. Indeed, the Independent Review committee considered that the real question was whether the extended standing provisions in the Act ‘should be expanded further’ (at p. 261). The explanatory memorandum does not provide any evidence that indicates section 487 has led to inappropriate litigation or has led an inappropriately high number of review applications.

**Given that public interest litigation brought by environmental NGOs may in many situations be the only effective practical mechanism for enforcing laws enacted to protect the public interest in the environment, and the possibility that the proposed amendment may re-direct rather than eliminate litigation, the committee seeks detailed advice from the Minister as to why this limitation on the availability of judicial review of decisions under the EPBC Act is justified.**

*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 non-reviewable decisions, in breach of principle 1(a)(iii) of the committee’s terms of reference.*

# **Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015**

Introduced into the House of Representatives on 20 August 2015

Portfolio: Treasury

## **Background**

This bill is part of a package of three bills. The bill amends various Acts relating to foreign acquisitions and takeovers to:

- introduce certain civil and criminal penalties;
- transfer to the Australian Taxation Office the responsibility of regulating foreign investment in residential real estate; and
- lower screening thresholds for investments in Australian agriculture.

## **Availability of merits and judicial review**

### **General comment**

The explanatory memorandum notes that the bill does not provide for merits review or review under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). The justification for this approach is outlined in the explanatory memorandum (at p. 71):

Like the existing Act, the Bill does not provide for merits review of any decision and decisions remain excluded from review under the ADJR Act, although judicial review remains available under the Judiciary Act.

The Bill does not provide for the review of decisions on their merits because the decisions under the Act involve complex questions of government policy that can have broad ranging implications for persons other than those immediately affected by the decision. For example, when making a decision under the Act it may be proper for the Treasurer to take into account a broad range of factors, including national security, competition, Australian Government policies (including tax), impacts on the economy and the community, and character of the foreign investor. It is therefore not appropriate for decisions that have such a high political content to be subject to merits review. The provision of merits review might also result in applicants being less willing to provide sensitive information which is relevant to the decision if they believe there is a risk that such information may be disclosed during such proceedings.

The committee notes that the availability of the judicial review under section 39B of the *Judiciary Act 1903* is not of itself a sufficient reason to exclude decisions from review under the ADJR Act. The ADJR Act provides for a statutory form of review which is procedurally and substantively more straightforward than review under the Judiciary Act. However, in light of the explanation provided, the committee leaves the question of the appropriateness of merits review and review under the ADJR Act 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.*

### **Delegation of legislative power**

#### **Schedule 1, item 3, proposed section 37 of the *Foreign Acquisitions and Takeovers Act 1975***

This proposed section is a regulation-making power to provide for a number of exceptions to the operation of the Act. Specifically, the section provides that regulations may be made that provide that the *Foreign Acquisitions and Takeovers Act 1975* (the Act), or specified provisions of the Act, do not apply to:

- acquisitions of the kind or in the circumstances prescribed by the regulations;
- interests of the kind or in the circumstances prescribed by the regulations;
- Australian businesses of the kind or in the circumstances prescribed by the regulations; or
- foreign persons of the kind or in the circumstances prescribed by the regulations.

In addition, the regulations may provide that:

- land of a specified kind is not agricultural land; or
- specified foreign persons who take action in relation to interests in Australian land may disregard the fact that the land is agricultural land for all or specified purposes.

**As the explanatory memorandum does not indicate why it is considered appropriate for these important exceptions to be provided for in the regulations (rather than primary legislation), the committee seeks detailed advice from the Treasurer as to the rationale for this proposed significant delegation of legislative power.**

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

### **Delegation of legislative power**

#### **Schedule 1, item 4, proposed sections 44 and 48 of the *Foreign Acquisitions and Takeovers Act 1975***

Proposed section 44 permits regulations to be made that provide that a specified action is a 'significant action' for the purposes of the Act. The explanatory memorandum (at p. 51) provides three examples:

... it is anticipated that regulations will prescribe the following actions to be significant actions:

- the acquisition by a foreign person of an interest of at least 5 per cent in an entity or business that wholly or partly carries on an Australian media business;
- the acquisition by a foreign government investor of a direct interest in an Australian entity or Australian business; and
- the starting of an Australian business by a foreign government investor.

However, the explanatory memorandum does not explain why these and other proposed 'significant actions' cannot be included in the primary legislation rather than the regulations. **The committee therefore seeks detailed advice from the Treasurer as to the rationale for this proposed significant delegation of legislative power.**

The committee notes that the same issue arises in relation to proposed section 48 which specifies that the regulations may provide that a specified action is a 'notifiable action'. **The committee therefore also seeks the Treasurer's advice in relation to the rationale for this provision.**

*Pending the Treasurer'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.*

**Trespass on personal rights or liberties—strict liability offence**  
**Schedule 1, item 4, proposed section 119 of the *Foreign Acquisitions and Takeovers Act 1975***

The statement of compatibility (at pages 145–146) explains that the bill creates a strict liability offence:

New section [119] makes it an offence if a person fails to make and keep a record under Division 2 of Part 7 of the Act unless the Treasurer has notified the person that they do not need to make or keep the record. As the offence is one of strict liability it is only necessary for the prosecution to prove the person's alleged inaction — the person's intention is irrelevant. It is reasonable for this offence to be one of strict liability because the requirement is uncomplicated and easily satisfied, and the information is within the person's control. The compliance burden would otherwise be high where it cannot be known if records exist and against this the penalty is low. The maximum penalty is a fine not exceeding 30 penalty units rather than a fine and or a period of imprisonment.

**In light of the explanation provided, the committee leaves question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

**Trespass on personal rights or liberties—onus of proof**  
**Schedule 1, item 4, proposed section 129 of the *Foreign Acquisitions and Takeovers Act 1975***

The effect of this section is to place an evidential burden of proof on a defendant to establish an exception to an offence in relation to protected information (under new section 128). A defendant bears an evidential burden of proof to establish that he or she made a record of, disclosed or otherwise

used protected information in good faith in performing, or purportedly performing, his or her functions under the Act.

The statement of compatibility (at p. 144) suggests that:

The imposition of an evidential burden is justified because the reason why a defendant used or disclosed protected information will generally be a matter that is peculiarly within the defendant's knowledge. Moreover, the effect of the limitation is that the defendant must merely adduce or point to evidence that suggests a reasonable possibility that he or she disclosed the information in good faith. Once this is done, the prosecution must refute this beyond reasonable doubt to obtain a conviction (see section 13.3 of the *Criminal Code*). As a result, the risk that a person may be found guilty of an offence against new section 128 of the Act despite there being reasonable doubt about the person's guilt is considered to be low. Accordingly, to the extent this provision might be considered to limit the presumption of innocence, the limitation is reasonable in all the circumstances.

**In light of this explanation, which is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the committee leaves question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

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

**Trespass on personal rights or liberties—onus of proof  
Schedule 1, item 4, proposed subsection 133(6) of the *Foreign Acquisitions and Takeovers Act 1975***

This subsection provides that a person who fails to comply with a notice to give information under new subsection 133(1) does not commit an offence if the person 'complies with the notice to the extent to which the person is capable of complying with it'. A defendant bears an evidential burden in relation to this defence. The statement of compatibility suggests this 'is appropriate because it is a matter that will be peculiarly within the defendant's knowledge and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter' (p. 145). Further:

Once the person has adduced or pointed to evidence which suggests there is a reasonable possibility that the person has complied with the notice to the extent possible, the prosecution must refute this beyond reasonable doubt in

order to obtain a conviction. For this reason it is again considered that the risk of a person being found guilty of an offence against subsection 133(5) of the Act is low, and to the extent this provision might be considered to limit the presumption of innocence the limitation is reasonable in all the circumstances.

**In light of this explanation, the committee leaves 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.*

**Trespass on personal rights or liberties—privilege against self-incrimination**

**Schedule 1, item 4, proposed subsections 133(7) and 133(8) of the *Foreign Acquisitions and Takeovers Act 1975***

A person is not excused from giving information or producing a document under section 133 on the ground that doing so may tend to incriminate her or him. This abrogation of the privilege against self-incrimination is, however, subject to a use and derivative use immunity (in the case of an individual). The explanatory memorandum (at p. 100) suggests that the approach is appropriate:

The removal of the privilege, subject to a use or derivative use immunity, assists the Treasurer and the Commissioner to monitor and enforce compliance with this Act and thereby assist in the effective administration of this Act. That is in circumstances where information may be held offshore and information necessary to administer the Act may not otherwise be available. The effective administration of this Act is vital to ensuring that the Australian public continues to have confidence in the way foreign investment is regulated in Australia.

**In light of the immunities available and the explanation provided, the committee leaves question of whether the proposed approach in relation to this abrogation of the privilege against self-incrimination 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 legislative power**

### **Schedule 1, item 4, proposed subsection 139(3) of the *Foreign Acquisitions and Takeovers Act 1975***

This regulation-making power enables the making of regulations ‘in relation to a matter’ which can apply, adopt or incorporate, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. In so doing, the provision overrides subsection 14(2) of the *Legislative Instruments Act 2003*. The explanatory memorandum (at p. 103) contains a detailed justification of the regulation-making power:

7.27 It is anticipated that this power will be used to define the meaning of the term ‘agribusiness’ to be a business that is carried on, wholly or partly, in any of certain classes of the Australian and New Zealand Standard Industrial Classification Codes as in force from time to time, published by the Australian Bureau of Statistics (ABS), and which is published on the ABS website and available free of charge.

7.28 It is also anticipated that a regulation will be made that defines the term ‘US national’ to mean a national of the United States of America, as defined in Title III of the Immigration and Nationality Act of the United States of America. Defining the meaning of the term US national in this way ensures consistency with the terms of the Australia-United States Free Trade Agreement. A number of websites provide access to this statute free of charge, including the Legal Information Institute.

7.29 The Government will continue to assist people to comply with their obligations under this Act, including by taking steps to draw the attention of stakeholders to any relevant changes to any document which is incorporated by reference in the regulations, including by publishing information on the internet. However, it is not anticipated that a regulation would incorporate by reference any document which is frequently amended.

While this information is very useful, the committee notes that proposed subsection 139(3) itself is not drafted in a way which would limit its use to the examples indicated above, or in a way that would require any material incorporated by reference to be freely and readily available. **The committee’s preference would be for the provision to either be restricted to the examples provided, or to include a requirement for free and public access to any incorporated material. However, in light of the detailed explanation provided, the committee leaves the question of whether the proposed approach to the delegation of legislative power in this provision is appropriate to the Senate as a whole.**

**The committee also draws this provision 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.*

**Trespass on personal rights or liberties—onus of proof  
Schedule 4, item 3, proposed section 354-5 of the *Taxation Administration Act 1953* (the TA Act)**

This provision is similar to the notice provision in proposed section 133 of the Foreign Acquisitions and Takeovers Act discussed above. A person who fails to comply with a notice to give information under proposed subsection 354-5(1) of Schedule 1 to the TA Act may be guilty of an offence against subsection 8C(1) of that Act. However, the effect of subsection 8C(1B) is that a person does not commit an offence to the extent to which the person is not capable of complying with the obligation. A defendant bears an evidential burden in relation to this matter.

The statement of compatibility (at p. 145) suggests that:

This is appropriate because generally only the defendant will know the reason why she or he will was unable to fully comply with the notice. For these reasons, to the extent this provision might be considered to limit the presumption of innocence the limitation is reasonable in all the circumstances.

**In light of this explanation, the committee leaves 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.*

**Trespass on personal rights or liberties—absolute liability**  
**Schedule 4, item 3, proposed section 354-5 of the *Taxation Administration Act 1953***

The statement of compatibility (at pages 145–146) explains that the bill relies on an absolute liability offence to enforce the obligation to give information created by new subsection 354-5(1):

A person who fails to comply with a notice given under new [subsection 354-5(1)] of Schedule 1 to the TAA 1953 may be guilty of an offence against section 8C of the TAA 1953 which is an offence of absolute liability. The maximum penalty is generally a fine of 20 penalty units. However, in the case of a person who has two or more relevant convictions, the maximum penalty is a fine of 50 penalty units or 12 months imprisonment or both. The notice requirement is uncomplicated, readily understood and limited to a narrow class of information which is readily available to the person. It is necessary because it may otherwise not be possible to obtain information about complex and opaque offshore corporate and business structures and ownership arrangements. These are matters purely within the knowledge of those involved and about which they can be expected to have knowledge. Noting that a person need only comply to the extent they are capable of doing so, it is appropriate to rely on an offence of absolute liability to enforce this obligation.

**In light of the explanation provided, the committee leaves 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.*

**Statement of compatibility: cross-referencing errors**

The committee draws the Treasurer's attention to apparent errors in the documents accompanying the introduction of the bill:

- page 145: it appears that the reference to ‘new section 128’ at the start of paragraph 13.27 should actually be a reference to new section 119; and
- pages 145–146: references to ‘section 354(1)’ and ‘section 354-1’ on these pages appear to be references to subsection 354-5(1).

**The committee notes that it would assist Senators and others in more readily understanding the operation of the bill if an updated version of the explanatory memorandum addressing these (and any other) apparent referencing errors is tabled in the Parliament.**

## **Foreign Acquisitions and Takeovers Fees Imposition Bill 2015**

Introduced into the House of Representatives on 20 August 2015

Portfolio: Treasury

### **Background**

This bill is part of a package of three bills. The bill amends the *Foreign Acquisitions and Takeovers Act 1975* to introduce fees on all foreign investment applications.

*The committee has no comment on this bill.*

## **Marriage Equality Plebiscite Bill 2015**

Introduced into the Senate on 19 August 2015

By: Senators Rice, Lazarus, Leyonhjelm, Lambie, Muir and Xenophon

### **Background**

This bill requires a national plebiscite on the issue of same-sex marriage be conducted at the next general election.

*The committee has no comment on this bill.*

# **Marriage Legislation Amendment Bill 2015**

Introduced into the House of Representatives on 17 August 2015

By: Mr Entsch, Ms Gambaro, Ms TM Butler, Mr Ferguson, Mr Bandt, Ms McGowan and Mr Wilkie

## **Background**

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

### **Delegation of legislative power—retrospectivity and *Henry VIII* clause Schedule 2, item 2**

Subitem 2(1) of Schedule 2 will allow regulations to be made amending Acts, including the *Marriage Act 1961* and the *Sex Discrimination Act 1984*, that are consequential on, or that otherwise relate to, the amendments made by Schedule 1. The regulations may therefore directly amend the text of an Act and thus this provision is considered to be a *Henry VIII* clause. However, the bill provides that the regulation-making power may only be exercised during the period of 12 months starting on the commencement of the item.

In addition, subitems 2(3) and (4) of Schedule 2 allow for the retrospective commencement of the regulations, even if this would affect the rights of a person or impose liabilities. However, subitem 2(5) specifies that a person cannot be convicted of an offence or have a pecuniary penalty imposed in relation to conduct contravening a retrospective regulation. The explanatory memorandum states that ‘this will provide adequate protection from the negative effects of any retrospective regulations’ and that ‘it will only be necessary to exercise the power to make retrospective regulations if the necessary regulations cannot be made before Schedule 1 commences’.

More generally, the explanatory memorandum provides the following rationale for this approach to the making of consequential amendments:

At the time of introduction of the Bill, it was not possible to ascertain all of the consequential amendments that might be required. It is likely that there will be only a short period of time between the passage of the Bill and the commencement of Schedule 1, which may not provide sufficient time to pass a Bill containing any necessary consequential amendments before that commencement. Including a regulation-making power will allow any

necessary consequential amendments to be made before that commencement, providing a seamless transition from the old law to the new law.

In relation to allowing for retrospective commencement of the regulations, the explanatory memorandum states that:

Allowing retrospective commencement is necessary to ensure that all consequential amendments commence at exactly the same time as the amendments to the *Marriage Act 1961*. It is impossible to know in advance whether any of the necessary consequential amendments will adversely affect rights or impose liabilities. This is because a single amendment might be advantageous for one class of person, but disadvantageous for another class.

**The committee draws this significant delegation of power and the possibility of retrospective commencement to the attention of Senators. However, in light of the explanation provided, the committee leaves question of whether the proposed approach to the delegation of legislative power in this provision is appropriate to the Senate as a whole.**

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

## **Register of Foreign Ownership of Agricultural Land Bill 2015**

Introduced into the House of Representatives on 20 August 2015

Portfolio: Treasury

### **Background**

This bill is part of a package of three bills. The bill establishes a register of foreign ownership of agricultural land to be administered by the Commissioner of Taxation and provides for the collection of information and publication of statistics.

*The committee has no comment on this bill.*

## **Social Security Legislation Amendment (Debit Card Trial) Bill 2015**

Introduced into the House of Representatives on 20 August 2015

Portfolio: Social Services

### **Background**

This bill enables a trial phase of new cashless welfare arrangements in response to a key recommendation from Mr Andrew Forrest's *Review of Indigenous Jobs and Training*.

*The committee has no comment on this bill.*

## **Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015**

Introduced into the House of Representatives on 20 August 2015  
Portfolio: Treasury

### **Background**

This bill amends various Acts relating to taxation.

Schedule 1 amends Subdivision 124-M of the *Income Tax Assessment Act 1997* relating to scrip for scrip roll-over

Schedule 2 removes an income tax exemption which applied to employees of an Australian government agency who work overseas for not less than 91 continuous days in the delivery of Official Development Assistance.

Schedule 3 amends the *Superannuation (Unclaimed Money and Lost Members) Act 1999* to increase the account balance threshold below which small lost member accounts will be required to be transferred to the Commission of Taxation from \$2,000 to \$4,000 from 31 December 2015, and from \$4,000 to \$6,000 from 31 December 2016.

### **Retrospective commencement**

#### **Schedule 1, item 15**

The amendments made by Schedule 1 (relating to the integrity of the scrip for scrip roll-over) apply in relation to capital gains tax events happening after 7.30 pm on 8 May 2012. The explanatory memorandum (at p. 22) states that:

The retrospective application of these amendments is appropriate. The Federal Court's decision in AXA revealed significant risks to the integrity provisions of the scrip for scrip roll-over. Addressing these integrity concerns will ensure that the roll-over operates as intended.

In developing the legislation, the Government has undertaken extensive consultation with interested parties since the publication of the proposals paper in July 2012. This was followed by public consultation on draft legislation in May 2015. Adverse impacts on taxpayers are therefore minimal.

**The committee notes the statement that adverse impacts on taxpayers will be minimal, however (depending on the circumstances in a particular**

case) the committee is likely to have scrutiny concerns where a retrospective provision has even a ‘minimal’ adverse impact. The committee therefore seeks the Assistant Treasurer’s further advice as to:

- the need and rationale for the retrospective application of these amendments; and
- whether and how the retrospective application of these amendments may have an adverse impact on taxpayers, including any relevant concerns raised during the public consultation process.

*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 (Better Targeting the Income Tax Transparency Laws) Bill 2015**

Introduced into the House of Representatives on 20 August 2015  
Portfolio: Treasury

### **Background**

This bill amends *Taxation Administration Act 1953* to ensure that the release of information by the Commission of Taxation under the income tax disclosure laws does not affect the privacy, personal security and market environment of Australian-owned private companies.

*The committee has no comment on this bill.*

## **COMMENTARY ON AMENDMENTS TO BILLS**

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

*[Digest 4 & 8/15 – Report 5/15]*

On 19 August 2015 the Senate agreed to two Australian Greens amendments and the bill was read a third time.

These amendments remove schedules 5 and 6 from the bill. Schedule 5 proposed to insert the concept of being ‘knowingly concerned’ in the commission of an offence as an additional form of secondary criminal liability in section 11.2 of the *Criminal Code*. Schedule 6 proposed to introduce mandatory minimum sentences of five years imprisonment for firearm trafficking.

The committee takes this opportunity to draw Senators attention to the comments outlining scrutiny concerns in relation to these provisions (under principle 1(a)(i) of the committee’s terms of reference relating to trespassing unduly on personal rights and liberties). The committee’s comments on schedule 5 (‘knowingly concerned’) are contained in the committee’s *Fifth Report of 2015* at pp 328–333 and the committee’s comments on schedule 6 (‘penalties for firearms trafficking offences’) are contained in the committee’s *Alert Digest No. 4 of 2015* at pp 11–12.

### **Omnibus Repeal Day (Spring 2014) Bill 2014**

*[Digest 15/14 – Report 1/15]*

On 19 August 2015 the Senate considered the message from the House of Representatives which indicated that the House disagreed to the seven Senate amendments to the bill, the Senate then resolved to:

- (a) insist on six amendments to which the House had disagreed; and
- (b) not insist on the seventh amendment but agreed to an amendment in place of that amendment.

**The committee has no comment on this replacement amendment.**

**Passports Legislation Amendment (Integrity) Bill 2015**  
*[Digest 6/15 – Report 7/15]*

On 19 August 2015 the House of Representatives agreed to three Government amendments, the Minister for Defence (Mr K J Andrews) presented a supplementary explanatory memorandum and the bill was read a third time.

**Government amendment (3) on sheet HB118**

**The committee commented on proposed subsection 53(4) in its *Seventh Report of 2015* (at p. 559–561).**

**This provision confers (in relation to the issuing of travel documents) a broad discretionary power on the Minister to refuse any name or signature of a person that the Minister considers to be unacceptable, inappropriate or offensive. Among other things, the committee had sought advice as to whether this power will be subject to merits review.**

**The committee welcomes this amendment which provides that a decision to refuse a name or signature of a person under subsection 53(4) will be subject to merits review.**

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

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

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

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

<b>Bill/Act</b>	<b>Section/Subsection</b>	<b>Offence</b>	<b>Penalty</b>
Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015	Schedule 1, item 4, proposed section 133 of the <i>Foreign Acquisitions and Takeovers Act 1975</i>	Failure to comply with a notice to give information	Imprisonment for 6 months or 30 penalty units, or both
Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015	Schedule 4, item 3, proposed section 354-5 of the <i>Taxation Administration Act 1953</i>	Failure to comply with requirements under taxation law	20 penalty units for first offence; 40 penalty units for a second offence; or 50 penalty units or imprisonment for a period not exceeding 12 months (or both) for subsequent offences

## **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*.

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

Nil

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

Nil