

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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Senate Standing Legislation Committee Inquiries

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

Corporations Amendment (Auditor Registration) Bill 2016

Introduced into the House of Representatives on 16 March 2016

Portfolio: Treasury

Background

This bill amends *Corporations Act 2001* to address the legal consequences arising from a legislative instrument issued by the Australian Securities and Investments Commission in November 2004 which approved the CPA and the Institute of Chartered Accountants in Australia auditing competency standard.

Retrospective validation

General comment

This bill proposes to retrospectively validate a legislative instrument that may otherwise be invalid as it was not lodged and registered as required by section 32 of the *Legislation Act 2003*. The legislative instrument is an auditing competency standard, approved by ASIC under section 1280A of the *Corporations Act 2001* in 2004, which had been produced by CPA Australia and the Institute of Chartered Accountants in Australia. The result is that the validity of the registration of an auditor on the basis of this standard since 1 December 2005 is uncertain.

The explanatory memorandum (at p. 3) acknowledges the retrospective operation of this amendment and states:

The retrospective effect of the amendments will not add any new regulatory requirements. Rather, the retrospective effect of the amendments is necessary to ensure that decisions and actions taken by auditors, the regulator and business which relied upon the enforceability and integrity of the Legislative Instrument are valid, and the retrospective effect of the Bill is necessary to provide certainty for those decisions and actions.

Given the nature of this instrument and the explanation provided the committee makes no further comment.

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

Customs and Other Legislation Amendment Bill 2016

Introduced into the House of Representatives on 16 March 2016

Portfolio: Immigration and Border Protection

Background

This bill amends the *Customs Act 1901* and the *Commerce (Trade Descriptions) Act 1905* to:

- enable the minister to exempt certain persons from liability to pay the import declaration processing charge;
- extend the circumstances in which an application can be made to move, alter or interfere with goods for export that are subject to customs control;
- remove certain requirements and clarify provisions concerning the making of tariff concession orders for made-to-order capital equipment;
- remove unnecessary and outdated provisions;
- enable an officer to inspect and examine goods that they believe are goods prescribed by the Commerce (Imports) Regulations 1940 (the Regulations); and
- enable the Regulations to prescribe penalties for offences against those regulations.

The bill also amends the *Maritime Powers Act 2013* to clarify that the powers under that Act are able to be exercised in the course of passage through or above the waters of another country in a manner consistent with the United Nations Convention on the Law of the Sea.

The committee has no comment on this bill.

Fair Work Amendment (Protecting Australian Workers) Bill 2016

Introduced into the Senate on 15 March 2016

By: Senator Cameron

Background

This bill amends the *Fair Work Act 2009* to:

- clarify the application of the Act to migrants;
- require Fair Work Information Statements to contain certain information;
- provide additional protection from adverse action in certain circumstances;
- introduce a ‘reasonable person’ test in determining whether an employer has engaged in sham contracting;
- enable the court to make orders requiring directors of phoenix companies to pay amounts owed by failed companies and orders disqualifying certain persons from managing corporations;
- increase maximum penalties for certain breaches of the Act; and
- introduce new offences for serious contraventions of the Act that involve the use of coercion or threats.

The bill also amends the *Corporations Act 2001* to make consequential amendments.

The committee has no comment on this bill.

Fair Work (Registered Organisations) Amendment Bill 2014 [No. 3]

Introduced into the House of Representatives on 18 April 2016

Portfolio: Employment

General comment

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

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

On 19 March 2015 an identical bill was reintroduced into the House of Representatives for a second time and the committee commented on it in *Alert Digest No. 4 of 2015*. The Minister's response to the committee's comments on this bill was then published in its *Fifth Report of 2015*.

On 18 April 2016 an identical bill was reintroduced into the House of Representatives for a third time. The committee therefore restates its views as outlined in *Alert Digest No. 4 of 2015* and its *Fifth Report of 2015*, both of which can be found on the committee's website at http://www.aph.gov.au/senate_scrutiny.

The committee notes that in relation to some provisions it had requested that the former Minister include additional information in the explanatory memorandum. **The committee notes its disappointment that the Minister did not take the opportunity to include this information in the explanatory memorandum before the current bill was introduced. In requesting that important information be included in an explanatory memorandum, the committee's intention is to ensure that such information is readily accessible in a primary resource to aid in the understanding and interpretation of a bill.**

Financial System Legislation Amendment (Resilience and Collateral Protection) Bill 2016

Introduced into the House of Representatives on 16 March 2016

Portfolio: Treasury

Background

This bill amends the *Payment Systems and Netting Act 1998* to:

- enable financial institutions in Australia to comply with internationally-agreed margining requirements when dealing in over-the-counter derivatives; and
- provide legal certainty about the operation of Australian law in relation to termination rights under certain financial market transactions and approved Real Time Gross Settlement systems, approved netting arrangements and netting markets in all market conditions.

The bill also makes consequential amendments to five Acts.

The committee has no comment on this bill.

Migration Amendment (Family Violence and Other Measures) Bill 2016

Introduced into the House of Representatives on 16 March 2016

Portfolio: Immigration and Border Protection

Background

This bill amends the *Migration Act 1958* to introduce a sponsorship framework for the sponsored family visa program including to:

- separate sponsorship assessment from the visa application process;
- require the approval of persons as family sponsors before any relevant visa applications are made;
- impose statutory obligations on persons who are or were approved as family sponsors;
- provide for sanctions if such obligations are not satisfied;
- facilitate the sharing of personal information between parties to the application; and
- enhance the management of family violence where it occurs in the family visa program.

Delayed/uncertain commencement

Clause 2

Clause 2 provides that Schedule 1 to the Act commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 12 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period

There is an explanation for the proposed timing for commencement at p. 3 of the explanatory memorandum:

The delayed commencement of Schedule 1 is to allow adequate time for regulation and administrative changes to be made which are necessary to give effect to the legislative changes made by this Act. It is anticipated that Schedule 1 will commence by Proclamation in late 2016 or early 2017, however due to an impending election this time frame may be delayed.

Given the explanation provided the committee makes no further comment in relation to the commencement of these provisions.

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

National Disability Insurance Scheme Amendment Bill 2016

Introduced into the House of Representatives on 16 March 2016

Portfolio: Social Services

Background

This bill amends the *National Disability Insurance Scheme Act 2013* to:

- increase the maximum number of Board members of the Agency from nine to 12 members, including the Chair; and
- clarify quorum arrangements for board meetings.

The committee has no comment on this bill.

National Disability Insurance Scheme Savings Fund Special Account Bill 2016

Introduced into the House of Representatives on 16 March 2016

Portfolio: Social Services

Background

This bill establishes the National Disability Insurance Scheme Savings Fund Special Account to assist the Commonwealth to meet its funding obligations in relation to the National Disability Insurance Scheme.

The committee has no comment on this bill.

Northern Australia Infrastructure Facility Bill 2016

Introduced into the House of Representatives on 17 March 2016

Portfolio: Industry, Innovation and Science

Background

This bill establishes the Northern Australia Infrastructure Facility and a Board of the Facility to make investment decisions for the facility.

The bill also provides up to \$5 billion in concessional finance over five years to provide financial assistance to state and territory governments to develop economic infrastructure in the Northern Territory and northern parts of Western Australia and Queensland.

The committee has no comment on this bill.

Northern Australia Infrastructure Facility (Consequential Amendments) Bill 2016

Introduced into the House of Representatives on 17 March 2016

Portfolio: Industry, Innovation and Science

Background

This bill amends the *Export Finance and Insurance Corporation Act 1991* to allow the Export Finance and Insurance Corporation to:

- assist the Northern Australia Infrastructure Facility;
- assist, on agreement, the states and territories; and
- charge fees to the facility and the states and territories for the services it provides in performing its functions for them.

The committee has no comment on this bill.

Road Safety Remuneration Amendment (Protecting Owner Drivers) Bill 2016

Introduced into the House of Representatives on 18 April 2016

Portfolio: Employment

Background

This bill will suspend the operation of the Contractor Drivers Minimum Payments Road Safety Remuneration Order 2016 (the 2016 Order), and any subsequent orders that may be made by the Road Safety Remuneration Tribunal, until 1 January 2017 and allow the Minister to make rules dealing with transitional and other matters.

Delegation of legislative power

Schedule 1, subitem 4(3)

Subitem 4(3) provides that the rules may provide for the main Act (i.e. the *Road Safety Remuneration Act 2012*) to have effect in relation to the 2016 Order or a later order with any modifications prescribed by the rules. In this way the primary legislation may take effect subject to modifications made by the rules (delegated legislation). However, this is limited to the operation of the 2016 Order or later orders which the bill is designed to suspend, i.e. the provision is quite limited in its focus.

Given the limited application of this provision the committee makes no further comment.

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

Road Safety Remuneration Repeal Bill 2016

Introduced into the House of Representatives on 18 April 2016

Portfolio: Employment

This bill received the Royal Assent on 19 April 2016

Background

This bill will repeal the *Road Safety Remuneration Act 2012* and allow the Minister to make rules dealing with transitional matters.

The committee has no comment on this bill.

Social Services Legislation Amendment (Consistent Treatment of Parental Leave Payments) Bill 2016

Introduced into the House of Representatives on 16 March 2016

Portfolio: Social Services

Background

This bill amends the social security and veterans' entitlements legislation to ensure Commonwealth parental leave payments under the *Paid Parental Leave Act 2010* are included in the income test for Commonwealth income support payments.

The committee has no comment on this bill.

Statute Law Revision Bill (No. 2) 2016

Introduced into the House of Representatives on 17 March 2016
Portfolio: Attorney-General

Background

This bill corrects technical errors, inserts generic references and removes obsolete provisions in various Acts.

The bill also repeals the *Forestry Marketing and Research and Development Services (Transitional and Consequential Provisions) Act 2007*.

The committee has no comment on this bill.

Statute Law Revision Bill (No. 3) 2016

Introduced into the House of Representatives on 18 April 2016

Portfolio: Prime Minister

Background

This bill corrects technical errors that have occurred in Acts as a result of drafting and clerical mistakes.

The committee has no comment on this bill.

Statute Update Bill 2016

Introduced into the House of Representatives on 17 March 2016

Portfolio: Attorney-General

Background

This bill amends various Acts to:

- replace references to penalties expressed as a number of dollars with penalties expressed as a number of penalty units;
- replace references to “maximum penalty” with “penalty”;
- provide that provisions relating to evidentiary status of a certificate (or other instrument or register) clearly provide that it is prima facie evidence of the matters stated in it; and
- update references to aircraft registered in accordance with the Civil Aviation Regulations 1988.

Delegation of legislative power—penalties in regulations

Schedule 1

Schedule 1 to the bill relates to references to dollar penalties in Commonwealth legislation. The explanatory memorandum (at p. 5) notes that current Commonwealth drafting practice is to express penalties for criminal offences as a number of penalty units. (The current value of a penalty unit is \$180 and under subsection 4AA(3) of the *Crimes Act 1914* the value of a penalty unit will be indexed every three years from 1 July 2018.)

The explanatory memorandum notes that many older Commonwealth Acts do not follow the current drafting practice as they contain provisions that create a criminal offence and express the penalty as an amount in dollars. However, existing section 4AB of the *Crimes Act 1914* has the effect that if the penalty for a criminal offence is expressed in dollars, it is deemed to be converted into a penalty of a certain number of penalty units (by dividing the number of dollars by 100, and rounding up to the next whole number if necessary). The result is that the actual legal penalty for the offence is higher than is stated in the provision. For example, if a provision refers to a penalty of \$10,000, this is converted into a reference to a penalty of 100 penalty units, which is currently \$18,000.

While this provides a comprehensive and consistent mechanism for linking older penalties expressed in dollar amounts to the current use of penalty units, the approach has a number of problems. As the explanatory memorandum suggests, ‘converting dollar penalties under section 4AB of the *Crimes Act 1914* is time consuming for the community and the appearance of dollar amounts on the face of the statute book that are less than the actual legal penalty can be misleading.’ Schedule 1, therefore, proposes to ‘convert existing penalties expressed as a number of dollars into penalties expressed as a number of penalty units to remove the need to convert the amounts and reduce the potential for confusion’.

At a general level, the committee has no comment in relation to this aspect of the amendments in Schedule 1.

However, the explanatory memorandum (at p. 5) further notes that:

Some of the items in this Schedule also amend regulation-making powers that authorise regulations to prescribe offences with penalties not exceeding an amount expressed in dollars. Current drafting practice is to express these maximum amounts in penalty units. The amendments update the references to refer to a number of penalty units, using the same formula as applies for converting dollar penalties under section 4AB of the *Crimes Act 1914*.

In this regard, there are a number of scrutiny points of relevance. First, it is not clear to the committee that the formula for converting dollar penalties under section 4AB of the *Crimes Act 1914* is applicable to existing regulation-making powers that authorise regulations to prescribe offences with penalties not exceeding an amount expressed in dollars.

For example, paragraph 42(d) of the *Australian War Memorial Act 1980* currently provides that the ‘Governor-General may make regulations...for prescribing penalties not exceeding a fine of \$500 for offences against the regulations’. It is not clear that section 4AB of the *Crimes Act 1914* would apply to the \$500 maximum limit specified in this provision, and, if this is the case, it is currently not permissible for regulations made pursuant to this provision to prescribe a penalty over \$500. However, the amendment in item 56 of Schedule 1 to this bill will omit ‘\$500’ from this provision and substitute ‘5 penalty units’. Therefore, regulations made pursuant to the new provision could prescribe penalties up to \$900. While in some respects this is not a significant penalty, it would represent a substantial increase in the level of penalty able to be prescribed under the regulations.

Second, it would also mean that the indexation of the value of penalty units in subsection 4AA(3) of the *Crimes Act 1914* will apply to these provisions and therefore the level of penalty able to be prescribed under the regulations will continue to increase over time.

Third, while it is generally considered that the creation of offences in regulations with a maximum penalty no greater than 50 penalty units for an individual (or 250 penalty units for a body corporate) may be acceptable, the committee will still usually expect a justification in the explanatory memorandum in any instance where penalties (of any level) are to be set in regulations (see the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) at p. 45). In this instance, as noted above, it appears that amendments proposed in schedule 1 to various regulation-making powers could have the effect of substantially increasing the level of penalties able to be set by regulation.

The committee therefore seeks the Attorney-General's advice as to whether section 4AB of the *Crimes Act 1914* applies to existing regulation-making powers that authorise regulations to prescribe offences with penalties not exceeding an amount expressed in dollars. If it does not, the committee also requests:

- **advice as to rationale for increasing the level of penalties able to be set by regulation;**
- **advice as to rationale for allowing the level of penalties able to be set by regulation to be automatically increased by indexation; and**
- **a list outlining each instance in which this occurs in the bill, including the current and proposed new maximum penalties able to be prescribed by the relevant regulations. (As this is an omnibus bill which proposes a large number of amendments across many portfolios, the committee considers that it would assist Parliamentary scrutiny if this list were also included in the explanatory memorandum accompanying the bill. This would enable Senators and others to quickly identify the items in the bill that propose amendments to regulation-making powers, as distinct from the other proposed amendments to penalty provisions).**

Pending the Attorney-General'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

Superannuation Legislation Amendment (Choice of Fund) Bill 2016

Introduced into the House of Representatives on 17 March 2016

Portfolio: Treasury

Background

This bill amends the *Superannuation Guarantee (Administration) Act 1992* to provide that employees are able to choose their own superannuation fund for their compulsory employer contributions where they are employed under a workplace determination or enterprise agreement made after 1 July 2016.

The committee has no comment on this bill.

Superannuation Legislation Amendment (Transparency Measures) Bill 2016

Introduced into the House of Representatives on 17 March 2016

Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* to:

- require trustees of regulated superannuation funds with five or more members to publish a choice product dashboard for each of their fund's ten largest choice investment options;
- exempt pooled superannuation trusts and eligible rollover funds from the product dashboard requirements;
- implement the existing portfolio holdings disclosure obligations; and
- require that funds publish, for each of their investment options, information about the nature and value of financial products or other property that the fund or associated entity of the fund, has directly invested in.

The committee has no comment on this bill.

Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016

Introduced into the House of Representatives on 17 March 2016

Portfolio: Treasury

Background

This bill amends various Acts relating to taxation, superannuation and grants.

Schedule 1 establishes a remedial power for the Commission of Taxation in relation to certain unforeseen or unintended outcomes in taxation and superannuation laws.

Schedule 2 amends the *Income Tax Assessment Act 1997* to allow primary producers to access income tax averaging ten income years after choosing to opt out, instead of that choice being permanent.

Schedule 3 amends the *A New Tax System (Luxury Car Tax) Act 1999* to provide relief from luxury car tax to certain public institutions that import or acquire luxury cars for the sole purpose of public display.

Schedule 4 makes a number of minor amendments across taxation and superannuation laws to provide certainty for taxpayers.

Delegation of legislative power—Commissioner of Taxation's remedial power

Schedule 1

Schedule 1 to this bill proposes to confer upon the Commissioner of Taxation a new and significant 'remedial power' to modify, by a disallowable legislative instrument, the operation of a taxation law. Although the remedial power does not empower the Commissioner to make a textual amendment to the relevant taxation law, it is akin to a so-called Henry VIII law as it enables a legislative instrument to modify the operation of primary legislation. As applied, the power therefore clearly enables the content of the law to be changed.

The remedial power (see schedule 1, item 3, proposed section 370-5) gives the Commissioner a discretion to determine a modification of the operation of a taxation law where:

- the ‘modification is not is not inconsistent with the intended purpose or object of the provision’; and
- the ‘Commissioner considers the modification to be reasonable, having regard to: (i) the intended purpose or object of the provision; and (ii) whether the cost of complying with the provision is disproportionate to that intended purpose or object’; and
- the Commissioner is advised, by a specified person, that ‘any impact of the modification on the Commonwealth budget would be negligible’.

The remedial power is an extraordinary power. It confers legislative power on an unelected official to modify the operation of significant primary legislation. Although it only arises in the limited circumstances outlined above, it nevertheless has a very broad application as it applies to any taxation law which is defined broadly in the *Income Tax Assessment Act 1997* to include an Act or parts of an Act of which the Commissioner has the general administration (and legislative instruments made under such Acts).

The explanatory materials provide a detailed and useful justification for the introduction of the remedial power. The following features of approach taken, or the context in which the power will be exercised, were given emphasis:

- Proposed subsection 370-5(4) provides that an entity must treat a modification made under the power as not applying to it and any other entity if the modification would produce a result for the first entity that is ‘less favourable’ than would have been the case absent the modification (see explanatory memorandum, pp 11 and 25–28). Furthermore, proposed subsection 370-5(5) provides that a determination made under the remedial power will not apply to an entity where it would affect a right or liability of that entity under an order made by a court before the commencement of the determination. (explanatory memorandum, p. 29)
- The ‘jurisdictional limits’ on the exercise of the remedial power will be subject to judicial review (as is the case with any statutory power to make a legislative instrument).
- Section 17 of the *Legislation Act 2003* (the LA) provides, in effect, that before exercising the power the Commissioner must be satisfied that any

appropriate and reasonably practicable consultation has been undertaken (see explanatory memorandum, pp 11 and 23–24).

- The explanatory memorandum (at p. 11) states that the remedial power will, in practice, only be used as a last resort, where other options (such as applying a purposive approach or the Commissioner’s general powers of administration) cannot provide a suitable solution. Further, in some cases it may be more appropriate for the Commissioner to seek a Parliamentary amendment rather than to use the power.
- The explanatory materials also emphasise that a determination is, as a disallowable instrument, subject to parliamentary accountability and that the ordinary rules in the LA apply. Thus, for example, any instrument made under this power would not be enforceable if it had not been registered on the Federal Register of Legislation.
- Item 4 of Schedule 1 confers a discretionary power on the Minister to seek a review of the remedial power provisions within 3–5 years of their commencement. If such a review is commissioned it must be tabled in each House of Parliament within 15 sitting days of the Minister receiving the report.

The explanatory memorandum also sets out in detail the reasons why the remedial power is considered necessary (see p. 14). In principle, the committee agrees that the complexity of taxation laws may give rise to unintended outcomes. It is also accepted that where the only response available is to amend the primary legislation this may (properly) involve a lengthy process. In light of these reasons and points offered in justification of the overall approach noted above, the committee considers that the remedial power may have the potential to be a plausible policy response to a practical problem encountered in the administration of taxation laws.

Nevertheless the committee has a number of questions and concerns.

First, the committee questions whether the full breadth of the power is necessary. The explanatory materials do not consider whether it would be possible to limit the application of the remedial power to those areas of taxation law and administration where the problem of unintended consequences regularly arises. Relatedly, from a scrutiny perspective, it would be preferable if the discretion to invoke the remedial power is limited or structured by the inclusion of legislative guidance as to the circumstances where parliamentary amendment of the primary legislation will be required

(rather than use of the remedial power). The explanatory memorandum acknowledges (at p. 11) that there will be some circumstances where change to primary legislation is more appropriate but does not expressly address whether the bill could include guidance about those circumstances. Nor are examples that illustrate such circumstances provided. The committee is concerned that there is nothing in the proposed amendments to ensure that the remedial power will be used in practice to complement rather than substitute ordinary processes to modify primary legislation. **The committee seeks the Assistant Treasurer’s advice in relation to the above points.**

Second, although it is accepted that the satisfaction of the jurisdictional limits (proposed subsection 370-5(1)) for the making of a determination under the remedial power could be determined in judicial review proceedings, the committee notes that the question of the reasonableness of the modification is a question which would only be reviewable on limited grounds (that is, courts would not be able to review the merits of these determinations). **In this context, the committee seeks the Assistant Treasurer’s advice as to whether a breach of the budget notification requirement (in proposed paragraph 370-5(1)(c)) is intended to result in the invalidity of the determination.**

Third, it is noted that the ‘less favourable result’ test (see proposed subsection 370-5(4)) involves some complexity and may generate uncertainty in its application. The committee recognises (and welcomes) the need to ensure that changes to the operation of taxation laws made by use of this extraordinary remedial power do not adversely affect taxpayers. The committee also acknowledges the detailed explanation as to the rationale for adopting the ‘less favourable result’ test outlined in the explanatory memorandum (see pp 25–28). **However, the committee seeks the Assistant Treasurer’s advice as to whether uncertainty in the application of the remedial power, including the ‘less favourable result’ test, may be considered to negate any potential benefits of the proposed regime (for example, a central rationale for the proposed power is to increase certainty in the administration of taxation laws—see explanatory memorandum, p. 14).**

Fourth, although the LA does include *general* consultation requirements, the committee would be assisted by more information about what consultation is, in practice, to be undertaken prior to the exercise of the remedial power. **In particular, the committee seeks the Assistant Treasurer’s advice as to whether affected taxpayer(s) in each instance will be consulted.**

Noting the extraordinary nature of this proposed remedial power and the fact that breach of the LA consultation requirements does not result in the invalidity of a legislative instrument, **the committee also seeks the Assistant Treasurer's advice as whether consideration has been given to:**

- **including more specific consultation requirements in the bill (for example, to provide that all relevant stakeholders must be consulted, a minimum period of consultation, and/or minimum advertising requirements, such as a requirement for including information about consultations on the ATO's website); and**
- **making compliance with these requirements a condition of the validity of the determination.**

Fifth, it appears that a determination modifying a taxation law may be given retrospective application (see explanatory memorandum, p. 49). Retrospective changes to the law may undermine public confidence in the legal system even if there are strong reasons to justify a particular change being applied from a date prior to commencement. In light of the fact that, in this instance, it is the determination of a non-elected official that may generate retrospective application, **the committee seeks the Assistant Treasurer's advice as to whether consideration has been given to the including limits in the bill on the extent of retrospectivity allowed in determinations made under the remedial power (for example, that laws as modified may only be given retrospective operation for a limited time).**

Sixth, **the committee seeks the Assistant Treasurer's advice as to why the Minister's power to cause a review to be undertaken of the operation of the remedial power provisions within three to five years of them commencing is discretionary rather than mandatory. Given the extraordinary delegation of legislative power involved the committee considers that there should be a mandatory report provided to the Parliament within three years.**

Pending the Assistant Treasurer'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.

Tax Laws Amendment (Tax Incentives for Innovation) Bill 2016

Introduced into the House of Representatives on 16 March 2016

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997*, the *Income Tax Assessment Act 1936*, the *Taxation Administration Act 1953* and the *Venture Capital Act 2002* to:

- create an early stage investor regime that provides tax incentives for qualifying investors through a non-refundable tax offset and capital gains tax exemption on innovation related investments;
- require early stage innovation companies to report on specific innovation related investments;
- provide a mechanism for Innovation Australia to provide guidance about whether particular investment activities are ineligible activities;
- provide non-refundable carry-forward tax offsets for limited partners in early stage venture capital limited partnerships (ESVCLP);
- provide for a capital gains tax exemption for fixed and unit trust beneficiaries of partners in ESVCLPs;
- exclude small entities from eligible venture capital investment auditor requirements;
- increase the maximum fund size for ESVCLPs to \$200 million;
- remove the requirement that an ESVCLP divest an investment in an entity once the value of the entity's assets exceeds \$250 million;
- provide that an entity can invest in another entity and remain an eligible venture capital investment;
- enable foreign venture capital funds to hold more than 30 per cent of the committee capital of an ESVCLP and extend their access to capital gains tax and other income tax concessions in relation to eligible venture capital investments; and
- enable a managed investment trust to disregard its investment in, and through, an ESVCLP or venture capital limited partnership when determining if it is a trading trust.

The committee has no comment on this bill.

Commentary on amendments to bills

Australian Crime Commission Amendment (National Policing Information) Bill 2015

[Digest 1/16 – Report 3/16]

On 18 March 2016 the Minister for Communications (Senator Fifield) tabled an addendum to the explanatory memorandum in the Senate.

The committee thanks the Minister for Justice for providing this addendum which inserted key information into the explanatory memorandum as requested by the committee in its *Third Report of 2016* (see pages 130–135). The committee welcomes the inclusion of additional information in explanatory material accompanying bills as these documents are an important point of access to understanding the law and, if needed, may be used as extrinsic material to assist with interpretation.

Commonwealth Electoral Amendment Bill 2016

[Digest 3/16 – no comment]

On 18 March 2016 the Senate agreed to nine Government and three Australian Green amendments, the Minister for Finance (Senator Cormann) tabled a supplementary explanatory memorandum and the bill was read a third time.

On the same day 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.

Northern Australia Infrastructure Facility Bill 2016

[Digest 3/16 – no comment]

On 19 April 2016 the Minister for Vocational Education and Skills (Senator Ryan) tabled a replacement explanatory memorandum in the Senate.

The committee has no comment on this replacement explanatory material.

Treasury Legislation Amendment (Repeal Day 2015) Bill 2016

[Digest 13/15 – no comment]

On 16 March 2016 the House of Representatives agreed to two Opposition amendments, the Minister for Human Services (Mr Tudge) 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.

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 44th Parliament since the previous Alert Digest was tabled:

Fair Work (Registered Organisations) Amendment Bill 2014 [No. 3] — Schedule 1, Part 1, item 88, section 329EA (**SPECIAL ACCOUNT:** CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*)

National Disability Insurance Scheme Savings Fund Special Account Bill 2016 — Clause 5 (**SPECIAL ACCOUNT:** CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*)

Other relevant appropriation clauses in bills

Northern Australia Infrastructure Facility Bill 2016 — Part 7, clause 41: special appropriation clause – for a specified purpose and finite amount

