



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

FOURTH REPORT
OF
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Members of the Committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator John Williams (Deputy Chair)	NATS, New South Wales
Senator Cory Bernardi	LP, South Australia
Senator the Hon Bill Heffernan	LP, New South Wales
Senator the Hon Joseph Ludwig	ALP, Queensland
Senator Rachel Siewert	AG, Western Australia

Secretariat

Ms Toni Dawes, Secretary
Mr Glenn Ryall, Principal Research Officer
Ms Ingrid Zappe, Legislative Research Officer

Committee legal adviser

Associate Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Phone: 02 6277 3050
Email: scrutiny.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_scrutiny

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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 2016

The committee presents its *Fourth Report of 2016* to the Senate.

The committee draws the attention of the Senate to clauses of the following bills which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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Appropriation Bill (No. 3) 2015-2016

Introduced into the House of Representatives on 4 February 2016

Portfolio: Finance

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter dated 15 March 2016. A copy of the letter is attached to this report.

The Minister's response also included information in relation to Appropriation Bill (No. 4) 2015-2016. The committee will consider this aspect of the response in a future report.

Alert Digest No. 2 of 2016 - extract

Background

This bill provides for additional appropriations from 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) 2015-2016*.

Insufficient parliamentary scrutiny of legislative power

General comment

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.

As noted above, odd-numbered appropriation bills—in order to comply with the provisions of section 54 of the Constitution—should deal only with appropriations for the ordinary annual services of the government (i.e. those which may not be amended by the Senate), with other appropriations included in the even-numbered bills (which are amendable by the Senate). However, it appears that the initial expenditure in relation to the establishment of the new ‘Cities and the Built Environment Taskforce’ may have been inappropriately classified as ordinary annual services and therefore included in Appropriation Bill (No. 3) 2015-2016.

In this regard, the committee notes that an entirely new program was created within the Environment Portfolio to support the new cities and the built environment policy which suggests that this is a ‘new policy not previously authorised by special legislation’ (see Mid-year Economic and Fiscal Outlook 2015-16 at p.168 and Environment Portfolio Additional Estimates Statements 2015-16 at pp 16, 25 and 36).

The committee is aware that responsibility for this measure appears to have been transferred to the Prime Minister and Cabinet portfolio, as an amendment was made to the Administrative Arrangements Order (AAO) on 18 February 2016 to include ‘national policy on cities’ as a matter to be dealt with by the Department of the Prime Minister and Cabinet. This appears to be the first time such a policy has been included in the AAO. This further suggests that this may be regarded as a new policy.

The committee notes that including expenditure on such new policies in the non-amendable bill 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 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 also highlighted the possible inappropriate classification of certain expenditure as ordinary annual services of the government in relation to Appropriation Bill (No. 1) 2015-2016 in its *Alert Digest No. 6 of 2015* (at pp 6–9).

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. 3) 2015-2016 which should only contain appropriations that are not amendable by the Senate).

In light of the comments in relation to the establishment of the new ‘Cities and the Built Environment Taskforce’ above, the committee seeks the Minister’s advice as to whether the government considers that the initial expenditure in relation to this measure may have been inappropriately classified as ordinary annual services of the government.

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.

Minister's response - extract

Your Committee sought my advice on the initial expenditure of the 'Cities and the Built Environment Taskforce' and its classification as ordinary annual services within Appropriation Bill (No. 3) 2015-2016. I note that the Committee considers this may be a 'new policy not previously authorised by special legislation'.

The appropriation for the Cities and the Built Environment Taskforce measure has been provided for in Bill No. 3 as it falls under the existing Outcome 1 of the Department of the Environment. The Department of the Environment's portfolio additional estimates statement makes clear that the expenditure is under Outcome 1, which is as follows:

Outcome 1: Conserve, protect and sustainably manage Australia's biodiversity, ecosystems, environment and heritage through research, information management, supporting natural resource management, establishing and managing Commonwealth protected areas, and reducing and regulating the use of pollutants and hazardous substances

As indicated in my previous correspondence to you, this Government prepares Appropriation Bills in a manner consistent with the previous practices of this Government and its predecessors. In particular, that ordinary and ongoing annual appropriation items, for administered and departmental purposes, are included in the odd-numbered Bills. The Cities and the Built Environment Taskforce involves departmental expenditure that falls within an existing outcome. Accordingly this measure was included in Appropriation Bill (No. 3) 2015-2016.

Committee response

The committee thanks the Minister for this response and takes this opportunity to summarise its views in relation to this important matter.

Constitutional 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. As a safeguard to protect the right of the Senate to amend non-ordinary annual services appropriations, section 54 of the Constitution provides that bills which appropriate 'revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation'. In practice this means that odd-numbered appropriation bills should deal only with appropriations for the ordinary annual services of the government (i.e. those which may not be amended by the Senate), with other appropriations included in the even-numbered bills (which are amendable by the Senate).

continued

New policies should be included in the amendable bill

As a result of continuing concerns relating to the misallocation of some items in appropriation bills, on 22 June 2010 (in accordance with a recommendation made in the 50th Report of the Appropriations and Staffing Committee), the Senate resolved ‘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 that ‘appropriations for expenditure on...*new policies not previously authorised by special legislation*...are not appropriations for the ordinary annual services of the Government’ [emphasis added].

Government practice not consistent with Senate resolution

The Minister advises that ‘this Government prepares Appropriation Bills in a manner consistent with the previous practices of this Government and its predecessors. In particular, that ordinary and ongoing annual appropriation items, for administered and departmental purposes, are included in the odd-numbered Bills. The Cities and the Built Environment Taskforce involves departmental expenditure that falls within an existing outcome. Accordingly this measure was included in Appropriation Bill (No. 3) 2015-2016.’

However, 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 (as noted above, new policies should be included in even-numbered appropriation bills which are subject to amendment by the Senate).

The committee again 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.

continued

The Cities Taskforce

The committee notes the Minister's advice that the appropriation for the 'Cities and the Built Environment Taskforce' measure (the Cities Taskforce) was provided for in Bill No. 3 (the non-amendable bill) as it falls under existing Outcome 1 of the Department of the Environment. The Minister states that 'the Department of the Environment's portfolio additional estimates statement makes clear that the expenditure is under Outcome 1' (to 'conserve, protect and sustainably manage Australia's biodiversity, ecosystems, environment and heritage through research, information management, supporting natural resource management, establishing and managing Commonwealth protected areas, and reducing and regulating the use of pollutants and hazardous substances'). **The committee considers that it is possible that the Cities Taskforce could potentially fall under this outcome, however it is certainly not clear on the information available to the committee that it does so (as suggested by the Minister).**

In any event, the question of whether a policy falls within an existing outcome is (at best) only indirectly relevant to the classification of appropriation items—as outlined in the 2010 Senate resolution, the actual question is whether the proposed appropriation relates to a 'new policy not previously authorised by special legislation'.

The committee notes that in this instance the case for suggesting that the Cities Taskforce is a new policy (the appropriation for which should be subject to amendment by the Senate) is particularly strong because:

- the expenditure relates to the *establishment* of a Cities Taskforce to develop and implement the Government's *new* Cities Agenda (see Environment Portfolio Additional Estimates Statements 2015-16 at p. 12);**
- it is not clear that the expenditure for this measure meets the government's own test for including items in the non-amendable bill (i.e. it is not entirely clear that the expenditure on the Cities Taskforce actually does fall within an existing department outcome);**
- an entirely new program was created within the Environment Portfolio to support the new cities and the built environment policy; and**
- it appears that responsibility for a 'national policy on cities' was included in the Administrative Arrangements Order (AAO) for the first time on 18 February 2016.**

The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to the Cities Taskforce has been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 3) 2015-2016 which was not amendable by the Senate).

The committee will continue to draw this important matter to the attention of Senators where appropriate in the future.

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Introduced into the House of Representatives on 24 June 2015

Portfolio: Immigration and Border Protection

This bill received Royal Assent on 11 December 2015

Introduction

The committee dealt with this bill in *Alert Digest No.7 of 2015*. The Minister responded to the committee's comments in a letter received on 11 January 2016. A copy of the letter is attached to this report.

Alert Digest No. 7 of 2015 - extract

Background

This bill amends the *Australian Citizenship Act 2007* to provide for the cessation of Australian citizenship in specified circumstances where a dual citizen engages in certain conduct.

Minister's response - extract

A brief chronology of the Act

On 24 June 2015, the Government introduced an initial version of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 to the Parliament. On 30 November 2015, the Government tabled amendments to the Bill, in response to recommendations from the Parliamentary Joint Committee on Intelligence and Security's report into the Bill (which was tabled on 4 September 2015). The amendments introduced additional accountability measures and further strengthened safeguards in relation to the core provisions of the Act. The amended Bill was passed by the Senate on 3 December 2015 without any further amendments as the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (the Act).

Please note that this response addresses the comments of the Senate Scrutiny of Bills Committee as they apply to the Act, as passed by the Senate on 3 December 2015 and as incorporating the PJCIS recommendations.

Overview: The objective of the Act

The Act was introduced as a response to the Australian Government's 'Review of Australia's Counter-Terrorism Machinery for a Safer Australia' (the Review) which found that the terrorist threat in Australia is rising and the number of potential terrorists, foreign fighters and terrorist sympathisers in Australia continues to grow. The Act responds to the evolving nature of terrorism, modern forms of warfare and the national security threat posed by irregular forces and new and emerging terrorist organisations.

As noted by the Attorney General in his second reading speech to the Senate on 1 December 2015, over 110 Australians are currently fighting or engaged with terrorist groups in conflicts in Syria and Northern Iraq. In addition, 30 Australians have returned to Australia from the conflict zones and around 190 people are currently being investigated for their direct involvement in the conflicts or for supporting these groups with financing and recruitment. It is estimated that approximately 30 Australians have so far been killed in Syria and Iraq as a result of their involvement in the conflict.

There have been over 145 Australian passport cancellations and refusals in relation to terrorist activity in Syria and Northern Iraq and there are more than 400 high-priority ASIO investigations afoot concerning Australians involved in terrorism.

In response to the issues identified by the Review, the Government determined that existing laws and powers were insufficient to deal with the modern terrorist threat in Australia.

The Act adds to the Government's counter-terrorism capabilities and the risk posed by dual-nationals who become involved in terrorism-related activity, in the following ways:

- A dual national can automatically lose their Australian citizenship if they act inconsistently with their allegiance to Australia by engaging in certain terrorist or other conduct (new s 33AA), or for fighting for, or being in the service of, a declared terrorist organisation overseas (new s 35); and
- if a dual-national or citizen is convicted and sentenced for a specified period by an Australian court for a specified terrorism offence, the Act provides the Minister with the discretionary power to determine, having regard to specified criteria including public interest criteria, that the person ceases to be an Australian citizen (new section 35A).

The provisions in the Act will further protect the Australian community from such threats while upholding those values which underpin the concept of citizenship. As explained in the Revised Explanatory Memorandum to the Bill, the Government's position is that citizenship is both a privilege as well as entailing rights. By recognizing the renunciation or cessation of a person's formal membership to the Australian community is appropriate to discourage people from engaging in acts or further acts that harm Australians or Australian interests.

Committee response

The committee thanks the Minister for this background information.

In order for the committee's scrutiny of legislation to be effective it is necessary for the committee to receive responses to its requests for information in a timely manner and well before passage of the legislation through the Parliament. This enables the committee to thoroughly consider the response and to inform the Senate of its finalised views on the bill while the bill is still before the Parliament.

Noting this, the committee takes this opportunity to express its concern about the delay in receiving a response to its comments in relation to this bill. The committee tabled its initial comments on this bill in the Senate on 12 August 2015 and wrote to the Minister the following day requesting a response by 27 August 2015. Unfortunately, in this instance a response was not received until 11 January 2016, well after the bill had been passed by the Parliament. This was despite informal contact following up the request for a response after the due date had passed. As is apparent from the committee's responses below, the committee retains scrutiny concerns in relation to the bill as passed. It is regrettable that the committee's continuing concerns were not available to Senators during their deliberations on the bill.

Alert Digest No. 7 of 2015 - extract

Trespass on personal rights and liberties—loss of citizenship without appropriate judicial process

Items 3 and 4, sections 33AA and 35

The purpose of these items includes providing for the cessation of Australian citizenship of persons who through their conduct are deemed to have acted inconsistently with their allegiance to Australia. The proposed amendments apply to a person who is an Australian citizen regardless of how the person became a citizen (including a person who became a citizen by birth) (see proposed subsections 33AA(4) and 35(3)). The provisions only apply to a person who is also a national or citizen of a country other than Australia (see proposed subsection 33AA(1) and paragraph 35(1)(a)).

Renunciation by conduct (proposed section 33AA)

Item 3 proposes to insert subsection 33AA(1) which provides that a person renounces their citizenship if they engage in conduct specified in subsection 33AA(2). Pursuant to these provisions, citizenship may be lost without the necessity for any judicial process. Subsection 33AA(2) specifies the following conduct:

- engaging in international terrorist activities using explosive or lethal devices;
- engaging in a terrorist act;
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- directing the activities of a terrorist organisation;
- recruiting for a terrorist organisation;
- financing terrorism;
- financing a terrorist; and
- engaging in foreign incursions and recruitment.

Subsection 33AA(3) provides that the words used in subsection 33AA(2) to specify the conduct which is taken as a renunciation of citizenship is to be understood as having the same meaning as in a number of offences in the *Criminal Code*. Given that the words used are defined in this way, renunciation of citizenship attaches to conduct that would be a ground for conviction of one of the listed offences.

However, although the specified conduct is defined by reference to offences specified in the *Criminal Code* it is unclear how, if at all, qualifications built into such offences (such as knowledge, intention or recklessness elements of the offence) condition the operation of subsection 33AA(1). Similarly, it is unclear—on the face of the legislation—whether the general provisions in the *Criminal Code* which relate to children are applicable (cf, explanatory memorandum, p. 10).

In addition, it is significant that the term ‘engaging in foreign incursions and recruitment’ is defined by reference to Division 119 of the *Criminal Code*. This Division captures a broad range of conduct, including:

- entering a foreign country with the intention of engaging in hostile activity, engaging in, or preparing to engage in, hostile activity (which includes intending to overthrow by force or violence the government of a foreign country; intimidating the public of a foreign country; and unlawfully destroying or damaging property belonging to the government of a foreign country) (*Criminal Code*, sections 119.1 and 119.4);
- entering or remaining in an area declared by the Foreign Affairs Minister (*Criminal Code*, section 119.2);

- providing or receiving military training (or being present at a meeting intending to provide or receive training), in order to prepare for engaging in hostile activity (*Criminal Code*, subsections 119.4(3) and (4));
- giving money, goods or services with the intention of supporting or promoting the offence of engaging in hostile activity (*Criminal Code*, subsection 119.4(5));
- allowing a building to be used to hold a meeting with the intention of committing, supporting or promoting military training or the giving of money or goods to support or promote engagement in hostile activity (*Criminal Code*, section 119.5); and
- publishing an advertisement or an item of news (for money or other consideration) and either being reckless as to whether it is for the purpose of recruiting persons to serve in any capacity with foreign armed forces; or the advertisement or news item contains information relating to where applications or information can be sought regarding serving with the armed forces in a foreign country; or relating to how a person can travel to another country in order to serve with the armed forces of a foreign country (*Criminal Code*, section 119.7).

Loss of citizenship in service of a declared terrorist organisation (proposed new section 35)

Item 4 proposes to insert a new subsection 35(1) which provides that a person ceases to be an Australian citizen if the person serves in the armed forces of a country at war with Australia or fights for, or is in the service of, a declared terrorist organisation where that conduct occurs outside Australia. Such conduct may also be the basis for a criminal prosecution for a terrorism offence.

Committee comment

Although citizenship rights have a statutory basis in Australia, it may be suggested that it misconceives the nature of citizenship (perhaps especially in relation to persons who have acquired citizenship by birth) to understand it as a privilege that may be removed or that will cease as a consequence of criminal misbehaviour, even if that misbehaviour is serious. Indeed, the deprivation of citizenship based on alleged or suspected criminal conduct may (like the deprivation of liberty based on a determination of criminal guilt) be an inherently judicial function, such that it can only be achieved if it is specified as a penalty that may be imposed if a person is convicted of a criminal offence. Regardless of any potential constitutional objections, however, serious issues of fairness arise given that a person may lose their citizenship on the basis of criminal conduct *without any of the protections associated with a criminal trial*.

The committee also notes that it does not consider that the ‘automatic’ or ‘self-executing’ nature of the cessation of citizenship provisions proposed by items 3 and 4 obviates this question of fairness for two reasons. First, the practical reality is that an internal administrative process will necessarily precede the government treating a person as having lost his or her citizenship. In this regard, the process for ‘operationalising’ the Act (should the bill be passed) is outlined in a letter from the Deputy Secretary of the Department of

Immigration and Border Protection to the Parliamentary Joint Committee on Intelligence and Security, dated 21 July 2015. The letter explains that implementation of the Act will involve the Department identifying dual nationals to whom one (or more) of the provisions relating to automatic citizenship apply. The Department notes that this will require close cooperation across government, including law enforcement and intelligence agencies. The Secretary of the Department will bring cases to the attention of the Minister.

The ‘automatic’ operation of the provisions has the result that an affected person is not afforded a hearing as part of that administrative process (see further comments below on natural justice). The result is an affected person is not entitled (at this point) to contest judgements about whether the cessation of citizenship provisions are triggered. Once a government official has reached a conclusion that citizenship has ceased under these provisions, then further decisions might be made which are premised on a person no longer being a citizen (for example, refusal of a passport application, cancellation of visa, and, ultimately, a deportation order).

Second, the lack of fairness involved in the loss of citizenship without protections associated with the application of the criminal judicial process is not cured by the capacity for an affected person to seek declaratory or injunctive relief. The statement of compatibility (at p. 31) states that:

The government considers that the right to a fair trial and fair hearing are not limited by the proposal. The proposal does not limit the application of judicial review of decisions that might be made as a result of the cessation or renunciation of citizenship. In a judicial review action the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. A person also has a right to seek declaratory relief as to whether the conditions giving rise to the cessation have been met.

A person who is deprived of their citizenship through the operation of section 33AA or section 35 could, after receiving a notice from the Minister that they have ceased to be an Australian citizen (see proposed subsection 33AA(6) and subsection 35(5)) or some other indication from a government official that their citizenship has ceased, seek a declaration from a court that their conduct has not triggered the operation of these provisions. In some circumstances, an injunction restraining decision-makers from making decisions which depend upon citizenship having ceased by operation of the proposed provisions could also be sought. Although, in such proceedings, the court would be the ultimate arbiter of whether the relevant facts have triggered the cessation of citizenship, this process would occur *after* a government official has signalled, in some way, that citizenship has been lost.

Indeed it is possible that a person may be unsuccessful in seeking a declaration that the provisions are not triggered and that their citizenship has therefore not ceased, even though they had been acquitted by a court of an offence relating to the same conduct. In a proceeding for declaratory relief the applicant would bear the onus of proof. That is, the affected person would need to establish, on the balance of probabilities, they did not engage in conduct that triggered the operation of the cessation provisions. Practical

difficulties may arise in discharging this burden, the fairness of which is not addressed in the explanatory material. For example, requiring the applicant to prove a negative may not be reasonable or feasible in particular circumstances. Relatedly, evidence held by the government may be subject to a claim of public interest immunity if national security is implicated. In this context, it is suggested that the conclusion in the statement of compatibility that the proposal does not limit the right to a fair trial or fair hearing requires detailed further justification.

For these reasons, the possibility that an affected person may initiate proceedings for declaratory relief does not overcome the objections (stated above) about the lack of criminal judicial process preceding the cessation of citizenship and associated uncertainties concerning the specification of the relevant conduct.

Noting the above, the committee indicates its serious concern that a person will, under these proposed amendments, lose their citizenship on the basis of alleged or suspected criminal conduct in circumstances where:

- **it is unclear whether or how protections associated with particular offences (such as the fault elements of offences) will be applicable; and**
- **the usual protections associated with the criminal judicial process have not been afforded.**

The committee therefore seeks a detailed justification from the Minister which addresses the fairness of these provisions in light of the above concerns.

In addition, the committee also requests a detailed and particularised explanation as to why all of the conduct listed in subsection 33AA(2) is considered an appropriate basis for the loss of citizenship, especially as the loss is ‘automatic’.

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.

Minister's response - extract

Trespass on personal rights and liberties—loss of citizenship without appropriate judicial process Items 3 and 4, sections 33AA and 35

New subsection 33AA(2) provides that, subject to subsections 33A(3) to 33A(5), subsection 33AA(1) applies to the following conduct:

- (a) engaging in international terrorist activities using explosive or lethal devices;

- (b) engaging in a terrorist act;
- (c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- (d) directing the activities of a terrorist organization;
- (e) recruiting for a terrorist organization;
- (f) financing terrorism;
- (g) financing a terrorist;
- (h) engaging in foreign incursions and recruitment.

New subsection 33AA(6) provides that these words and expressions have the same meaning as in Subdivision A of Division 72 and sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the *Criminal Code* (not including the fault elements).

If a person engages in the above conduct with the requisite intention, the person has, by their conduct, acted inconsistently with their allegiance to Australia, and chosen to step outside of the formal Australian community.

It is imperative that there is clarity in the Australian community as to what type of conduct will bring about automatic cessation of Australian citizenship. The list of conduct in subsection 33AA(2) provides certainty and clarity as to when a person's citizenship will automatically cease. This legislative design underpins one of the main objectives of the Act, as outlined in the Revised Explanatory Memorandum:

‘Where a person is no longer loyal to Australia and its people, and engages in acts that harm Australians or Australia’s interest, they have severed their bond to this country and repudiated their allegiance to Australia.’

In relation to the fault element of the above offences, while the original Bill did not include provisions relating to intention, these have since been added in new subsections 33AA(3) and (4).

Subsection 33AA(3) specifies that a person renounces their Australian citizenship under subsection 33AA(1) if the conduct listed in subsection 33AA(2) is engaged in with the intention of advancing a political, religious or ideological cause and with the intention of either coercing or influencing by intimidation, the government of the Commonwealth or a State, territory or foreign country, or of intimidating the public or a section of the public.

New subsection 33AA(4) is a deeming provision which provides that a person is taken to have engaged in conduct listed in new subsection 33AA(2) with an intention referred to in new subsection 33AA(3) if, when the person engaged in the conduct, they were a member of a declared terrorist organization or acting on instruction of, or in cooperation with a declared terrorist organization.

Section 35 of the Act provides that a dual national ceases to be an Australian citizen if they serve in the armed forces of a country at war with Australia or fight for, or are in the service of, a declared terrorist organisation (as defined in new section 35AA). This loss of citizenship model originates from the *Nationality and Citizenship Act 1948* (Cth) (now repealed) which specified that dual British and German nationals would automatically lose their citizenship if they served with enemy forces.

In relation to the definition of ‘intention’ under section 35, the amended Act includes a safeguard in new subsection 35(4) whereby a person is not ‘in the service of a declared terrorist organisation’ to the extent that: the person’s actions are unintentional; the person is acting under duress or force; or the person is providing neutral and independent humanitarian assistance.

In response to concerns that the Act does not afford the usual protections of the criminal justice process, subsections 33AA(10) to (12) and subsections 35(5) to (7) provide that, in certain circumstances, the Minister must give the affected person a written notice. Subsections 33AA(11) and 35(6) specify respectively, that under subsection 33AA(10) or a subsection 35(5), a written notice must include the affected person’s rights of review. The notice must also include the matters required by section 35B, which include:

- a statement that the Minister has become aware of conduct that the affected person has engaged in which has triggered the section 33AA or 35 cessation provisions; and
- a basic description of the offending conduct.

By requiring that a section 33AA or 35 notice include the above information, the affected person is also provided with an explanation of why their Australian citizenship has ceased. The notice explicitly sets out the person’s rights of review, which means that the affected person is made aware of the options available to them to seek review of the basis on which a notice was given.

To avoid doubt, subsections 33AA(24) and 35(19) have been included in the Act to specify that a person’s citizenship is taken never to have ceased under sections 33AA or 35 if a person is successful in their review action.

Committee response

The committee thanks the Minister for this response. The committee notes the Minister’s advice in relation to additional safeguards provided for in the revised bill, including:

(a) that a person only renounces their Australian citizenship under subsection 33AA(1) if the conduct listed in subsection 33AA(2) is engaged in with the *intention* of advancing a political, religious or ideological cause and with the *intention* of either coercing or influencing by intimidation, the government of the Commonwealth or a State, territory or foreign country, or of intimidating the public or a section of the public (although the committee notes that the impact of this provision as a safeguard may be affected by new subsection 33A(4) which deems that a person is taken to have engaged in conduct listed in new subsection 33AA(2) *with the requisite intention* if, when the person engaged in the conduct, they were a member of a declared terrorist organisation or acting on instruction of, or in cooperation with, a declared terrorist organisation); and

continued

(b) the safeguard in new subsection 35(4) which provides that a person is not ‘in the service of a declared terrorist organisation’ to the extent that: the person’s actions are unintentional; the person is acting under duress or force; or the person is providing neutral and independent humanitarian assistance.

The committee also notes the Minister’s advice in relation to the requirement to give an affected person a written notice that sets out the person’s rights of review and a basic description of the offending conduct. However, a notice must not: contain operationally sensitive information; contain information that may prejudice national security or endanger a person’s safety; or include the disclosure of information that would be likely to be contrary to the public interest for any other reason (new section 35B). In addition, the Minister may determine in writing that a notice should not be given if the Minister is satisfied that giving the notice could prejudice national security (subsections 33AA(12) and 35(7)). The Minister states that the notice provisions mean that the affected person is ‘provided with an explanation of why their Australian citizenship has ceased’ and ‘is made aware of the options available to them to seek review of the basis on which a notice was given’.

As noted above, while the court in any review proceedings would be the ultimate arbiter of whether the relevant facts have triggered the cessation of citizenship, this process would occur *after* the affected person has received a notice from the Minister (or some other indication from a government official that their citizenship has ceased).

It remains possible that a person may be unsuccessful in seeking a declaration that the provisions are not triggered and that their citizenship has therefore not ceased, even though they had been acquitted by a court of an offence relating to the same conduct.

Furthermore, in a proceeding for declaratory relief the applicant would bear the onus of proof. That is, the affected person would need to establish, on the balance of probabilities, they did not engage in conduct that triggered the operation of the cessation provisions. Practical difficulties may still arise in discharging this burden. For example, requiring the applicant to prove a negative may not be reasonable or feasible in particular circumstances. Relatedly, evidence held by the government may be subject to a claim of public interest immunity if national security is implicated.

For these reasons, the safeguards and notice provisions in the revised bill do not fully ameliorate the committee’s scrutiny concerns in relation to the lack of fairness involved in the loss of citizenship without the protections associated with the application of the criminal judicial process. The committee reiterates its view that this lack of fairness is not cured by the capacity for an affected person to seek review.

However, as the bill has already been passed by both Houses of the Parliament the committee makes no further comment in relation to this matter.

Alert Digest No. 7 of 2015 - extract

Trespass on personal rights and liberties—breadth and proportionality of application of provision

Item 5, proposed new section 35A

Loss of citizenship following conviction

This item inserts new section 35A that will provide for the cessation of citizenship if a person is *convicted* of specified terrorism and certain other offences. The proposed amendments apply to a person who is an Australian citizen regardless of how the person became a citizen (including a person who became a citizen by birth) (see proposed subsection 35A(4)). The provisions only apply to a person who is also a national or citizen of a country other than Australia (see proposed paragraph 35A(1)(b)). Although citizenship will cease under this provision only after a conviction is recorded, it remains the case that the loss of citizenship is a consequence of conviction rather than a penalty imposed on a person as part of an exercise of judicial power.

Additionally, the *breadth* of the category of offences is a matter of significant concern.

The explanatory memorandum gives a brief description of the 32 separate offences (listed in subsection 35A(3)) that trigger the automatic cessation of citizenship. The listed offences are broader than those in sections 33AA and 35. Importantly, not all of the offences relate directly to terrorist activities. For example, one of the listed offences relates to intentionally destroying or damaging any property belonging to the Commonwealth (*Crimes Act 1914*, section 29). The maximum custodial penalty for the offences ranges from 5 years imprisonment to imprisonment for life.

The explanatory memorandum and statement of compatibility justify cessation of citizenship on the basis of conviction for one of the specified offences on the basis that they involve ‘very serious conduct that demonstrates a person has repudiated their allegiance to Australia’ (e.g. at p. 22). The rationale given for a person being deprived of their citizenship is that this will reduce the possibility for acts or further acts that harm Australians or Australian interests. The explanatory memorandum also suggests that the operation of this provision may have a deterrent effect above and beyond that already provided by the criminal law.

The loss of citizenship is a severe consequence (which may ultimately lead to a person being physically excluded from the Australian community). It is therefore unfortunate that the explanatory memorandum does not offer a particularised justification for the inclusion of the specified offences as providing a sufficient basis for cessation of citizenship. The explanatory memorandum makes no effort to explain the criteria or principles by reference to which offences are included or excluded for this purpose. The only justification

provided is the blanket claim that the offences relate to ‘very serious conduct’. Yet the range of penalties associated with the specified offences illustrates the bluntness of this claim (a maximum penalty of five years may not necessarily indicate ‘very serious conduct’ as it is usually understood). Moreover, some offences—such as destroying or damaging Commonwealth property—may be unconnected with terrorist activities and may (in the circumstances of a particular case) involve relatively minor conduct.

Given the automatic operation of this cessation provision, there is a significant possibility that the application of the law will not be proportionate to the circumstances of particular cases. The automatic operation of the provisions means there is no discretionary judgment exercised prior to the time that cessation of citizenship takes effect. (The Minister’s discretionary power to exempt the operation of the cessation provisions, after citizenship has ceased by operation of law, is considered below.) Finally, it may be noted that the conduct relevant to some of the offences (such as urging or advocating violence or terrorism) relates to expression and communication. Whether or not the cessation of citizenship (and the possible exclusion from the Australian community) is appropriate in relation to such offences, given the obvious implications for freedom of speech, is not a matter which is properly addressed in the explanatory material.

For these reasons, the committee seeks a detailed and particularised explanation from the Minister as to why conviction for each of the specified offences justifies the loss of citizenship. The committee requests that the explanation should at least consider the following issues:

- **the underlying principles used for determining which offences are included;**
- **why those principles justify the inclusion of the particular offence;**
- **whether it is possible that automatic cessation of citizenship on the basis of each offence may (in application to particular circumstances) be disproportionate in its application; and**
- **whether the cessation of citizenship in relation to conviction for particular offences is appropriate given the impact on freedom of speech.**

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.

Minister's response - extract

Trespass on personal rights and liberties—breadth and proportionality of application of provision

Item 5, proposed new section 35A

Conviction (section 35A)

New section 35A provides for the cessation of citizenship, by determination by the Minister, of a person convicted for terrorism offences and certain other offences. In the first reading version of the Bill, which the Committee considered, section 35A operated to automatically revoke the citizenship of a person convicted of certain offences. We note that the provision has since been amended in light of the PJCIS recommendations and the new provision allows the Minister to make a determination ceasing a person's citizenship for conviction of certain offences. In exercising the power to make such a determination, new section 35A requires the Minister to be satisfied about certain matters relating to the person repudiating their allegiance to Australia and public interest considerations of the person remaining an Australian citizen. As such, new section 35A no longer operates to automatically revoke a person's citizenship.

New paragraph 35A(1)(a) provides that for the purposes of new subsection 35A(1), the offences are the following:

- a provision of Subdivision A (International terrorist activities using explosive or lethal devices) of Division 72 of the *Criminal Code*;
- a provision of section 80.1 (Treason), 80.1AA (Treason - materially assisting enemies etc) or 91.1 (Espionage and similar activities) of the *Criminal Code*;
- a provision of Part 5.3 (Terrorism) of the *Criminal Code* (except section 102.8 (Associating with terrorist organisations) or Division 104 (Control orders) or 105 (Preventative detention orders));
- a provision of Part 5.5 (Foreign incursions) of the *Criminal Code*;
- section 24AA (Treachery) or 24AB (Sabotage), of the *Crimes Act 1914*;
- section 6 (incursions into foreign States with intention of engaging in hostile activities) or 7 (preparations for incursions into foreign States for purpose of engaging in hostile activities) of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*.

The maximum penalties under the Criminal Code range from 10 years' imprisonment to imprisonment for life.

The purpose of new section 35A is to deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community. Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia (refer to paragraph 35A(1)(d)). Removing a person's formal membership of the Australian community is appropriate to reduce the possibility of a person engaging in acts or further acts that harm Australians or Australian interests.

The Government's position is to identify terrorism-related offences that are inconsistent with allegiance to Australia and where the maximum penalty of imprisonment is considerable (that is, with reference to the maximum penalty, rather than the sentence in any particular case). To this end, the Act requires that the person has, in respect of their conviction or convictions, been sentenced to a period of imprisonment of at least six years (or to periods of imprisonment that total at least six years). Also, the Minister is required to consider and be satisfied that:

- the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
- having regard to specified factors, it is not in the public interest for the person to remain an Australian citizen.

The Government considers that the cessation of the citizenship under these circumstances is proportionate to achieving the purpose of the Act.

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice in relation to the significant changes made to this provision in the revised bill. In particular, the committee notes new section 35A no longer operates to automatically revoke a person's citizenship and instead the Minister is able to make a determination ceasing a person's citizenship for conviction of certain offences. In addition, the committee notes that the offences which trigger this provision have been narrowed in the revised bill (including the removal of the offence of 'destroying or damaging Commonwealth property') and there is now a requirement that the person has, in respect of their conviction or convictions, been sentenced to a period of imprisonment of at least six years (or to periods of imprisonment that total at least six years).

continued

Retrospective application of section 35A

The committee also takes this opportunity to note scrutiny concerns in relation to the application of section 35A in the revised bill. The supplementary explanatory memorandum (at p. 40) explains that section 35A will have ‘a partial retrospective application as it applies to past convictions that occurred within the previous 10 years before commencement of the item’ (and where the person was sentenced to a period of imprisonment of at least 10 years in respect of that conviction). The provision applies in relation to persons who became Australian citizens before, on or after the commencement of the item.

The provision will operate by enabling ‘the Minister to make a current decision to deprive somebody of their Australian citizenship, based on a previous conviction. This would include a current assessment of whether the person’s past conviction reveals that they have breached their allegiance to Australia and whether it is contrary to the public interest for the person to remain an Australian citizen’ (supplementary explanatory memorandum, p. 40).

The supplementary explanatory memorandum (at p. 40) goes on to suggest that this ‘partial retrospective application is appropriate as a person should be subject to revocation of citizenship on the basis of past conduct where that conduct involves a high degree of criminality’.

The committee notes this explanation for the approach. The explanation focuses on what is considered to be in the public interest and, also, on the degree of criminality associated with the conduct leading to loss of citizenship. The committee does not consider that either of these justifications can, without more, be considered to justify the retrospective application of a provision such as this (i.e. a provision which means that the serious consequence of loss of citizenship can arise based on convictions that occurred before commencement). Although criminal conduct may be punished, it is a fundamental principle of the rule of law that the existence of an offence and penalty be established prospectively. In this context, it cannot be concluded that a person could have reasonably expected the loss of citizenship (in addition to any penalty that may lawfully be imposed if their conduct constitutes a crime) prior to the enactment of this bill. **The committee emphasises that it will consistently raise scrutiny concerns in circumstances where the law is applied retrospectively, particularly when the consequences for affected individuals are significant as in this case. In general, individuals should be entitled to rely on the current law to determine their rights and obligations. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law. The committee highlights its general concern about the retrospective application of laws, however as the bill has already been passed by both Houses of the Parliament the committee makes no further comment in this instance.**

Alert Digest No. 7 of 2015 - extract

Trespass on personal rights and liberties and delegation of legislative power— breadth and proportionality of application of provision

Item 4, subsection 35(1)

As noted above, item 4 proposes to insert new subsection 35(1) which provides that a person ceases to be an Australian citizen if he or she serves in the armed forces of a country at war with Australia or fights for, or is in the service of, a declared terrorist organisation where that conduct occurs outside Australia. Such conduct would also clearly be a ground for conviction of an offence.

The explanatory memorandum notes that there are currently 20 organisations listed as terrorist organisations under the *Criminal Code* and that these are published on the Australian National Security government website.

Two scrutiny issues are of concern in relation to the specification of the conduct upon which citizenship ceases.

First, the operation of the provision relies upon a ministerial declaration of a terrorist organisation that is not a legislative instrument. In general, the committee prefers all elements of a criminal offence to be included in the primary legislation. The operation of this law does not by its terms impose criminal sanctions. Nevertheless, the operation of the provision imposes a very serious consequence (i.e. loss of citizenship) for anyone who is deemed to have engaged in the specified conduct (which may, if proven, also constitute criminal conduct). **The committee therefore seeks an explanation from the Minister in relation to the appropriateness of making these consequences reliant upon a ministerial declaration that is not subject to disallowance by the Parliament.**

Second, the provision extends not only to a person who fights for a declared terrorist organisation, but also to one who ‘is in the service of’ such an organisation. The explanatory memorandum states that the phrase ‘in the service of’ is not defined in the bill because it is intended that it be given its ordinary meaning. Understood this way, however, the provision has a very wide application and may capture conduct such as the provision of medical or other aid.

The committee considers that the explanatory materials do not sufficiently explain why such a broad application of the provision is appropriate or address circumstances in which the (‘automatic’) application of the provision may be disproportionate. The committee therefore seeks a more detailed explanation from the Minister in this regard. The committee notes that its scrutiny concerns in relation to the breadth of this provision has even greater force given that (as noted above) the

law operates with respect to organisations identified by a ministerial declaration that is not disallowable by the Parliament.

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

Minister's response - extract

Trespass on personal rights and liberties and delegation of legislative power – breadth and proportionality of application of provision

Fighting for or being in the service of a declared terrorist organisation overseas (s 35)

New subsection 35(1) provides that a person aged 14 or older ceases to be an Australian citizen if:

- the person is a national or citizen of a country other than Australia; and
- the person
 - serves in the armed forces of a country at war with Australia; or
 - fights for, or is in the service of, a declared terrorist organisation; and
- the person's service or fighting occurs outside Australia.

A 'declared terrorist organisation', is an organisation that the Minister has declared, by legislative instrument, to be such an organisation. In the first reading version of the Bill that the Committee considered, this power was contained in subsection 35(1) and the declaration need only be 'in writing'. Further, under subsection 35(10) of the first reading version of the Bill, such a declaration was not a legislative instrument and, for that reason, was not subject to disallowance.

However, in light of the PJCIS recommendations, former section 35 has been amended and the power to declare an organisation as a terrorist organisation is now provided for in new section 35AA. Further, under new subsection 35AA(1) of the Act, such a declaration is a legislative instrument and therefore subject to disallowance under section 42 of the Legislative Instruments Act.

New subsection 35(1) causes citizenship to cease by operation of law and builds on, adapts and modernises loss of citizenship provisions for those fighting in a war against Australia which have been in place since 1949. It applies to a dual citizen who fights on behalf of, or is in the service of, a terrorist organisation outside Australia.

The purpose of this provision is to deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community.

The Executive arm of Government has responsibility for national security and law enforcement matters. Section 35AA allows the Minister to declare organisations as terrorist organisations. As the Revised Explanatory Memorandum to the Bill explains, the Minister will declare those organisations that are opposed to Australia or Australia's values, democratic beliefs, rights or liberties.

The organisations that the Minister can declare to be declared terrorist organisations for the purpose of section 35 can only be from those already listed for the purposes of the Criminal Code.

New subsection 35(1) is intended to apply to all persons who fight for or in the service of a declared terrorist organisation while outside Australia. The Bill does not define the term '*in the service of*', so it should be given its ordinary meaning. In the Macquarie Dictionary, 'service' is an act of helpful activity or the supplying of any articles, commodities, activities etc., required or demanded.

A person who is unwittingly or unknowingly aiding and providing assistance to a terrorist organisation will not be acting 'in the service of' a terrorist organisation. As the Revised Explanatory Memorandum to the Bill explains, the term 'in the service of' is intended to cover acts done by persons willingly (for example, joining a terrorist group in order to provide it with medical support) and is not meant to cover acts done by a person against their will (for example, an innocent kidnapped person), the unwitting supply of goods (for example, the provision of goods following online orders by innocent persons). A person providing medical or other aid under the auspices of a humanitarian organisation is clearly a person who is serving the humanitarian organisation and is not in the service of a terrorist organisation. This type of conduct is not captured by new section 35 of the Bill, and this is reinforced by new subsection 35(4).

Committee response

The committee thanks the Minister for this response.

The committee notes the Minister's advice in relation to the changes made to this provision in the revised bill. In particular, the committee notes that ministerial declarations of a terrorist organisation will now be subject to disallowance by either House of the Parliament, and new paragraph 35(4)(c) provides that a person 'providing neutral and independent humanitarian assistance' is not 'in the service of' a terrorist organisation.

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Although it may be said that the ‘Executive arm of Government has responsibility for national security and law enforcement matters’, in the committee’s view this claim requires qualification and further elaboration if it is to be accepted. In particular, although it is true that the executive branch has primary operational responsibility in these areas, this does not exclude either the Parliament or the judiciary from involvement in matters connected to national security and law enforcement within the spheres of their constitutional functions. While the executive arm may develop proposed policy and execute laws in relation to national security and law enforcement, responsibility for these matters is clearly and appropriately divided between the three arms of government. It is clearly the responsibility of the Parliament as the legislative arm of government to legislate, scrutinise and inquire into executive actions in relation to national security. The judicial arm of government is responsible (among other things) for determining cases brought by the executive against a person accused of an offence relating to national security. **The committee therefore considers that responsibility for national security should not be considered limited to the executive arm of government if that is what is suggested in the Minister’s response.**

The committee notes that the bill has already been passed by both Houses of the Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 7 of 2015 - extract

Exclusion of the right to be heard Items 3, 4 and 5

Each of the cessation of citizenship provisions (proposed sections 33AA, 35 and 35A) take effect ‘by operation of law and do not necessitate the Minister making a decision’ (explanatory memorandum, p. 2). It is a person’s own conduct or conviction for a specified offence that will result in the cessation of their citizenship. The provisions are described as ‘self-executing’ to the extent that they are deemed to operate without requiring an official decision that establishes the loss of citizenship. For this reason the provisions of the bill are described as operating ‘automatically’.

The Minister must, if he or she becomes aware of conduct or a conviction which has resulted in the cessation a person’s citizenship, ‘give written notice to that effect at such time and to such persons as the Minister considers appropriate’ (see proposed subsections 33AA(6), 35(5) and 35A(5)). However, such written notice is a recognition of cessation of citizenship not a determination that produces that result. Significantly, there is no requirement that a written notice from the Minister that citizenship has ceased must be

given to the affected person as it may be that the Minister considers this to be inappropriate. It is therefore clearly intended that citizenship may be lost (pursuant to the 'automatic' cessation provisions) even though the Minister may be unaware of the relevant conduct and despite the fact an affected person has not been notified.

This proposed statutory scheme for the cessation of citizenship is beset with ambiguities concerning its practical operation. As noted above, the notion that these provisions (with the possible exception of section 35A which operates upon conviction for a specified offence) are self-executing belies the way in which the provisions will work in practice. Whether or not a person has engaged in the conduct required to trigger the operation of section 33AA and section 35 may well involve questions of disputed fact and judgment. For example, whether a person has engaged in a terrorist act or has recruited for a terrorist organisation so as to activate subsection 33AA(1) may be questions about which there is genuine dispute. Similarly, whether subsection 35(1) is triggered because a person has fought for, or acted in the service of, a declared terrorist organisation is not a conclusion that is self-certifying. An accusation that a person has acted in the service of a declared organisation does not establish the truth of the accusation.

The result is that until such time as a government decision-maker identifies conduct that they believe triggers these provisions the provisions will not have a practical effect. The practical reality is that a person who has engaged in the specified conduct will continue to be treated as a citizen until a government official (perhaps, but not necessarily, the Minister) has detected conduct which is believed to trigger the cessation of citizenship provisions. Indeed, this reality is implicitly recognised by subsections 33AA(6), 35(5) and 35A(5) which each provide that if the Minister becomes aware of conduct because of which a person has ceased to be an Australian citizen, the Minister must give written notice to that effect at such time and to such persons as the Minister considers appropriate.

From a scrutiny perspective, an unfortunate outcome of the application of the proposed legislative scheme is that a person may be deemed by government officials to have lost their citizenship without having been given any prior opportunity to contest the basis of this conclusion. Nor would a hearing in relation to this issue be required prior to a government official exercising a power (such as denying a passport application) on the basis that citizenship has been lost. This is a matter of grave scrutiny concern given the significance of interests involved and the importance of the right to a fair hearing. Indeed, the courts consider procedural fairness to be a fundamental principle of the common law. In part, the value of affording a fair hearing to affected persons is the recognition that doing so increases the likelihood that the law will be correctly applied and discretionary decisions made on the basis of relevant information. '[T]he path of the law is', as Megarry J famously noted, 'strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change' (*John v Rees* [1970] Ch 345, 402).

It is clearly a purpose of sections 33AA and 35 to deprive a person of citizenship in the absence of a conviction for a specified offence. But the effect of these provisions is that a

person may be considered to have lost their citizenship by the government (which exposes them to adverse decisions being made based upon this loss of citizenship) without that person having had the opportunity to contest the basis of the judgment that their conduct has indeed triggered the cessation provisions. Indeed, the problem is exacerbated by proposed subsections 33AA(12), 35(11) and 35A(11) which provide that section 39 of the ASIO Act is inapplicable to the new cessation provisions.

Section 39 of the ASIO Act prohibits a Commonwealth agency from taking action on the basis of preliminary advice from ASIO, subject to exceptions for temporary action in limited circumstances. No clear justification is given for excluding the operation of section 39 of the ASIO Act and thus, in effect, enabling the government to conclude the cessation provisions are triggered in the absence of a full security assessment from ASIO (noting that review rights exist in relation to such an assessment). (Although a person could seek a declaration that their conduct has not triggered the cessation of citizenship provisions or an order restraining the government from acting on the basis that their citizenship has ceased by operation of the provisions, it is not accepted—for reasons suggested above—that this possibility ameliorates the lack of fairness in the initial operation of the cessation provisions.)

The committee therefore seeks a further justification be from the Minister which addresses the lack of procedural fairness in the operation of the scheme in light of the above scrutiny concerns.

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.

Minister's response - extract

Exclusion of the right to be heard Items 3, 4 and 5

The common law rule of natural justice provides that if an administrative decision maker is considering making an adverse decision, they must put relevant material to the person in question for comment before the decision is made.

Provisions excluding natural justice are not novel and have been upheld by courts as valid.

In general, the rules of natural justice are excluded from the operation of administrative powers of the Minister under sections 33AA, 35 and 35A of the Bill. The exceptions are in new subsections 33AA(22) and 35(17), which provide that the rules of natural justice do apply to a decision by the Minister to make, or not make, a determination under new subsections 33AA(14) and 35(9), respectively, in relation to the Minister's powers to

rescind a notice and exempt the person who is the subject of the notice from the effect of the relevant section. The rules of natural justice also apply to the Minister's power to determine that a person ceases to be an Australian citizen if the person has been convicted of certain terrorism or other offences (new subsection 35A(11) refers).

The rules of natural justice have not been excluded in review proceedings before a court. If the person has not in fact undertaken the conduct and triggered the operation of sections 33AA, 35 or 35A, or there is some other reason that the provision does not apply to the person, then this matter can be resolved on review by the courts.

In the first reading version of the Bill, that the Committee considered, subsections 33AA(12), 35(11) and 35A(11) excluded the operation of section 39 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) in relation to the exercise of a power or performance of a function under sections 33AA, 35 and 35A. Section 39 of the ASIO Act has the effect that government agencies cannot make decisions on the basis of any information ASIO may provide; government agencies can only make decisions on the basis of information ASIO provides in the form of a Security Assessment of a person.

We note that these provisions have since been removed, to implement recommendations of the PJCIS. As a result, in the context of the exercise of powers under the Act, the Minister will not be able to act on the basis of a communication made by ASIO about a person which does not amount to a security assessment.

Committee response

The committee thanks the Minister for this response and the advice in relation to the amendments made to the bill which mean that the Minister will now not be able to act on the basis of a communication made by ASIO about a person that does not amount to a security assessment.

The committee also notes:

- (a) the Minister's confirmation that 'the rules of natural justice are excluded from the operation of administrative powers of the Minister under sections 33AA, 35 and 35A of the Bill', and
- (b) the Minister's advice that 'provisions excluding natural justice are not novel and have been upheld by courts as valid'.

While this may be the case the committee does not consider that this provides a justification as requested by the committee which addresses the lack of procedural fairness in the operation of the scheme.

continued

First, although the courts have accepted that Parliament may exclude natural justice (though questions remain as to whether all aspects of its rules may be excluded), the question for the committee is not focused on the constitutional validity of provisions which attempt to diminish a fair hearing but, rather, is one of the adequacy of the justification which is given. Repeatedly, the High Court has resisted attempts to exclude natural justice unless the legislative intention to do so has been expressed with irresistible clearness (e.g. *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252). The committee's focus, therefore, is on whether a provision expressly purporting to exclude natural justice is fully justified, such that Senators can evaluate the adequacy of the reasons offered in support of that exclusion.

Secondly, in this particular instance, it remains the case that a person may be deemed by government officials to have lost their citizenship without having been given any prior opportunity to contest the basis of this conclusion. In addition, a hearing in relation to this issue will not be required prior to a government official exercising a power (such as denying a passport application) on the basis that citizenship has been lost.

Although, as noted by the Minister, a person could seek a declaration in the courts that their conduct has not triggered the cessation of citizenship provisions, **the committee reiterates its view that this possibility of review does not ameliorate the lack of fairness in the initial operation of the cessation provisions. In this context it is important to note the practical difficulties that an applicant would face in these review proceedings—see p. 265 above for further details in this regard).**

However, the committee notes that the bill has already been passed by both Houses of the Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 7 of 2015 - extract

Exclusion of natural justice and limitation of judicial review—Minister's power to rescind a notice and exempt a person from the operation of the cessation provisions

Merits review

Items 3, 4 and 5

Where a notice has been issued under subsections 33AA(6), 35(5) and 35A(5), on the basis that the Minister has become aware of conduct because of which a person has ceased to become an Australian citizen, subsections 33AA(7), 35(6) and 35A(6) give a personal (i.e. non-delegable) discretionary power to the Minister to rescind the notice and exempt the

person from the effect of the cessation of citizenship section in relation to the matters that were the basis for the giving of the notice. The power is to be exercised if the Minister considers it in the 'public interest' to do so. The Minister does not have a duty to consider whether to exercise the power, whether he or she is requested to do so by any person or in any other circumstance (subsections 33AA(8), 35(7) and 35A(7)). Subsections 33AA(10), 35(11) and 35A(11) expressly exclude the rules of natural justice in relation to the powers of the Minister under this section.

Two further scrutiny concerns are raised by this complicated set of provisions.

First, the exclusion of natural justice in relation to the Minister's power to rescind a notice and exempt the person from the operation of the relevant cessation provision is not sufficiently justified as the explanatory materials simply repeat the effect of the provision.

As noted above, the existence of conduct which triggers the cessation of citizenship may be contested. The circumstances of particular cases will involve matters which are relevant to whether it is in the public interest to rescind the notice and exempt the affected person from the operation of the cessation of citizenship provision. **The committee therefore expresses its concern that the Minister's exercise of his or her power to rescind a notice and exempt the person from the operation of the cessation provisions need not be preceded by a fair, unbiased hearing. In light of this, the committee seeks a more detailed explanation from the Minister for the exclusion of natural justice in relation to the Minister's power to rescind a notice. The committee requests that the explanation address the justification for the exclusion of the fair hearing rule and the rule against actual and ostensible bias.**

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.

Second, given the way in which the key elements of the cessation provisions fit together, the provisions (i.e. subsections 33AA(8), 35(7) and 35A(7)) which provide that the Minister has no duty to even consider the exercise of his or her substantive power to rescind a notice and exempt the person from the operation of the provision under which their citizenship has ceased are also of scrutiny concern. The effect of such 'no duty to consider' clauses is that the standard judicial review remedies of certiorari (to quash a decision) and mandamus (to require the making of a decision where there is a public duty to do so) would have no utility and would therefore be unavailable: see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 335. Although it is possible that a court could issue a declaration as to the lawfulness of the exercise of the power not to rescind a notice and exempt the person from the relevant cessation of citizenship provision, such a remedy would not invalidate the decision. Further, a declaration would only be considered appropriate if the Minister had made a decision to consider whether to exercise the power (which he or she is not obliged to do) and then proceeded to make a legal error in the course of considering whether to exercise the power. Thus, if the Minister refused to even consider the exercise of the power, no judicial review remedy (including declaratory

relief) would be available in relation to the exercise of this power to rescind a notice and exempt the person from the operation of the cessation provisions.

The substantive power (to rescind and exempt) is required as it provides the *only* mechanism available to counteract the extraordinary breadth of the cessation provisions (as there will clearly be situations where the cessation of citizenship provisions are overly-inclusive—as outlined above). However, the ‘no duty to consider’ provisions mean that the exercise of these powers will, for practical purposes, be beyond meaningful judicial supervision. Judicial review is not expressly excluded by these clauses but it is difficult to see how, if at all, judicial review would have any practical utility. Put differently, there are no meaningful jurisdictional limits to the exercise of these powers. Given this, the availability of judicial review does not provide any assurance that the powers will not be exercised arbitrarily.

In *Plaintiff M61* the High Court held that the similar ‘no duty to consider’ provisions in the *Migration Act 1958* (Cth) were not inconsistent with the minimum content of judicial review entrenched by section 75(v) of the Constitution. It should be noted, however, that the statutory context of those provisions was, in important respects, different to the ‘no duty to consider’ provisions included in this bill. In *Plaintiff M61* the substantive powers (to which the ‘no duty to consider’ provisions in the Migration Act were attached) were to exempt offshore visa applicants from the effect of provisions that prohibited them from making a visa application and which prevented the Minister from issuing a visa.

However, in the statutory context presented by this bill, the ‘no duty to consider’ clauses attach to a power to rescind a notice confirming that the government considers a person’s citizenship has, by virtue of their conduct, ceased. This loss of citizenship, as explained above, is produced in circumstances where the affected person has not at any point in the decision-making process been afforded an opportunity to challenge the conclusion that their conduct has triggered the provisions. This and other differences in the legislative context of these no duty to consider provisions may justify the conclusion that the practical exclusion of review is inconsistent with the entrenched minimum provision of judicial review (a level of review which the High Court treats as a fundamental element in the maintenance of the rule of law in Australia).

The committee therefore expresses its concern that it may be considered that the ‘no duty to consider’ provisions attached to the exemption power are unfair given that the cessation of citizenship occurs automatically and the result therefore is that the Minister’s decision as to whether the operation of the exemption provision is appropriate is not subject to any meaningful judicial review. The committee requests a detailed justification from the Minister addressing the fairness of this position in light of the committee’s comments.

Further, given the ineffectiveness of judicial review to maintain the rule of law in the administration of these powers, the committee seeks a justification as to why a mechanism for merits review has not been included in the bill in relation to the

Minister's power to rescind a notice *and* exempt the person from the operation of the cessation provisions.

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 may also 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.

Minister's response - extract

Exclusion of natural justice and limitation of judicial review – Minister's power to rescind a notice and exempt a person from the operation of the cessation provisions

Merits review

Items 3, 4 and 5

If the Minister becomes aware of conduct because of which a person has, under sections 33AA or 35, ceased to be an Australian citizen, or if the Minister makes a determination under subsection 35A(1) that a person ceases to be an Australian citizen due to a conviction for a terrorism offence, the Minister must give, or make reasonable attempts to give, written notice to that effect to the person as soon as practicable. If the Minister makes a determination under subsection 33AA(12), 35(7) or 35A(7) that a notice should not be given to a person, the notice must be given to the person as soon as practicable after the Minister revokes the determination (if the Minister does so).

The Minister's power under subsections 33AA(14) and 35(9) to make a determination to exempt a person from loss of citizenship is not an adverse decision; it is a decision to give a person a benefit (excusing them from loss of citizenship). If the Minister decides to consider whether to exercise the power to exempt a person from loss of citizenship, the Minister must have regard to the following matters:

- the severity of the matters that were the basis for any notice given;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18 – the best interests of the child as a primary consideration;
- whether the person is being or is likely to be prosecuted in relation to the matters that were the basis for the notice;

- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations;
- any other matters of public interest.

The rules of natural justice apply to a decision by the Minister to make, or not make, a determination to exempt a person from loss of citizenship (subsections 33AA(22) and 35(17) refer). The rules of natural justice also apply to the Minister's power to determine that a person ceases to be an Australian citizen if the person has been convicted of certain terrorism or other offences (subsection 35A(11) refers). In this respect, the Act as passed differs from the Bill that was before the Committee on 12 August 2015, at which time the rules of natural justice were excluded.

If a person wishes to challenge a decision of the Minister not to exempt him or her from the effect of the section, they may do so through judicial review. While the Minister cannot be compelled to consider rescinding the written notice and exempting a person from the operation of the provisions under the Bill, if the Minister does make such a decision, that decision may be the subject of judicial review.

In common with similar provisions in portfolio legislation giving the Minister a personal and non-compellable power, exercisable in the public interest, it is not considered appropriate to make the exercise of the 'rescinding' power subject to merits review.

The availability of access to the court to seek declaratory relief that the conduct was not in fact engaged in provides the person with a broad and effective opportunity to have the facts of the issue canvassed before a court, and have a court make a determination in relation to those facts.

Judicial review is available to a person affected by the provisions for loss of citizenship in the Bill, whether the person is onshore or offshore. A person has available to him or her the opportunity to seek judicial review or declaratory relief regarding (for example) the Minister's refusal to exempt him or her from the effect of section 33AA or s 35. The right of access to courts and equality before them is not limited to citizens, but is available to all within Australia's jurisdiction. For those persons who renounce or cease their Australian citizenship while they are outside Australia, judicial review on behalf of that person may still be accessed by persons who have standing.

If the Minister becomes aware of conduct because of which a person has ceased to be an Australian citizen or makes a determination that a person has ceased to be an Australian citizen due to a conviction, the Minister must give, or make reasonable attempts to give, written notice to that effect to the person (unless a determination is made that notice should not be given). When the Minister gives such a written notice, the onus is on the Minister to be aware that citizenship has ceased. If a person seeks relief or review of such a notice, the onus is on the person to establish (for example) that they were not a dual citizen or dual national at the time of engaging in the specified conduct or at the time of the conviction of

the specified offences, or that they did not engage in the specified conduct or were not so convicted.

A person who receives notice that their citizenship has ceased can challenge various aspects of the cessation, including:

- the constitutional validity of the provisions;
- whether they have in fact undertaken the conduct that caused their citizenship to cease;
- statelessness (a person may argue that they are not a national or citizen of a country other than Australia); and
- the adequacy of the notice (but this does not challenge the cessation of citizenship, so it is unlikely to be the only ground of challenge).

Committee response

The committee thanks the Minister for this response and the advice in relation to the amendments made to the bill which mean that the rules of natural justice will now apply to:

(a) a decision by the Minister to make, or not make, a determination to exempt a person from loss of citizenship (subsections 33AA(22) and 35(17)); and

(b) the Minister's power to determine that a person ceases to be an Australian citizen if the person has been convicted of certain terrorism or other offences (subsection 35A(11)).

The committee also notes:

(a) the Minister's advice in relation to the factors to which the Minister must have regard if the Minister decides to consider whether to exercise the power to exempt a person from loss of citizenship;

(b) the Minister's statement that 'if a person wishes to challenge a decision of the Minister not to exempt him or her from the effect of the section, they may do so through judicial review'; and

(c) the Minister's suggestion that 'it is not considered appropriate to make the exercise of the 'rescinding' power subject to merits review' because this is consistent with similar provisions in other migration legislation where the Minister is given a personal and non-compellable power, exercisable in the public interest.

continued

In relation to each of these points the committee:

(a) notes that the ‘no duty to consider’ provisions mean that Minister does not have a duty to consider whether to exercise the power to exempt a person from loss of citizenship and in such circumstances the Minister does not need to have regard to any of factors listed in subsections 33AA(17) and 35(12);

(b) reiterates its view that the ‘no duty to consider’ provisions mean that the exercise of the power to rescind and exempt will, for the reasons outlined in the committee’s initial comments above, be beyond meaningful judicial supervision (given this the committee considers that the availability of judicial review does not provide any assurance that the powers will not be exercised arbitrarily). In this regard, the committee questions the claim that ‘the availability of access to the court to seek declaratory relief that the conduct was not in fact engaged in provides the person with a broad and effective opportunity to have the facts of the issue canvassed before a court, and have a court make a determination in relation to those facts’. It is suggested that this claim requires further consideration. Although in the *Plaintiff M61* case a declaration did (despite the existence of a ‘no duty to consider’ provision) have practical utility, the availability of declaratory relief was in part based on the circumstance that ‘the procedures which [were] said to be infirm were conducted for the purpose of informing the Minister of matters directly bearing upon the exercise of power to avoid breach by Australia of its international obligations’; and

(c) reiterates its view (noting the ineffectiveness of judicial review to maintain the rule of law in the administration of these exemption powers) that merits review should be provided in relation to the Minister’s power to rescind a notice and exempt the person from the operation of the cessation provisions. The committee emphasises that the existence of similar powers in portfolio legislation which are not subject to merits review is not considered a sufficient justification for again excluding merits review.

However, the committee notes that the bill has already been passed by both Houses of the Parliament and therefore makes no further comment in relation to this matter.

Alert Digest No. 7 of 2017 - extract

Trespass on personal rights and liberties—uncertain operation of the law

As noted above, the cessation of citizenship provisions (particularly the provisions based on conduct, as opposed to conviction for a specified offence) are said to operate ‘automatically’. The result is that a person may lose their citizenship without ever having been told of this. Further, even if the Minister believes that citizenship has ceased there is

no obligation on him or her to give notice of this to an affected person. One of the core elements of the rule of law is that the content of the law is stated with sufficient clarity such that a person is able to refer to the law as a guide to their conduct. Where the rights and interests affected are of great significance (as is the case with citizenship) the importance of knowing how the law may affect the right is magnified.

The committee is of the view that the proposition that a person may lose their citizenship through operation of law, in the absence of a decision that applies the law to their circumstances or even notifies them of the result, warrants further justification.

The bill also contains uncertainties about the legal consequences in relation to the practical operation of the loss citizenship following conviction provision. The bill does not expressly provide for the circumstance where a conviction may be set aside on appeal. Similarly, difficult questions of interpretation may arise where a person's citizenship is deemed to cease by virtue of their conduct but where that person is later acquitted of charges relating to the same conduct that has led to the laying of the criminal charges.

The committee therefore seeks the Minister's advice as to the rationale for the proposed approach and whether legislative guidance can be provided as to how these matters of concern will be addressed.

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.

Minister's response - extract

Trespass on personal rights and liberties – uncertain operation of the law

The process for implementing the Bill

In the Department's public submission to the inquiry by the PJCIS into the Bill, the Department explained the Government's intentions for implementation of the provisions of the Bill:

“Operationalising the Act will involve identifying dual nationals to whom one (or more) of the provisions relating to automatic loss of citizenship apply. This will require close cooperation across government. The Department, including the Australian Border Force, will work closely with relevant departments and agencies, including law enforcement and intelligence agencies, to put in place the appropriate steps and processes to support the new provisions. Where available and suitable, existing whole of government intelligence and law enforcement coordination mechanisms will be utilised.

In addition, deputy secretaries from relevant departments and agencies and will work together to provide high-level oversight and coordination and provide information to the Secretary of the Department of Immigration and Border Protection on cases and other matters, such as the identification of relevant listed terrorist organisations for the purposes of the Act. The Secretary will bring cases to the attention of the Minister.”

In evidence to the Committee’s public hearings on 10 August 2015, the Secretary of the Department of Immigration and Border Protection, Mr Michael Pezzullo, indicated this would be as ‘an administrative process run under the auspices of normal public service support to ministers’. He added that ‘as a matter of practice, the better course in such a matter would be to provide the minister with a joined-up piece of advice that effectively comes from an interagency board or interagency committee.’ He explained that senior public servants would ‘need to assess facts, intelligence and other forms of reports’ in preparing the information brief to provide the Minister with the facts of the case. He confirmed that the information brief would be confidential, saying ‘most of it would be what we would describe as classified, which is not to say that some of it would not come from what we call ‘open source’ research’. The brief would include advice to the Minister on any public interest grounds for rescinding the notice.

The obligation to issue a notice is engaged upon the Minister becoming ‘aware’. Awareness is a knowledge that something has occurred. It is more than belief or suspicion, but does not require absolute proof. It involves a clear degree of mental apprehension. The Minister should know the relevant ceasing event has occurred and that knowledge should be based on a high degree of probability as to the facts underpinning it.

The Minister must give, or make reasonable attempts to give, a person written notice of loss of citizenship as soon as practicable, unless a determination is made under subsection 33AA(12), 35(7) or 35A(7) that notice should not be given. Such a determination that notice should not be given to a person can be made if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke the determination no later than 6 months after making it, and at least every 6 months thereafter until 5 years have passed since the determination was made.

Legal consequences of loss of citizenship following conviction

Where a conviction relevant to section 35A is set aside on appeal, and all appeal options have been exhausted, the person would be taken never to have lost their citizenship under that provision.

Where a person was found to have ceased their citizenship under proposed section 33AA or 35 and is subsequently acquitted of an offence associated with the same conduct that resulted in their loss of citizenship, the loss of citizenship would stand. However, the acquittal and any other relevant material could be considered by the Minister if the Minister considers rescinding a notice of loss of citizenship that was issued under the provisions.

Committee response

The committee thanks the Minister for this response and notes:

- (a) the information provided in relation to the process for implementing the bill and, in particular, the provisions which specify that the Minister must give, or make reasonable attempts to give, a person written notice of loss of citizenship as soon as practicable, unless a determination is made under subsection 33AA(12), 35(7) or 35A(7) that notice should not be given;
- (b) that under the revised bill where a conviction relevant to section 35A is set aside on appeal, and all appeal options have been exhausted, the person would be taken never to have lost their citizenship under that provision; and
- (c) where a person was found to have ceased their citizenship under proposed section 33AA or 35 and is subsequently acquitted of an offence associated with the same conduct that resulted in their loss of citizenship, the loss of citizenship would stand (however, the acquittal and any other relevant material could be considered by the Minister if the Minister considers rescinding a notice of loss of citizenship that was issued under the provisions).

Despite this additional information, the committee remains concerned that a person may lose their citizenship through operation of law; that is, in the absence of a decision that applies the law to their circumstances and (in some circumstances) without even being notified of the loss of citizenship.

The committee also remains concerned that a person's loss of citizenship (under proposed section 33AA or 35) would stand even when they are subsequently acquitted of an offence associated with the same conduct that resulted in their loss of citizenship. The committee does not consider the fact that the acquittal and any other relevant material *could* be considered by the Minister *in the event that* the Minister considers rescinding the loss of citizenship ameliorates this concern. An approach more consistent with the rule of law would be one where the person is taken never to have lost their citizenship, perhaps with a provision (subject to full merits and judicial review) that would allow the Minister to *positively* determine that the loss of citizenship should stand despite the relevant acquittal.

However, the committee notes that the bill has already been passed by both Houses of the Parliament and therefore makes no further comment in relation to this matter.

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]

Introduced into the House of Representatives on 2 February 2016

Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter dated 9 March 2016. An extract of the Minister's reply and the committee's response are outlined below, and a copy of the Minister's full letter is attached to this report.

Minister's response - extract

As you have identified, the Bills are in identical terms to Bills that were introduced into the House of Representatives on 14 November 2013 and that were previously the subject of review and comment by the Committee in *Alert Digest No. 9 of 2013*.

The former Minister for Employment, Senator the Hon Eric Abetz, provided detailed responses to the issues raised by the Committee in a letter of 18 March 2014 and these were considered by the Committee in its *Fourth Report of 2014*. I endorse the Australian Government's previous responses to the Committee.

The Government's position on the need for the Bills has not changed and the case supporting the Bills' passage is even more compelling now than when the Bills were first introduced. Since the Committee's report in 2014, the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) uncovered and examined a wide range of corrupt or inappropriate conduct on the part of relevantly, unions in the building and construction industry, and in particular, the Construction, Forestry, Mining and Energy Union (CFMEU).

His Honour Justice Heydon AC QC concluded, in the final report of the Royal Commission, that the 'sustained and entrenched disregard for both industrial and criminal laws shown by the [CFMEU] further supports the need [for a separate building industry regulator]' (Paragraph 83, Chapter 8, Volume 5). His Honour considered that the 'conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court' (Paragraph 1, Chapter 8, Volume 5).

The Government remains committed to re-establishing an effective industrial regulator, the Australian Building and Construction Commission, to deal with the culture of lawlessness and systemic unlawful behaviour in the building and construction industry and returning the rule of law to that vital industry. The Bills should be progressed through the Parliament as a matter of the highest priority.

Committee response

The committee thanks the Minister for this response. **The committee restates its views in relation to provisions of this bill as outlined below and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Exclusion of judicial review rights

Part 2, schedule 1, item 2

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and requests that the key information be included in the explanatory memorandum. The committee, however, remains concerned about the exclusion of review under the ADJR Act. Two matters may be noted about the difficulties mentioned by the Minister in relation to the requirement to give reasons under section 13 of the ADJR Act. First, it is open to the Parliament to include particular decisions where an obligation to give reasons is considered inappropriate in Schedule 2 of the ADJR Act, the result of which would be the exclusion of the reasons obligation without also excluding judicial review. Furthermore, it is unclear why the section 13 reasons requirement 'may prejudice or unduly delay investigations'. Under the ADJR Act, where a request for reasons is made, the person who made the decision must provide reasons as 'soon as practicable' and in any event within 28 days of receiving the request. There is no suggestion that reasons must be provided prior to the implementation of a decision (such as, for example, a decision to enter premises). **The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]

Introduced into the House of Representatives on 2 February 2016

Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter dated 9 March 2016. An extract of the Minister's reply and the committee's response are outlined below, and a copy of the Minister's full letter is attached to this report.

Minister's response - extract

As you have identified, the Bills are in identical terms to Bills that were introduced into the House of Representatives on 14 November 2013 and that were previously the subject of review and comment by the Committee in *Alert Digest No. 9 of 2013*.

The former Minister for Employment, Senator the Hon Eric Abetz, provided detailed responses to the issues raised by the Committee in a letter of 18 March 2014 and these were considered by the Committee in its *Fourth Report of 2014*. I endorse the Australian Government's previous responses to the Committee.

The Government's position on the need for the Bills has not changed and the case supporting the Bills' passage is even more compelling now than when the Bills were first introduced. Since the Committee's report in 2014, the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) uncovered and examined a wide range of corrupt or inappropriate conduct on the part of relevantly, unions in the building and construction industry, and in particular, the Construction, Forestry, Mining and Energy Union (CFMEU).

His Honour Justice Heydon AC QC concluded, in the final report of the Royal Commission, that the 'sustained and entrenched disregard for both industrial and criminal laws shown by the [CFMEU] further supports the need [for a separate building industry regulator]' (Paragraph 83, Chapter 8, Volume 5). His Honour considered that the 'conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court' (Paragraph 1, Chapter 8, Volume 5).

The Government remains committed to re-establishing an effective industrial regulator, the Australian Building and Construction Commission, to deal with the culture of lawlessness

and systemic unlawful behaviour in the building and construction industry and returning the rule of law to that vital industry. The Bills should be progressed through the Parliament as a matter of the highest priority.

Committee response

The committee thanks the Minister for this response. **The committee restates its views in relation to provisions of this bill as outlined below and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Delegation of legislative power—determination of important matters by regulation

Clause 5, definition of ‘authorised applicant’

Committee's response to the identical provision in the 2013 bill

(detailed in *Alert Digest No. 2 of 2016*)

The committee thanks the Minister for this response and notes that extensions to the definition of ‘authorised applicants’ will be subject to disallowance. **The committee requests that the key information be included in the explanatory memorandum and 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 Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and the examples of intended content outlined above.

Delegation of legislative power

Clause 6

Committee's response to the identical provision in the 2013 bill

(detailed in *Alert Digest No. 2 of 2016*)

The committee thanks the Minister for this response. The committee notes the examples provided where it may be appropriate for rules to be made to include additional activities within the definition of ‘building work’ and that any rules will be subject to disallowance.

Continued

The committee requests that the key information be included in the explanatory memorandum and 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 Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and the examples of intended content outlined above.

Trespass on personal rights and liberties—reversal of onus Subclause 7(4)

Committee's response to the identical provision in the 2013 bill
(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and notes the findings of the Cole Royal Commission highlighted by the Minister. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Delegation of legislative power Subclause 11(2)

Committee's response to the identical provision in the 2013 bill
(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and notes that the provision mirrors a provision in the *Fair Work Act 2009*. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and whether any rules made under the power would be more suitable for parliamentary enactment.

Undue dependence upon insufficiently defined powers
Delegation of legislative power
Paragraphs 19(1)(d) and 40(1)(c)

Committee's response to the identical provision in the 2013 bill
(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and notes the safeguards highlighted by the Minister which are designed to ensure that any delegations by the ABC Commissioner and the Federal Safety Commissioner are transparent and able to be scrutinised by Parliament. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Broad discretionary power
Subclause 21(3)

Committee's response to the identical provision in the 2013 bill
(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for the additional information provided and notes that the appointment of a person as ABC Commissioner is subject to the Australian Government Merit and Transparency Policy administered by the Australian Public Service Commission.

Merits review—provision of reasons
Clause 28

Committee's response to the identical provision in the 2013 bill
(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and requests that the key information be included in the explanatory memorandum. The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole

Delegation of legislative power—determination of important matters by regulation

Clause 43

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response. The committee notes that it is intended that the current Fair Work (Building Industry—Accreditation Scheme) Regulations 2005 will be preserved as rules made under clause 43 of the bill and that the rules are subject to disallowance by both Houses of the Parliament. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Penalties

Clauses 49 and 81

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Trespass on personal rights and liberties—reversal of onus

Clause 57

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and notes the examples provided by the Minister of evidence that may be able to be produced by a person to demonstrate their actual intent when undertaking the action in question. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Insufficiently defined administrative powers—broad delegation of powers

Paragraphs 66(1)(c) and 68(1)(c)

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and notes the additional information provided. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Delegation of legislative power—determination of important matters by regulation

Paragraph 70(1)(c)

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and notes the additional information provided. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and whether any rules made under the power would be more suitable for parliamentary enactment.

Trespass on personal rights and liberties—Coercive powers, entry without consent or warrant

Clause 72

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

Initial response

The committee thanks the Minister for this response. The committee, however, retains its concern about these entry powers. The Minister emphasises the importance of the efficient and effective resolution of investigations and claims to justify entry without consent or warrant. It is not clear to the committee why these concerns are of greater relevance in the industrial relations context than other regulatory contexts in which these powers are not available. As such, the committee is not persuaded that a compelling justification has been established for the proposed powers. **In light of the committee's view, the committee sought the Minister's further advice as to whether consideration has been given, or can be given, to establishing a requirement for reporting to Parliament on the exercise of these powers.**

Further response

The committee thanks the Minister for his response and notes the advice that the provisions are primarily based on existing and previous provisions. However, this does not, of itself, address the committee's scrutiny concerns. The committee does not consider that the requirements of investigative efficiency or the resource implications of obtaining warrants provide sufficiently compelling justification for the use of such coercive powers. **The committee draws its comments to the attention of Senators and leaves the appropriateness of the proposed approach to the consideration of the Senate as a whole.**

Trespass on personal rights and liberties—definition of offence, ‘reasonable excuse’

Subclauses 76(3), 77(3) and 99(8)

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and notes the additional information and examples of what may constitute a ‘reasonable excuse’ provided by the Minister. **The committee requests that the key information be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Trespass on personal rights and liberties—reversal of onus

Clause 93

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response.

Trespass on personal rights and liberties—self-incrimination

Clauses 102 and 104

Committee's response to the identical provision in the 2013 bill

(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for this response and notes the additional information provided including the Minister’s statement that the approach adopted in the bill is consistent with the approach in section 713 of the *Fair Work Act 2009*, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010*. **The committee requests that the key information be included in the explanatory memorandum, draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

Trespass on personal rights and liberties—inappropriate delegation of legislative power
Subclause 120(3)

Committee's response to the identical provision in the 2013 bill
(detailed in Alert Digest No. 2 of 2016)

The committee thanks the Minister for his response, but notes its concern that the provision allows rules to be made retrospectively. The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

The committee also draws this matter to the attention of the Senate Regulations and Ordinances Committee in relation to the justification for the delegation of power and whether any retrospective commencement could trespass unduly on personal rights and liberties.

Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015

Introduced into the House of Representatives on 15 October 2015

Portfolio: Education and Training

This bill received Royal Assent on 11 December 2015

Introduction

The committee dealt with this bill in the amendment section of *Alert Digest No. 1 of 2016*. The Minister responded to the committee's comments in a letter received 29 February 2016. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2016 - extract

Background

This bill amends the *Higher Education Support Act 2003* to:

- require VET FEE-HELP approved training providers to establish minimum prerequisites for enrolment for each course;
- require parent's or guardian's approval of students under the age of 18 before the student can request a VET FEE-HELP loan;
- provide a two day 'cooling off period' from 1 January 2016;
- amend the circumstances in which students can have their loan cancelled;
- introduce a scheme of infringement notices attached to civil penalties for VET FEE-HELP providers that engage in improper conduct; and
- introduce a new minimum registration and trading history requirement for new VET FEE-HELP provider applicants.

Merits review

Government amendment (16) on sheet GZ155 (as amended by Lazarus-AMEP (2) on sheet 7835)

This amendment (as amended) adds six new items to the table in clause 91 of Schedule 1A to the *Higher Education Support Act 2003* (the HESA). Clause 91 sets out the decisions that are made under Schedule 1A that are 'reviewable VET decisions' and are therefore subject to reconsideration and then review by the Administrative Appeals Tribunal. **The committee takes this opportunity to seek the Minister's advice as to what decisions made under Schedule 1A are not 'reviewable VET decisions' and the rationale for excluding these decisions from this review mechanism.**

Minister's response - extract

Merits Review

Government amendment (16) on sheet GZ155 (as amended by Lazarus-AMEP (2) on sheet 7835

Listed in the table below, are those new decisions added or amended by the *Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015* that have not been included in clause 91 of Schedule 1A to the HESA as a 'reviewable VET decision'.

Legislative Reference	Decision	Rationale
36(8) of Schedule 1A	In deciding whether to make a decision under subclause 36(5), the Secretary must consider any response received from the body within the 14 day period.	Decision not subject to merits review as the decision to suspend a body's approval is made under subclause 36(5) of Schedule 1A and is subject to merits review.
45D(6) of Schedule 1A	The Minister may, by legislative instrument, determine: (a) whether credits arise in the VET FEE-HELP accounts of specified VET providers when another body ceases to be a VET provider; and (b) the amounts of such credits.	Not suitable for merits review as subject to parliamentary scrutiny and to the accountability safeguards that apply to legislative decisions. The decision relates to the allocation of a finite resource, represents one-off allocation to certain providers, and successful application by one provider would result in reduction in the allocation of additional credits to other providers.
45E(1) of Schedule 1A	(a) VET FEE-HELP provider's VET FEE-HELP account is in deficit at the end of a calendar year; and (b) The Secretary gives the VET provider a written notice about the deficit; the VET provider must pay	Not suitable for merits review as follows a set of defined circumstances.

Legislative Reference	Decision	Rationale
	to the Commonwealth an amount equal to the amount of the deficit (the excess loan amount).	
45E(6) of Schedule 1A	The Secretary may give written notice to the VET provider of the amount of the general interest charge for a particular day or days. A notice given under this subclause is prima facie evidence of the matters stated in the notice.	Not suitable for merits review as follows a set of defined circumstances. A decision to remit or not to remit a general interest charge is made under subclause 45E(7) of Schedule 1A and is subject to merits review.
46A(4) of Schedule 1A	In deciding whether to make the decision under subclause 46A(1), the Secretary must consider any submissions received from the applicant, and from the VET provider, within the 28 day period.	Decision not subject to merits review. The decision to refuse to re-credit or to re-credit a person's FEE-HELP balance is made under subclause 46A(1) of Schedule 1A and is subject to merits review.
46A(3) of Schedule 1A	The Secretary may re-credit the student's FEE-HELP balance under subclause 46B if the requirements of 46B(3)(a) and (b) are met.	Not suitable for merits review as follows a set of defined circumstances.
46A(4) of Schedule 1A	The Secretary may re-credit the FEE-HELP balance of each of those students if the requirements of clause 46B(4) are met.	Not suitable for merits review as follows a set of defined circumstances.
60(2) of Schedule 1A	Minister may, by legislative instrument, determine the way (including payment in instalments or in arrears), and the times when, amounts payable by the Commonwealth under this Schedule are to be paid to specified finds of VET providers.	Not suitable for merits review as subject to the accountability safeguards and apply to legislatives decisions. Decision has limited impact, as the VET provider would still be receiving payment, just the method and times would be impacted. These are procedural administrative decisions without substantive

Legislative Reference	Decision	Rationale
		consequences. The cost of a merits review would not justify the decision being subject to merits review
60(3) of Schedule 1A	Minister may, in writing, determine the way (including payment in instalments or in arrears), and the times when, amounts payable by the Commonwealth under this Schedule are to be paid to a particular VET provider.	Decision has limited impact, as the VET provider would still be receiving payment, just the method and times would be impacted. These are procedural administrative decisions without substantive consequences. The cost of a merits review would not justify the decision being subject to merits review.

Committee response

The committee thanks the Minister for this detailed response and notes that the instances outlined above can broadly be categorised as:

- circumstances in which an underlying decision is already subject to merits review;
- relying on legislative instruments therefore being subject to ‘parliamentary scrutiny and to the accountability safeguards that apply to legislative decisions’;
- unsuitable for merits review as the legislative process ‘follows a set of defined circumstances’; or
- being ‘procedural administrative decisions without substantive consequences’ for which the cost of merits review is not justified.

In light of the explanation provided the committee makes no further comment in relation to this matter.

Alert Digest No. 1 of 2016 - extract

Delegation of power to ‘a person’ Government amendment (25) on sheet GZ155

This amendment relates to subclause 39GA(1) of Schedule 1A to the HESA. The amendment will enable the Secretary to appoint any person (rather than being confined to an APS employee in the Department) as an investigator. The supplementary explanatory memorandum (at p. 18) states that:

There are times when the Department does not have the internal expertise to carry out particular types of investigation and may want to appoint another person or body with relevant expertise, including persons or bodies outside the public service. Equally, there are times when there are competing compliance priorities and additional capacity is required for investigations. This amendment gives the Department the flexibility to appoint other persons or bodies as required. The proposed subclause 39GA(3) of Schedule 1A to the Act will apply to ensure that any person so appointed must have the knowledge or experience necessary to properly exercise the powers of such an investigator.

The committee notes this explanation, but seeks further advice from the Minister as to:

- **examples of the types of persons or bodies outside the public service that may be appointed as an investigator under this provision; and**
- **whether it would be possible to provide any further limits or safeguards on the power to appoint investigators outside the public service (beyond the requirement in subclause 39GA(3) that the person must be considered to have appropriate knowledge and experience). In this regard the committee notes that if an investigator is appointed from outside the public service that person would not automatically be subject to the APS Values and Code of Conduct.**

Minister's response - extract

Delegation of power to ‘a person’ Government amendment (25) on sheet GZJSS

Further advice is sought as to:

- examples of the types of persons or bodies outside the public service that may be appointed as an investigator under this provision; and

- whether it would be possible to provide any further limits or safeguards on the power to appoint investigators outside the public service (beyond the requirement in subclause 39GA(3) that the person must be considered to have appropriate knowledge and experience). In this regard the committee notes that if an investigator is appointed from outside the public service that person would not automatically be subject to the APS Values and Code of Conduct.

Procurement of services outside of the public service is subject to the Australian Government's procurement policy. Any appointment of external investigators would be undertaken in accordance with the procurement policy and the relevant parts of the *Public Governance, Performance and Accountability Act 2013*.

Many departments have established a number of panel arrangements for the provision of goods or services through a rigorous open approach to market processes. The terms, conditions and deliverables of contracts entered into under the panel arrangements ensure risks to the Commonwealth are minimised and require external contractors to act diligently, effectively and to a high professional standard and not bring the public service into disrepute.

The Department of Education and Training and the Department of Employment have created an 'Accounting, Audit and Related Professional Services Panel'. Organisations with the relevant expertise and qualifications may be sourced from this panel to undertake investigations under subclause 39GA(l) of Schedule 1A to the HESA, such as auditors, accountants and consultant investigators.

Any investigations undertaken by external contractors would be overseen by departmental officers and undertaken in line with the *Australian Government Investigations Standards 2011* (AGIS), which provides guidance as to the qualifications investigators/compliance officers should have. AGIS establishes the minimum standards for Australian Government agencies conducting investigations. The qualifications include the need for Certificate IV in Government Investigations. This includes achievement of core competency PSPETHC401A 'uphold and support the values and principles of public service' as well as essential competencies regarding fraud awareness, compliance with legislation and managing information and evidence. This would apply to the investigators appointed. AGIS Clause 1.9 Ethical Conduct also requires agencies to conduct investigations in accordance with the APS Values and Code of Conduct. Agencies must also have a procedure governing the manner in which complaints concerning the conduct of its investigations are handled. These procedures should ensure that complaints are handled in a timely, appropriate and comprehensive manner.

Committee response

The committee thanks the Minister for this response and notes that it would have been useful had this key information been included in the supplementary explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).

The committee restates its view that it is preferable in circumstances such as this to include a legislative requirement to meet relevant minimum standards for appointees and investigations. The committee draws this general view to the attention of Senators, but as the bill has already passed the committee makes no further comment.

Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016

Introduced into the House of Representatives on 10 February 2016
Portfolio: Immigration and Border Protection

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter dated 8 March 2016. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2016 - extract

Background

This bill amends the *Migration Act 1958* in relation to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* mandatory visa cancellation-related powers and the lawful disclosure of non-citizens' identifying information where a non-citizen is suspected of being of character concern.

General

The explanatory memorandum (at p. 15) states that the proposals in this bill 'are technical and consequential amendments arising out of' the *Migration Amendment (Character and General Cancellation) Act 2014* (the Character Act). In one sense this is an accurate description of the proposed amendments as they concern matters which may appear consistent with the intentions behind the substantive changes made by the Character Act. However, the amendments also operate in ways which increase the impact or reach that the existing regime for detention under the Migration Act will have.

As noted in the statement of compatibility (for instance at p. 18), the bill may 'result in a limited increase in the number of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act'.

The committee previously reported on a number of significant scrutiny concerns it raised in relation to the Character Act (see the *Fifteenth Report of 2014*). Underlying a number of those concerns was the introduction into the Migration Act of further very broadly framed Ministerial powers which are not, as a practical matter, constrained by law (due to the breadth of discretion, the absence of procedural fairness obligations, the fact that merits review is unavailable, or a combination of these factors). Thus, although the amendments in this bill can be described as merely giving 'full effect to the substantive amendments made...by the Character Act' (statement of compatibility, p. 15), the amendments do not in any way address the concerns expressed earlier by the committee. For example, the

committee's *Fifteenth Report of 2014* included the following comments in relation to the bill preceding the Character Act:

Scrutiny issue	Provision	Committee conclusion	Page
Review rights	Item 12, proposed paragraph 501(6)(g)	<p>The committee notes that the Minister's response, although detailed, does not appear to address this matter and restates its request for the [Minister's] advice as to whether ASIO assessments on which these decisions are based will be reviewable in the AAT and, if so, what implications the exercise of merits review rights will have for the validity or implementation of decisions based on this paragraph 501(6)(g) of the Migration Act.</p> <p>[The committee sought further advice from the Minister about this point, which was provided after the bill had already been passed by the Parliament. The response and the committee's conclusion (outlining its continuing scrutiny concern) were included in its <i>Third Report of 2015</i> at pp 229–231.]</p>	p. 896
Procedural fairness	Item 17, proposed section 501BA	<p>The committee thanks the Minister for this response and requests that the key information above be included in the explanatory memorandum. However, the committee retains concerns about the proposed approach, as the committee:</p> <ol style="list-style-type: none"> 1. notes that the response does not specifically address why it is considered appropriate to exclude all aspects of the rules of natural justice; 2. notes that the response does not indicate why ensuring decisions reflect community standards and expectations to an acceptable degree cannot be pursued through the articulation of policy; and 3. questions whether the community holds the Minister personally responsible for decisions made by the AAT, which has a reputation for external, independent review of government decisions. <p>However, in the circumstances, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.</p>	p. 899
Merits review	Items 26 and 27	<p>The committee thanks the Minister for this response. The committee notes that the reasons provided for the amendments are that the High Court's interpretation of the existing law is 'inconsistent with the original intent of the legislation, and incongruous with the broader framework of personal decision-making by the Minister under section 501 of the Act'. The committee does not consider that the fact a decision is made by the Minister personally is, of itself, sufficient justification for excluding merits review. Further, the committee does not accept that the existence of other provisions in the Migration Act which exempt decisions made by the Minister from merits review is a sufficient reason to exclude review in relation to other powers. However, the committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.</p>	p. 903

Procedural fairness	Schedule 2, item 12, subsections 133A(4) and 133C(4)	The committee thanks the Minister for this response, however, it appears that the response does not engage with the committee's concerns or answer the specific question posed, which relates to the apparent abrogation of the fundamental principles of natural justice, including the rule against bias. The committee therefore restates its request for the Minister's fuller explanation of these points. [The committee sought further advice from the Minister about this point, but it was not addressed in the Minister's further reply reported on in the committee's <i>Third Report of 2015</i> .]	p. 905
Merits review	Schedule 2, items 18-21	The committee thanks the Minister for this response, but notes that its request sought the Minister's detailed explanation as to why each of the grounds for cancellation under sections 109 and 116 should not be subject to merits review. As it appears that the response does not directly address these issues, the committee restates its request for this information from the Minister. [The committee sought further advice from the Minister about this point, but it was not addressed in the Minister's further reply reported on in the committee's <i>Third Report of 2015</i> .]	p. 907

In light of the committee's scrutiny concerns about the Character Act, and as the current bill may have the effect of extending the reach of the Character Act, the committee seeks the Minister's advice in relation to the issues raised about the Character Act in its *Fifteenth Report of 2014* and for further advice as to the justification of the current provisions.

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 terms of reference.

Minister's response - extract

Amendments made by the Migration Amendment (Character and General Visa Cancellation) Act 2014

The amendments in this Bill are consequential to the substantive amendments made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Character Act). They do not expand visa cancellation powers or the grounds upon which a person may have their visa cancelled. They also do not alter the detention framework already established in the *Migration Act 1958* (the Migration Act). Nor does the Bill introduce any additional Ministerial powers to set aside decisions by the Administrative Appeals Tribunal (AAT) or propose any changes to the mandatory cancellation and revocation powers.

The measures proposed in the Bill will amend the legal framework in the Migration Act to ensure that it will be interpreted consistently with the original policy intention, and

operates effectively as intended. These changes are necessary to ensure that the character cancellation provisions throughout the Migration Act operate consistently.

Committee response

The committee thanks the Minister for this response.

The purpose of these amendments is to improve the efficacy of existing powers about which the committee has expressed concerns and which may (as accepted in the explanatory memorandum) result in an increase in the number of non-citizens who will be ineligible to apply for a visa and thus be liable to be detained under the Migration Act. For this reason the committee expects the proposed amendments to be comprehensively justified and is of the view that reference to considerations of efficacy and consistency (measured by reference to the substantive provisions) does not adequately detail the rationale for the provisions.

The committee therefore draws its concerns to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

Alert Digest No. 2 of 2016 - extract

Retrospective commencement

Subitems 22(2), 22(6) and 22(7)

This subitem provides that the amendment made by item 10 of Schedule 1 has retrospective application. The explanatory memorandum states (at p. 12):

The retrospective application of this item is necessary to put beyond doubt that there is a clear removal pathway for people who have been invited by the Minister personally under subsection 501CA(4) to seek revocation of their subsection 501(3A) cancellation decision before commencement, who made representations and the Minister decided not to revoke the cancellation decision or the person had not made representation in accordance with the invitation and the period for making the representations has ended.

The committee expects a detailed justification for the retrospective application of coercive powers. Unfortunately this explanation, which relates to a power to retrospectively authorise removal (a highly coercive power), is insufficiently detailed. Where there is legal uncertainty about whether a coercive power can be exercised, that uncertainty does not of itself justify the application of a newly framed power which does create authority to apply retrospectively.

Subitem 22(3) provides that new subsection 198 subsection 198(2B) of the Migration Act, as inserted by item 11 of this Schedule, applies in relation to a decision under subsection 501(3A) of that Act made before or after the commencement of item 22 and to an invitation under section 501CA of that Act given before or after that commencement. The explanatory memorandum gives the following justification for retrospective application:

The retrospective application of this item is necessary to put beyond doubt that there is a clear power to remove people who have been invited by a delegate of the Minister under subsection 501CA(4) of the Migration Act to seek revocation of their subsection 501(3A) cancellation decisions before commencement, who made representations and whose visa cancellation decisions were not revoked or the person had not made representations in accordance with the invitation and the period for making the representations has ended.

The introduction of a new removal power and amendment to the existing removal power under subsection 198(2A) will provide certainty about when a person becomes liable for removal under section 198. These amendments do not reach back and change what the law was before commencement and so are not retrospective in that sense. The amendments apply after commencement to establish a clear removal power where a non-citizen's visa was mandatorily cancelled under subsection 501(3A) and the non-citizen either did not seek revocation within the statutory timeframe under section 501CA, or was unsuccessful in seeking revocation.

In the committee's view, the claim that '[t]hese amendments do not reach back and change what the law was before commencement and so are not retrospective in that sense' requires clarification. **The committee therefore seeks the Minister's further explanation, including addressing the fairness of attaching legal consequences to an administrative decision (here liability to removal) after that decision has already been made.**

In effect, the same issue arises in relation to subitems 22(6) and (7) and the committee also seeks the Minister's further justification for the proposed approach in relation to these items.

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 terms of reference.

Minister's response - extract

Retrospective application: Sub items 22(2), 22(6) and 22(7)

Sub item 22(2): application of item 10 – removal power

Section 198 of the Migration Act contains provisions which set out when and in what circumstances an unlawful non-citizen must be removed from Australia. The Bill proposes

amendments to section 198 of the Migration Act to add a reference to section 501CA into the existing removal provision at subsection 198(2A). The Bill also proposes to insert a removal power specific to non-citizens who have had their visa cancelled under section 501 (3A) by a delegate and have not sought revocation of that cancellation, or who sought revocation and the cancellation was not revoked, at new subsection 198(28).

The introduction of a new removal power and amendment to the existing removal power under subsection 198(2A) will provide certainty about when a person becomes liable for removal. It is intended that a non-citizen whose visa has been mandatorily cancelled under subsection 501(3A), whether by the Minister personally or a delegate, and either does not seek revocation within the statutory timeframe under section 501CA, or is unsuccessful in seeking revocation will be liable for removal. Where a non-citizen has not sought or has been unsuccessful in seeking revocation of a visa cancellation under section 501CA, the cancellation and revocation decision process is complete and the non-citizen's visa status is resolved. For all other cancellation and revocation decisions relating to non-citizens who fail the character test, where those decisions are completed and the non-citizen's status is resolved the removal power in section 198 would generally be enlivened. Applying the amendments to non-citizens whose visas have already been mandatorily cancelled under subsection 501(3A) provides clarity in relation to this cohort, and clearly articulates when a person in this cohort can be removed under section 198.

This amendment is intended to make clear when removal liability arises even when the visa cancellation and revocation decisions occurred before commencement of this amendment. While the existing removal powers provide for the ability to remove non-citizens in this cohort, the Government is of the view that it is preferable to have a specific removal power to put beyond doubt that a non-citizen whose visa has been cancelled either personally by the Minister or by a delegate of the Minister under subsection 501(3A), will be available for removal from Australia once it is clear that the person's visa cancellation will not be revoked.

Subitem 22(6): application of item 20 – Inclusion of section 501BA into paragraph 503(1)(b)

The Minister's power to cancel a visa under section 501BA allows the Minister to set-aside, where the Minister is satisfied it is in the national interest, a non-adverse delegate or AAT decision made under subsection 501CA(4). The power under section 501BA is only enlivened after a non-citizen has had the opportunity to put their case for revocation to either a delegate, or the AAT.

The Bill proposes to insert a reference to section 501BA into paragraph 503(1)(b). The effect of this amendment is that a person whose visa is cancelled by the Minister personally under section 501 BA is not entitled to enter Australia at any time during the period determined by the regulations.

The retrospective application of this amendment to a decision under section 501BA made before or after commencement is necessary to ensure that a person whose visa is cancelled

personally by the Minister under section 501BA of the Migration Act before commencement is excluded from Australia in the same way as a person whose visa is cancelled personally by the Minister under that provision after commencement. The exclusion provisions apply to any other cancellation decision made under section 501, 501A and 501B. This amendment will remove the existing anomaly whereby section 501BA decisions do not result in exclusion, by ensuring that all persons whose visas are cancelled under any of the character provisions are treated consistently in terms of their ability to return to Australia. In any event, the impact of this provision applying to decisions made prior to commencement is likely to be small as the Minister is yet to exercise his power under section 501BA to cancel a visa.

Subitem 22(7): application of item 21 – Protected information

Broadly speaking, section 503A of the Migration Act protects the disclosure of confidential information communicated to an authorised migration officer by a gazetted agency that is relevant to the exercise of a power under section 501, 501A, 501B or 501C. Section 503B broadly provides that if confidential information is given to the Department by a gazetted agency that is relevant to the exercise of a power under section 501, 501A, 501B or 501C, and the information is relevant to proceedings before the Federal Court or Federal Circuit Court, either of those courts can make orders to protect the disclosure of that information.

The Bill proposes to amend sections 503A and 503B of the Migration Act by including references to sections 501BA and 501CA. These amendments will ensure the protection of confidential information provided by a gazetted agency that is relevant to the exercise of power under sections 501BA and 501CA, and allow the Federal Court and the Federal Circuit Court to make orders protecting this information from the applicant, the legal representative of the applicant, or any other member of the public in legal proceedings. This will ensure that confidential information used in section 501BA and 501CA decision-making receives the same level of protection as confidential information that is relevant to the exercise of a power under section 501, 501A, 501B or 501C.

Confidential information provided in relation to the exercise of one of the character cancellation powers needs to be protected for use in the exercise of any of the other character cancellation powers.

This is particularly the case because some character cancellation powers are not enlivened until another power has been used (for example, the Minister's power to set-aside a non-adverse delegate or Tribunal decision is only enlivened once the power in section 501 has been exercised). It is therefore necessary to ensure that confidential information provided to the Department by a gazetted agency that was relevant to the exercise of a power under section 501 prior to the introduction of this amendment continues to be protected and able to be used during the exercise of the decision-making powers under section 501BA and 501CA.

The retrospective application of this amendment will ensure the continued protection of confidential information which is relevant, for example, to the revocation consideration of a mandatory cancellation decision, in circumstances where that information was provided to the department before commencement.

These amendments strengthen protection for criminal intelligence and related information that is critical to decision making under sections 501BA and 501CA of the Migration Act.

Committee response

The committee thanks the Minister for this response and makes the following comments.

In relation to the application of item 10:

In essence, the argument for the retrospective application of the amendments in this item appears to be that it will provide clarity about the existence of power to remove from Australia a particular group of persons (i.e. persons whose visa has been cancelled under subsection 501(3A) and who have not sought revocation within the statutory timeframe under section 501CA or who is unsuccessful in seeking revocation). The Minister's response also states, however, that there are existing removal powers for this group of persons. In light of the implications for undermining the rule of law, the committee has a long-standing concern about provisions with retrospective detrimental effect. The general argument that 'clarity' of an authority to exercise coercive powers is, by itself, sufficient justification for retrospectivity does not adequately address the fairness of the application of a coercive power with retrospective effect. The desire to make the legal position clear does not appear to be a satisfactory answer to the question of why it is fair to enliven authority to remove a person with retrospective effect.

The committee draws its concerns about the retrospective effect of this item to the attention of Senators and leaves the question of whether it is appropriate to the Senate as a whole.

In relation to the application of item 20:

The committee notes the justification given that the amendment will 'remove the existing anomaly'. However, again in light of the implications for undermining the rule of law, the committee notes that it has a long-standing concern about provisions with retrospective detrimental effect. Given that the Minister 'is yet to exercise his power under section 501BA to cancel a visa' the necessity of applying the amendments with retrospective effect is not clear to the committee. **The committee draws its concerns about the retrospective effect of this item to the attention of Senators and leaves the question of whether it is appropriate to the Senate as a whole.**

continued

In relation to the application of item 21:

As an order which protects confidential information may limit the availability of this information in proceedings before the Federal Court or Federal Circuit Court, these amendments may limit an applicant's ability to make his or her case in those proceedings. **The committee leaves to the Senate as a whole the question of whether it is appropriate to extend the protection of confidential information as proposed in this item, but again retains concerns that these amendments, which may limit rights to a fair hearing, are being given retrospective application. The committee draws its concerns about the retrospective effect of this item to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

Offshore Petroleum and Greenhouse Gas Storage Amendment Bill 2016

Introduced into the House of Representatives on 11 February 2016

Portfolio: Industry, Innovation and Science

This bill received Royal Assent on 29 February 2016

Introduction

The committee dealt with this bill in *Alert Digest No. 2 of 2016*. The Minister responded to the committee's comments in a letter received 3 March 2016. A copy of the letter is attached to this report.

Alert Digest No. 2 of 2016 - extract

Retrospective validation

General comment

The explanatory memorandum (at p. 1) notes that an 'administrative oversight' in relation to decisions to grant renewals or extensions of term for 'prior usage rights' petroleum titles was recently discovered. The purpose of the bill is therefore said to be to 'validate past Joint Authority decisions to grant renewals or extensions of the term of 'prior usage rights' titles, where the consent of the Minister for the Environment was neither sought, nor given, under subsection 359(3) of the EPBC Act.'

The explanatory memorandum also states that 'amendments to validate affected decisions are the only way to satisfactorily eliminate the risk affected decisions pose for titleholders' (at p. 1).

While the committee acknowledges the circumstances outlined above and the description of the amendments as 'mechanical', in light of their retrospective effect the committee seeks the Minister's advice as to whether the administrative oversight and resulting remedial action proposed in this bill could have legal consequences for any person (substantive or procedural) and, if so, whether these could be detrimental to any person.

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 terms of reference.

Minister's response - extract

Background

The amendments made by the Bill ensure that affected petroleum titleholders are placed in the legal position that they would have been in, had the administrative oversight not occurred, and the Minister for the Environment had granted consent to the renewal or extension of the term of the affected titles. The purpose of the retrospective operation of the Bill is to ensure that titleholders have, and at all relevant times are taken to have had, the requisite authority to undertake activities under the title. It also ensures that titleholders can continue to operate under the title that they believed they were operating under, and on the basis of which they may have made commercial and financial decisions. Only retrospective legislation can achieve that purpose.

Response

It is the titleholder's legal and financial interests that could be affected if the amendments were not made with retrospective operation. That is, the retrospective operation of the amendments made by the Bill will not result in any detrimental legal consequences for affected petroleum titleholders or any other person. On the contrary, as noted above, it ensures certainty for titleholders, who may have invested a considerable amount of money in their title areas. There are no new or additional legal requirements that will apply to a titleholder, or any other person, as a result of the retrospective operation of the amendments. The relevant titleholders' title-related rights and obligations will continue to apply as they would have if the initial extension or renewal decisions had been correctly made.

A petroleum titleholder has the exclusive right to conduct petroleum activities in its title area in accordance with the requirements of the OPGGS Act and regulations, and any title conditions. The titleholder also has the exclusive right, in accordance with the legislation, to apply for renewals of its title, and for successor titles, e.g. a production licence or retention lease. It is on the basis of this tenure of title that the titleholder makes the, often substantial, investment involved in offshore petroleum exploration. In this context, it is appropriate that the effect on the titleholder of both the administrative oversight in relation to certain title decisions, and of the amendments made by the Bill to validate those title decisions, be given the greatest consideration.

In conclusion, there are no legal consequences for any other person due to the amendments made by the Bill; it is the titleholder's legal and financial interests that could be affected if the amendments were not made, with retrospective operation.

I trust that this additional information will be sufficient to address the Committee's comments in *Alert Digest No. 2 of 2016* in relation to the Bill.

Committee response

The committee thanks the Minister for this detailed response, which addresses its concerns. **The committee requests that the key points outlined by the Minister above be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (e.g. section 15AB of the *Acts Interpretation Act 1901*).**

Senator Helen Polley
Chair



SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MC16-000579

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

I refer to the letters of 25 February 2016, sent to my senior adviser by Ms Toni Dawes, Secretary to the Senate's Standing Committee for the Scrutiny of Bills (the Committee). Those letters drew my attention to the Committee's *Alert Digest No. 2 of 2016* (the Digest) requests for information in relation to the Appropriation Bill (No. 3) 2015-2016

Appropriation Bill (No. 3) 2015-2016

Your Committee sought my advice on the initial expenditure of the 'Cities and the Built Environment Taskforce' and its classification as ordinary annual services within Appropriation Bill (No. 3) 2015-2016. I note that the Committee considers this may be a 'new policy not previously authorised by special legislation'.

The appropriation for the Cities and the Built Environment Taskforce measure has been provided for in Bill No. 3 as it falls under the existing Outcome 1 of the Department of the Environment. The Department of the Environment's portfolio additional estimates statement makes clear that the expenditure is under Outcome 1, which is as follows:

Outcome 1: Conserve, protect and sustainably manage Australia's biodiversity, ecosystems, environment and heritage through research, information management, supporting natural resource management, establishing and managing Commonwealth protected areas, and reducing and regulating the use of pollutants and hazardous substances

As indicated in my previous correspondence to you, this Government prepares Appropriation Bills in a manner consistent with the previous practices of this Government and its predecessors. In particular, that ordinary and ongoing annual appropriation items, for administered and departmental purposes, are included in the odd-numbered Bills. The Cities and the Built Environment Taskforce involves departmental expenditure that falls within an existing outcome. Accordingly this measure was included in Appropriation Bill (No. 3) 2015-2016.



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MC15-219778

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Helen
Dear Senator

I refer to the letter of 13 August 2015 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills to my office in relation to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

The Committee's remarks in relation to that Bill are contained in *Alert Digest No. 7 of 2015*. In response to those remarks, I provide the attached.

Thank you for bringing the Committee's views to my attention.

I note that the Bill was passed by the Parliament on 3 December 2015 and came into effect as the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* on 12 December 2015.

Should you need further information the contact officer in my Department is Greg Phillipson, Assistant Secretary Legislation and Framework Branch, who can be contacted on 02 6264 2594.

Yours sincerely

PETER DUTTON

11/01/16

Senate Scrutiny of Bills Committee
Alert Digest No. 7 of 2015
12 August 2015

Australian Citizenship Amendment (Allegiance to Australia) Act 2015

A brief chronology of the Act

On 24 June 2015, the Government introduced an initial version of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 to the Parliament. On 30 November 2015, the Government tabled amendments to the Bill, in response to recommendations from the Parliamentary Joint Committee on Intelligence and Security's report into the Bill (which was tabled on 4 September 2015). The amendments introduced additional accountability measures and further strengthened safeguards in relation to the core provisions of the Act. The amended Bill was passed by the Senate on 3 December 2015 without any further amendments as the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (the Act).

Please note that this response addresses the comments of the Senate Scrutiny of Bills Committee as they apply to the Act, as passed by the Senate on 3 December 2015 and as incorporating the PJCIS recommendations.

Overview: The objective of the Act

The Act was introduced as a response to the Australian Government's 'Review of Australia's Counter-Terrorism Machinery for a Safer Australia' (the Review) which found that the terrorist threat in Australia is rising and the number of potential terrorists, foreign fighters and terrorist sympathisers in Australia continues to grow. The Act responds to the evolving nature of terrorism, modern forms of warfare and the national security threat posed by irregular forces and new and emerging terrorist organisations.

As noted by the Attorney General in his second reading speech to the Senate on 1 December 2015, over 110 Australians are currently fighting or engaged with terrorist groups in conflicts in Syria and Northern Iraq. In addition, 30 Australians have returned to Australia from the conflict zones and around 190 people are currently being investigated for their direct involvement in the conflicts or for supporting these groups with financing and recruitment. It is estimated that approximately 30 Australians have so far been killed in Syria and Iraq as a result of their involvement in the conflict.

There have been over 145 Australian passport cancellations and refusals in relation to terrorist activity in Syria and Northern Iraq and there are more than 400 high-priority ASIO investigations afoot concerning Australians involved in terrorism.

In response to the issues identified by the Review, the Government determined that existing laws and powers were insufficient to deal with the modern terrorist threat in Australia.

The Act adds to the Government's counter-terrorism capabilities and the risk posed by dual-nationals who become involved in terrorism-related activity, in the following ways:

- A dual national can automatically lose their Australian citizenship if they act inconsistently with their allegiance to Australia by engaging in certain terrorist or other conduct (new s33AA), or for fighting for, or being in the service of, a declared terrorist organisation overseas (new s35); and
- if a dual-national or citizen is convicted and sentenced for a specified period by an Australian court for a specified terrorism offence, the Act provides the Minister with the discretionary power to determine, having regard to specified criteria including public interest criteria, that the person ceases to be an Australian citizen (new section 35A).

The provisions in the Act will further protect the Australian community from such threats while upholding those values which underpin the concept of citizenship. As explained in the Revised Explanatory Memorandum to the Bill, the Government's position is that citizenship is both a privilege as well as entailing rights. By recognizing the renunciation or cessation of a person's formal membership to the Australian community is appropriate to discourage people from engaging in acts or further acts that harm Australians or Australian interests.

Addressing the Committee's comments in more detail

Trespass on personal rights and liberties—loss of citizenship without appropriate judicial process
Items 3 and 4, sections 33AA and 35

Noting the above, the committee indicates its serious concern that a person will, under these proposed amendments, lose their citizenship on the basis of alleged or suspected criminal conduct in circumstances where:

- it is unclear whether or how protections associated with particular offences (such as the fault elements of offences) will be applicable; and
- the usual protections associated with the criminal judicial process have not been afforded.

The committee therefore seeks a detailed justification from the Minister which addresses the fairness of these provisions in light of the above concerns.

In addition, the committee also requests a detailed and particularised explanation as to why all of the conduct listed in subsection 33AA(2) is considered an appropriate basis for the loss of citizenship, especially as the loss is 'automatic'.

New subsection 33AA(2) provides that, subject to subsections 33A(3) to 33A(5), subsection 33AA(1) applies to the following conduct:

- (a) engaging in international terrorist activities using explosive or lethal devices;
- (b) engaging in a terrorist act;
- (c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- (d) directing the activities of a terrorist organization;
- (e) recruiting for a terrorist organization;
- (f) financing terrorism;
- (g) financing a terrorist;
- (h) engaging in foreign incursions and recruitment.

New subsection 33AA(6) provides that these words and expressions have the same meaning as in Subdivision A of Division 72 and sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the *Criminal Code* (not including the fault elements).

If a person engages in the above conduct with the requisite intention, the person has, by their conduct, acted inconsistently with their allegiance to Australia, and chosen to step outside of the formal Australian community.

It is imperative that there is clarity in the Australian community as to what type of conduct will bring about automatic cessation of Australian citizenship. The list of conduct in subsection 33AA(2) provides certainty and clarity as to when a person's citizenship will automatically cease. This legislative design underpins one of the main objectives of the Act, as outlined in the Revised Explanatory Memorandum:

'Where a person is no longer loyal to Australia and its people, and engages in acts that harm Australians or Australia's interest, they have severed their bond to this country and repudiated their allegiance to Australia.'

In relation to the fault element of the above offences, while the original Bill did not include provisions relating to intention, these have since been added in new subsections 33AA(3) and (4).

Subsection 33AA(3) specifies that a person renounces their Australian citizenship under subsection 33AA(1) if the conduct listed in subsection 33AA(2) is engaged in with the intention of advancing a political, religious or ideological cause and with the intention of either coercing or influencing by intimidation, the government of the Commonwealth or a State, territory or foreign country, or of intimidating the public or a section of the public.

New subsection 33AA(4) is a deeming provision which provides that a person is taken to have engaged in conduct listed in new subsection 33AA(2) with an intention referred to in new subsection 33AA(3) if, when the person engaged in the conduct, they were a member of a declared terrorist organization or acting on instruction of, or in cooperation with a declared terrorist organization.

Section 35 of the Act provides that a dual national ceases to be an Australian citizen if they serve in the armed forces of a country at war with Australia or fight for, or are in the service of, a declared terrorist organisation (as defined in new section 35AA). This loss of citizenship model originates from the *Nationality and Citizenship Act 1948 (Cth)* (now repealed) which specified that dual British and German nationals would automatically lose their citizenship if they served with enemy forces.

In relation to the definition of 'intention' under section 35, the amended Act includes a safeguard in new subsection 35(4) whereby a person is not 'in the service of a declared terrorist organisation' to the extent that: the person's actions are unintentional; the person is acting under duress or force; or the person is providing neutral and independent humanitarian assistance.

In response to concerns that the Act does not afford the usual protections of the criminal justice process, subsections 33AA(10) to (12) and subsections 35(5) to (7) provide that, in certain circumstances, the Minister must give the affected person a written notice. Subsections 33AA(11) and 35(6) specify respectively, that under subsection 33AA(10) or a subsection 35(5), a written notice must include the affected person's rights of review. The notice must also include the matters required by section 35B, which include:

- a statement that the Minister has become aware of conduct that the affected person has engaged in which has triggered the section 33AA or 35 cessation provisions; and
- a basic description of the offending conduct.

By requiring that a section 33AA or 35 notice include the above information, the affected person is also provided with an explanation of why their Australian citizenship has ceased. The notice explicitly sets out the person's rights of review, which means that the affected person is made aware of the options available to them to seek review of the basis on which a notice was given.

To avoid doubt, subsections 33AA(24) and 35(19) have been included in the Act to specify that a person's citizenship is taken never to have ceased under sections 33AA or 35 if a person is successful in their review action.

Trespass on personal rights and liberties—breadth and proportionality of application of provision

Item 5, proposed new section 35A

For these reasons, the committee seeks a detailed and particularised explanation from the Minister as to why conviction for each of the specified offences justifies the loss of citizenship. The committee requests that the explanation should at least consider the following issues:

- the underlying principles used for determining which offences are included;
- why those principles justify the inclusion of the particular offence;

- whether it is possible that automatic cessation of citizenship on the basis of each offence may (in application to particular circumstances) be disproportionate in its application; and
- whether the cessation of citizenship in relation to conviction for particular offences is appropriate given the impact on freedom of speech.

Conviction (section 35A)

New section 35A provides for the cessation of citizenship, by determination by the Minister, of a person convicted for terrorism offences and certain other offences. In the first reading version of the Bill, which the Committee considered, section 35A operated to automatically revoke the citizenship of a person convicted of certain offences. We note that the provision has since been amended in light of the PJCIS recommendations and the new provision allows the Minister to make a determination ceasing a person's citizenship for conviction of certain offences. In exercising the power to make such a determination, new section 35A requires the Minister to be satisfied about certain matters relating to the person repudiating their allegiance to Australia and public interest considerations of the person remaining an Australian citizen. As such, new section 35A no longer operates to automatically revoke a person's citizenship.

New paragraph 35A(1)(a) provides that for the purposes of new subsection 35A(1), the offences are the following:

- a provision of Subdivision A (*International terrorist activities using explosive or lethal devices*) of Division 72 of the *Criminal Code*;
- a provision of section 80.1 (*Treason*), 80.1AA (*Treason - materially assisting enemies etc*) or 91.1 (*Espionage and similar activities*) of the *Criminal Code*;
- a provision of Part 5.3 (*Terrorism*) of the *Criminal Code* (except section 102.8 (*Associating with terrorist organisations*) or Division 104 (*Control orders*) or 105 (*Preventative detention orders*));
- a provision of Part 5.5 (*Foreign incursions*) of the *Criminal Code*;
- section 24AA (*Treachery*) or 24AB (*Sabotage*), of the *Crimes Act 1914*;
- section 6 (*incursions into foreign States with intention of engaging in hostile activities*) or 7 (*preparations for incursions into foreign States for purpose of engaging in hostile activities*) of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*.

The maximum penalties under the Criminal Code range from 10 years' imprisonment to imprisonment for life.

The purpose of new section 35A is to deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community. Cessation of citizenship is a very serious outcome of very serious conduct that demonstrates a person has repudiated their allegiance to Australia (refer to paragraph 35A(1)(d)). Removing a person's formal membership of the Australian community is appropriate to reduce the possibility of a person engaging in acts or further acts that harm Australians or Australian interests.

The Government's position is to identify terrorism-related offences that are inconsistent with allegiance to Australia and where the maximum penalty of imprisonment is considerable (that is, with reference to the maximum penalty, rather than the sentence in any particular case). To this end, the Act requires that the person has, in respect of their conviction or convictions, been sentenced to a period of imprisonment of at least six years (or to periods of imprisonment that total at least six years). Also, the Minister is required to consider and be satisfied that:

- the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
- having regard to specified factors, it is not in the public interest for the person to remain an Australian citizen.

The Government considers that the cessation of the citizenship under these circumstances is proportionate to achieving the purpose of the Act.

Trespass on personal rights and liberties and delegation of legislative power - breadth and proportionality of application of provision

Item 4, subsection 35(1)

The committee therefore seeks an explanation from the Minister in relation to the appropriateness of making these consequences reliant upon a ministerial declaration that is not subject to disallowance by the Parliament.

The committee considers that the explanatory materials do not sufficiently explain why such a broad application of the provision is appropriate or address circumstances in which the ('automatic') application of the provision may be disproportionate. The committee therefore seeks a more detailed explanation from the Minister in this regard. The committee notes that its scrutiny concerns in relation to the breadth of this provision has even greater force given that (as noted above) the law operates with respect to organisations identified by a ministerial declaration that is not disallowable by the Parliament.

Fighting for or being in the service of a declared terrorist organisation overseas (s35)

New subsection 35(1) provides that a person aged 14 or older ceases to be an Australian citizen if:

- the person is a national or citizen of a country other than Australia; and
- the person
 - serves in the armed forces of a country at war with Australia; or
 - fights for, or is in the service of, a declared terrorist organisation; and
- the person's service or fighting occurs outside Australia.

A 'declared terrorist organisation', is an organisation that the Minister has declared, by legislative instrument, to be such an organisation. In the first reading version of the Bill that the Committee considered, this power was contained in subsection 35(1) and the declaration need only be 'in writing'. Further, under subsection 35(10) of the first reading version of the Bill, such a declaration was not a legislative instrument and, for that reason, was not subject to disallowance.

However, in light of the PJCIS recommendations, former section 35 has been amended and the power to declare an organisation as a terrorist organisation is now provided for in new section 35AA. Further, under new subsection 35AA(1) of the Act, such a declaration is a legislative instrument and therefore subject to disallowance under section 42 of the Legislative Instruments Act.

New subsection 35(1) causes citizenship to cease by operation of law and builds on, adapts and modernises loss of citizenship provisions for those fighting in a war against Australia which have been in place since 1949. It applies to a dual citizen who fights on behalf of, or is in the service of, a terrorist organisation outside Australia.

The purpose of this provision is to deal with the threat caused by those who have acted in a manner contrary to their allegiance to Australia by removing them from formal membership of the Australian community.

The Executive arm of Government has responsibility for national security and law enforcement matters. Section 35AA allows the Minister to declare organisations as terrorist organisations. As the Revised Explanatory Memorandum to the Bill explains, the Minister will declare those organisations that are opposed to Australia or Australia's values, democratic beliefs, rights or liberties.

The organisations that the Minister can declare to be declared terrorist organisations for the purpose of section 35 can only be from those already listed for the purposes of the Criminal Code.

New subsection 35(1) is intended to apply to all persons who fight for or in the service of a declared terrorist organisation while outside Australia. The Bill does not define the term '*in the service of*', so it should be given its ordinary meaning. In the Macquarie Dictionary, 'service' is an act of helpful activity or the supplying of any articles, commodities, activities etc., required or demanded.

A person who is unwittingly or unknowingly aiding and providing assistance to a terrorist organisation will not be acting 'in the service of' a terrorist organisation'. As the Revised Explanatory Memorandum to the Bill explains, the term 'in the service of' is intended to cover acts done by persons willingly (for example, joining a terrorist group in order to provide it with medical support) and is not meant to cover acts done by a person against their will (for example, an innocent kidnapped person), the unwitting supply of goods (for example, the provision of goods following online orders by innocent persons). A person providing medical or other aid under the auspices of a humanitarian organisation is clearly a person who is serving the humanitarian organisation and is not in the service of a terrorist organisation. This type of conduct is not captured by new section 35 of the Bill, and this is reinforced by new subsection 35(4).

Exclusion of the right to be heard Items 3, 4 and 5

The committee therefore seeks a further justification from the Minister which addresses the lack of procedural fairness in the operation of the scheme in light of the above scrutiny concerns.

The common law rule of natural justice provides that if an administrative decision maker is considering making an adverse decision, they must put relevant material to the person in question for comment before the decision is made.

Provisions excluding natural justice are not novel and have been upheld by courts as valid.

In general, the rules of natural justice are excluded from the operation of administrative powers of the Minister under sections 33AA, 35 and 35A of the Bill. The exceptions are in new subsections 33AA(22) and 35(17), which provide that the rules of natural justice do apply to a decision by the Minister to make, or not make, a determination under new subsections 33AA(14) and 35(9), respectively, in relation to the Minister's powers to rescind a notice and exempt the person who is the subject of the notice from the effect of the relevant section. The rules of natural justice also apply to the Minister's power to determine that a person ceases to be an Australian citizen if the person has been convicted of certain terrorism or other offences (new subsection 35A(11) refers).

The rules of natural justice have not been excluded in review proceedings before a court. If the person has not in fact undertaken the conduct and triggered the operation of sections 33AA, 35 or 35A, or there is some other reason that the provision does not apply to the person, then this matter can be resolved on review by the courts.

In the first reading version of the Bill, that the Committee considered, subsections 33AA(12), 35(11) and 35A(11) excluded the operation of section 39 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) in relation to the exercise of a power or performance of a function under sections 33AA, 35 and 35A. Section 39 of the ASIO Act has the effect that government agencies cannot make decisions on the basis of any information ASIO may provide; government agencies can only make decisions on the basis of information ASIO provides in the form of a Security Assessment of a person.

We note that these provisions have since been removed, to implement recommendations of the PJCIS. As a result, in the context of the exercise of powers under the Act, the Minister will not be able to act on the basis of a communication made by ASIO about a person which does not amount to a security assessment.

Exclusion of natural justice and limitation of judicial review - Minister's power to rescind a notice and exempt a person from the operation of the cessation provisions

Merits review

Items 3, 4 and 5

The committee therefore expresses its concern that the Minister's exercise of his or her power to rescind a notice and exempt the person from the operation of the cessation provisions need not be preceded by a fair, unbiased hearing. In light of this, the committee seeks a more detailed explanation from the Minister for the exclusion of natural justice in relation to the Minister's power to rescind a notice. The committee requests that the explanation address the justification for the exclusion of the fair hearing rule and the rule against actual and ostensible bias.

The committee therefore expresses its concern that it may be considered that the 'no duty to consider' provisions attached to the exemption power are unfair given that the cessation of citizenship occurs automatically and the result therefore is that the Minister's decision as to whether the operation of the exemption provision is appropriate is not subject to any meaningful judicial review. The committee requests a detailed justification from the Minister addressing the fairness of this position in light of the committee's comments.

Further, given the ineffectiveness of judicial review to maintain the rule of law in the administration of these powers, the committee seeks a justification as to why a mechanism for merits review has not been included in the bill in relation to the Minister's power to rescind a notice *and* exempt the person from the operation of the cessation provisions.

If the Minister becomes aware of conduct because of which a person has, under sections 33AA or 35, ceased to be an Australian citizen, or if the Minister makes a determination under subsection 35A(1) that a person ceases to be an Australian citizen due to a conviction for a terrorism offence, the Minister must give, or make reasonable attempts to give, written notice to that effect to the person as soon as practicable. If the Minister makes a determination under subsection 33AA(12), 35(7) or 35A(7) that a notice should not be given to a person, the notice must be given to the person as soon as practicable after the Minister revokes the determination (if the Minister does so).

The Minister's power under subsections 33AA(14) and 35(9) to make a determination to exempt a person from loss of citizenship is not an adverse decision; it is a decision to give a person a benefit (excusing them from loss of citizenship). If the Minister decides to consider whether to exercise the power to exempt a person from loss of citizenship, the Minister must have regard to the following matters:

- the severity of the matters that were the basis for any notice given;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18 – the best interests of the child as a primary consideration;
- whether the person is being or is likely to be prosecuted in relation to the matters that were the basis for the notice;
- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations;
- any other matters of public interest.

The rules of natural justice apply to a decision by the Minister to make, or not make, a determination to exempt a person from loss of citizenship (subsections 33AA(22) and 35(17) refer). The rules of natural justice also apply to the Minister's power to determine that a person ceases to be an Australian citizen if the person has been convicted of certain terrorism or other offences (subsection 35A(11) refers). In this respect, the Act as passed differs from the Bill that was before the Committee on 12 August 2015, at which time the rules of natural justice were excluded.

If a person wishes to challenge a decision of the Minister not to exempt him or her from the effect of the section, they may do so through judicial review. While the Minister cannot be compelled to consider rescinding the written notice and exempting a person from the operation of the provisions under the Bill, if the Minister does make such a decision, that decision may be the subject of judicial review.

In common with similar provisions in portfolio legislation giving the Minister a personal and non-compellable power, exercisable in the public interest, it is not considered appropriate to make the exercise of the 'rescinding' power subject to merits review.

The availability of access to the court to seek declaratory relief that the conduct was not in fact engaged in provides the person with a broad and effective opportunity to

have the facts of the issue canvassed before a court, and have a court make a determination in relation to those facts.

Judicial review is available to a person affected by the provisions for loss of citizenship in the Bill, whether the person is onshore or offshore. A person has available to him or her the opportunity to seek judicial review or declaratory relief regarding (for example) the Minister's refusal to exempt him or her from the effect of section 33AA or s35. The right of access to courts and equality before them is not limited to citizens, but is available to all within Australia's jurisdiction. For those persons who renounce or cease their Australian citizenship while they are outside Australia, judicial review on behalf of that person may still be accessed by persons who have standing.

If the Minister becomes aware of conduct because of which a person has ceased to be an Australian citizen or makes a determination that a person has ceased to be an Australian citizen due to a conviction, the Minister must give, or make reasonable attempts to give, written notice to that effect to the person (unless a determination is made that notice should not be given). When the Minister gives such a written notice, the onus is on the Minister to be aware that citizenship has ceased. If a person seeks relief or review of such a notice, the onus is on the person to establish (for example) that they were not a dual citizen or dual national at the time of engaging in the specified conduct or at the time of the conviction of the specified offences, or that they did not engage in the specified conduct or were not so convicted.

A person who receives notice that their citizenship has ceased can challenge various aspects of the cessation, including:

- the constitutional validity of the provisions;
- whether they have in fact undertaken the conduct that caused their citizenship to cease;
- statelessness (a person may argue that they are not a national or citizen of a country other than Australia); and
- the adequacy of the notice (but this does not challenge the cessation of citizenship, so it is unlikely to be the only ground of challenge).

Trespass on personal rights and liberties - uncertain operation of the law

The committee therefore seeks the Minister's advice as to the rationale for the proposed approach and whether legislative guidance can be provided as to how these matters of concern will be addressed.

The process for implementing the Bill

In the Department's public submission to the inquiry by the PJCIS into the Bill, the

Department explained the Government's intentions for implementation of the provisions of the Bill:

“Operationalising the Act will involve identifying dual nationals to whom one (or more) of the provisions relating to automatic loss of citizenship apply. This will require close cooperation across government. The Department, including the Australian Border Force, will work closely with relevant departments and agencies, including law enforcement and intelligence agencies, to put in place the appropriate steps and processes to support the new provisions. Where available and suitable, existing whole of government intelligence and law enforcement coordination mechanisms will be utilised.

In addition, deputy secretaries from relevant departments and agencies and will work together to provide high-level oversight and coordination and provide information to the Secretary of the Department of Immigration and Border Protection on cases and other matters, such as the identification of relevant listed terrorist organisations for the purposes of the Act. The Secretary will bring cases to the attention of the Minister.”

In evidence to the Committee's public hearings on 10 August 2015, the Secretary of the Department of Immigration and Border Protection, Mr Michael Pezzullo, indicated this would be as 'an administrative process run under the auspices of normal public service support to ministers'. He added that 'as a matter of practice, the better course in such a matter would be to provide the minister with a joined-up piece of advice that effectively comes from an interagency board or interagency committee.' He explained that senior public servants would 'need to assess facts, intelligence and other forms of reports' in preparing the information brief to provide the Minister with the facts of the case. He confirmed that the information brief would be confidential, saying 'most of it would be what we would describe as classified, which is not to say that some of it would not come from what we call 'open source' research'. The brief would include advice to the Minister on any public interest grounds for rescinding the notice.

The obligation to issue a notice is engaged upon the Minister becoming 'aware'. Awareness is a knowledge that something has occurred. It is more than belief or suspicion, but does not require absolute proof. It involves a clear degree of mental apprehension. The Minister should know the relevant ceasing event has occurred and that knowledge should be based on a high degree of probability as to the facts underpinning it.

The Minister must give, or make reasonable attempts to give, a person written notice of loss of citizenship as soon as practicable, unless a determination is made under subsection 33AA(12), 35(7) or 35A(7) that notice should not be given. Such a determination that notice should not be given to a person can be made if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke the determination no later than 6 months after making it, and at least every 6 months thereafter until 5 years have passed since the determination was made.

Legal consequences of loss of citizenship following conviction

Where a conviction relevant to section 35A is set aside on appeal, and all appeal options have been exhausted, the person would be taken never to have lost their citizenship under that provision.

Where a person was found to have ceased their citizenship under proposed section 33AA or 35 and is subsequently acquitted of an offence associated with the same conduct that resulted in their loss of citizenship, the loss of citizenship would stand. However, the acquittal and any other relevant material could be considered by the Minister if the Minister considers rescinding a notice of loss of citizenship that was issued under the provisions.



Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC16-000599

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

**Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]
and Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]**

This letter is in response to the letter of 25 February 2016 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning issues raised in the Committee's *Alert Digest No. 2 of 2016* in relation to the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2] and the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] (the Bills).

As you have identified, the Bills are in identical terms to Bills that were introduced into the House of Representatives on 14 November 2013 and that were previously the subject of review and comment by the Committee in *Alert Digest No. 9 of 2013*.

The former Minister for Employment, Senator the Hon Eric Abetz, provided detailed responses to the issues raised by the Committee in a letter of 18 March 2014 and these were considered by the Committee in its *Fourth Report of 2014*. I endorse the Australian Government's previous responses to the Committee.

The Government's position on the need for the Bills has not changed and the case supporting the Bills' passage is even more compelling now than when the Bills were first introduced. Since the Committee's report in 2014, the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) uncovered and examined a wide range of corrupt or inappropriate conduct on the part of relevantly, unions in the building and construction industry, and in particular, the Construction, Forestry, Mining and Energy Union (CFMEU).

His Honour Justice Heydon AC QC concluded, in the final report of the Royal Commission, that the 'sustained and entrenched disregard for both industrial and criminal laws shown by the [CFMEU] further supports the need [for a separate building industry regulator]' (Paragraph 83, Chapter 8, Volume 5). His Honour considered that the 'conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court' (Paragraph 1, Chapter 8, Volume 5).

The Government remains committed to re-establishing an effective industrial regulator, the Australian Building and Construction Commission, to deal with the culture of lawlessness and systemic unlawful behaviour in the building and construction industry and returning the rule of law to that vital industry. The Bills should be progressed through the Parliament as a matter of the highest priority.



Senator the Hon Scott Ryan

Minister for Vocational Education and Skills

Senator for Victoria

Our Ref MC16-000589

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley *Helen,*

Thank you for the letter of 4 February 2016 from Ms Toni Dawes, Committee Secretary, Senate Scrutiny of Bills Committee, on behalf of the Committee, concerning the *Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015* (the Bill).

To facilitate the Committee finalising its consideration of the Bill a response to the issues identified in the 'Commentary on Amendments to Bills' outlined in the *Alerts Digest No. 1 of 2016* tabled on 3 February 2016 is at Attachment A.

Thank you for the opportunity to respond to the issues raised by the Committee in relation to the Bill.

Yours sincerely

Encl. Response to Senate Scrutiny of Bills Committee's Commentary on Amendments to Bills
cc. Secretariat, Senate Scrutiny of Bills Committee
scrutiny.sen@aph.gov.au

Response to Senate Scrutiny of Bills Committee's Commentary on Amendments to Bills

Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015

Merits Review

Government amendment (16) on sheet GZ155 (as amended by Lazarus-AMEP (2) on sheet 7835

This amendment (as amended) adds six new items to the table in clause 91 of Schedule 1A to the Higher Education Support Act 2003 (the HESA). Clause 91 sets out the decisions that are made under Schedule 1A that are 'reviewable VET decisions' and are therefore subject to reconsideration and then review by the Administrative Appeals Tribunal. The committee takes this opportunity to seek the Minister's advice as to what decisions made under Schedule 1A are not 'reviewable VET decisions' and the rationale for excluding these decisions from this review mechanism.

Listed in the table below, are those new decisions added or amended by the *Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015* that have not been included in clause 91 of Schedule 1A to the HESA as a 'reviewable VET decision'.

Legislative Reference	Decision	Rationale
36(8) of Schedule 1 A	In deciding whether to make a decision under subclause 36(5), the Secretary must consider any response received from the body within the 14 day period.	Decision not subject to merits review as the decision to suspend a body's approval is made under subclause 36(5) of Schedule 1A and is subject to merits review.
45D(6) of Schedule 1A	The Minister may, by legislative instrument, determine: (a) whether credits arise in the VET FEE-HELP accounts of specified VET providers when another body ceases to be a VET provider; and b) the amounts of such credits.	Not suitable for merits review as subject to parliamentary scrutiny and to the accountability safeguards that apply to legislative decisions. The decision relates to the allocation of a finite resource, represents one-off allocation to certain providers, and successful application by one provider would result in reduction in the allocation of additional credits to other providers.
45E(1) of Schedule 1A	(a) VET FEE-HELP provider's VET FEE-HELP account is in deficit at the end of a calendar year; and (b) the Secretary gives the VET provider a written notice about the deficit; the VET provider must pay to the Commonwealth an amount equal to the amount of the deficit (the excess loan amount).	Not suitable for merits review as follows a set of defined circumstances.

Legislative Reference	Decision	Rationale
45E(6) of Schedule 1A	The Secretary may give written notice to the VET provider of the amount of the general interest charge for a particular day or days. A notice given under this subclause is prima facie evidence of the matters stated in the notice.	Not suitable for merits review as follows a set of defined circumstances. A decision to remit or not to remit a general interest charge is made under subclause 45E(7) of Schedule 1A and is subject to merits review.
46A(4) of Schedule 1A	In deciding whether to make the decision under subclause 46A(1), the Secretary must consider any submissions received from the applicant, and from the VET provider, within the 28 day period.	Decision not subject to merits review. The decision to refuse to re-credit or to re-credit a person's FEE-HELP balance is made under subclause 46A(1) of Schedule 1A and is subject to merits review.
46B(3) of Schedule 1A	The Secretary may re-credit the student's FEE-HELP balance under subclause 46B if the requirements of 46B(3)(a) and (b) are met.	Not suitable for merits review as follows a set of defined circumstances.
46B(4) of Schedule 1A	The Secretary may re-credit the FEE-HELP balance of each of those students if the requirements of clause 46B(4) are met.	Not suitable for merits review as follows a set of defined circumstances.
60(2) of Schedule 1A	Minister may, by legislative instrument, determine the way (including payment in instalments or in arrears), and the times when, amounts payable by the Commonwealth under this Schedule are to be paid to specified kinds of VET providers	Not suitable for merits review as subject to the accountability safeguards that apply to legislative decisions. Decision has limited impact, as the VET provider would still be receiving payment, just the method and times would be impacted. These are procedural administrative decisions without substantive consequences. The cost of a merits review would not justify the decision being subject to merits review.
60(3) of Schedule 1A	Minister may, in writing, determine the way (including payment in instalments or in arrears), and the times when, amounts payable by the Commonwealth under this Schedule are to be paid to a particular VET provider.	Decision has limited impact, as the VET provider would still be receiving payment, just the method and times would be impacted. These are procedural administrative decisions without substantive consequences. The cost of a merits review would not justify the decision being subject to merits review.

Delegation of power to 'a person'
Government amendment (25) on sheet GZ155

Further advice is sought as to:

- examples of the types of persons or bodies outside the public service that may be appointed as an investigator under this provision; and
- whether it would be possible to provide any further limits or safeguards on the power to appoint investigators outside the public service (beyond the requirement in subclause 39GA(3) that the person must be considered to have appropriate knowledge and experience). In this regard the committee notes that if an investigator is appointed from outside the public service that person would not automatically be subject to the APS Values and Code of Conduct.

Procurement of services outside of the public service is subject to the Australian Government's procurement policy. Any appointment of external investigators would be undertaken in accordance with the procurement policy and the relevant parts of the *Public Governance, Performance and Accountability Act 2013*.

Many departments have established a number of panel arrangements for the provision of goods or services through a rigorous open approach to market processes. The terms, conditions and deliverables of contracts entered into under the panel arrangements ensure risks to the Commonwealth are minimised and require external contractors to act diligently, effectively and to a high professional standard and not bring the public service into disrepute.

The Department of Education and Training and the Department of Employment have created an 'Accounting, Audit and Related Professional Services Panel'. Organisations with the relevant expertise and qualifications may be sourced from this panel to undertake investigations under subclause 39GA(1) of Schedule 1A to the HESA, such as auditors, accountants and consultant investigators.

Any investigations undertaken by external contractors would be overseen by departmental officers and undertaken in line with the *Australian Government Investigations Standards 2011* (AGIS), which provides guidance as to the qualifications investigators/compliance officers should have. AGIS establishes the minimum standards for Australian Government agencies conducting investigations. The qualifications include the need for Certificate IV in Government Investigations. This includes achievement of core competency PSPETHC401A 'uphold and support the values and principles of public service' as well as essential competencies regarding fraud awareness, compliance with legislation and managing information and evidence. This would apply to the investigators appointed. AGIS Clause 1.9 Ethical Conduct also requires agencies to conduct investigations in accordance with the APS Values and Code of Conduct. Agencies must also have a procedure governing the manner in which complaints concerning the conduct of its investigations are handled. These procedures should ensure that complaints are handled in a timely, appropriate and comprehensive manner.



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

MC16 - 006514

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 25 February 2016 in relation to comments made in the Committee's *Alert Digest No. 2 of 2016* concerning the following bill in my portfolio:

- Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016.

Please find my advice in relation to the Committee's comments on this bill at [Attachment A](#).

Yours sincerely

**Migration Amendment (Character Cancellation Consequential Provisions)
Bill 2016**

Amendments made by the Migration Amendment (Character and General Visa Cancellation) Act 2014

In light of the committee's scrutiny concerns about the Character Act, and as the current bill may have the effect of extending the reach of the Character Act, the committee seeks the Minister's advice in relation to issues raised about the Character Act in its Fifteenth Report of 2014 and for further advice as to the justification of the current provisions.

The amendments in this Bill are consequential to the substantive amendments made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Character Act). They do not expand visa cancellation powers or the grounds upon which a person may have their visa cancelled. They also do not alter the detention framework already established in the *Migration Act 1958* (the Migration Act). Nor does the Bill introduce any additional Ministerial powers to set aside decisions by the Administrative Appeals Tribunal (AAT) or propose any changes to the mandatory cancellation and revocation powers.

The measures proposed in the Bill will amend the legal framework in the Migration Act to ensure that it will be interpreted consistently with the original policy intention, and operates effectively as intended. These changes are necessary to ensure that the character cancellation provisions throughout the Migration Act operate consistently.

Retrospective application: Sub items 22(2), 22(6) and 22(7)

The committee therefore seeks the Minister's further explanation, including addressing the fairness of attaching legal consequences to an administrative decision (here liability to removal) after that decision has been made.

In effect the same issue arises in relation to sub items 22(6) and (7) and the committee also seeks the Minister's further justification for the approach in relation to these items.

Sub item 22(2): application of item 10 – removal power

Section 198 of the Migration Act contains provisions which set out when and in what circumstances an unlawful non-citizen must be removed from Australia. The Bill proposes amendments to section 198 of the Migration Act to add a reference to section 501CA into the existing removal provision at subsection 198(2A). The Bill also proposes to insert a removal power specific to non-citizens who have had their visa cancelled under section 501(3A) by a delegate and have not sought revocation of that cancellation, or who sought revocation and the cancellation was not revoked, at new subsection 198(2B).

The introduction of a new removal power and amendment to the existing removal power under subsection 198(2A) will provide certainty about when a person

becomes liable for removal. It is intended that a non-citizen whose visa has been mandatorily cancelled under subsection 501(3A), whether by the Minister personally or a delegate, and either does not seek revocation within the statutory timeframe under section 501CA, or is unsuccessful in seeking revocation will be liable for removal. Where a non-citizen has not sought or has been unsuccessful in seeking revocation of a visa cancellation under section 501CA, the cancellation and revocation decision process is complete and the non-citizen's visa status is resolved. For all other cancellation and revocation decisions relating to non-citizens who fail the character test, where those decisions are completed and the non-citizen's status is resolved the removal power in section 198 would generally be enlivened. Applying the amendments to non-citizens whose visas have already been mandatorily cancelled under subsection 501(3A) provides clarity in relation to this cohort, and clearly articulates when a person in this cohort can be removed under section 198.

This amendment is intended to make clear when removal liability arises even when the visa cancellation and revocation decisions occurred before commencement of this amendment. While the existing removal powers provide for the ability to remove non-citizens in this cohort, the Government is of the view that it is preferable to have a specific removal power to put beyond doubt that a non-citizen whose visa has been cancelled either personally by the Minister or by a delegate of the Minister under subsection 501(3A), will be available for removal from Australia once it is clear that the person's visa cancellation will not be revoked.

Subitem 22(6): application of item 20 – Inclusion of section 501BA into paragraph 503(1)(b)

The Minister's power to cancel a visa under section 501BA allows the Minister to set-aside, where the Minister is satisfied it is in the national interest, a non-adverse delegate or AAT decision made under subsection 501CA(4). The power under section 501BA is only enlivened after a non-citizen has had the opportunity to put their case for revocation to either a delegate, or the AAT.

The Bill proposes to insert a reference to section 501BA into paragraph 503(1)(b). The effect of this amendment is that a person whose visa is cancelled by the Minister personally under section 501BA is not entitled to enter Australia at any time during the period determined by the regulations.

The retrospective application of this amendment to a decision under section 501BA made before or after commencement is necessary to ensure that a person whose visa is cancelled personally by the Minister under section 501BA of the Migration Act before commencement is excluded from Australia in the same way as a person whose visa is cancelled personally by the Minister under that provision after commencement. The exclusion provisions apply to any other cancellation decision made under section 501, 501A and 501B. This amendment will remove the existing anomaly whereby section 501BA decisions do not result in exclusion, by ensuring that all persons whose visas are cancelled under any of the character provisions are treated consistently in terms of their ability to return to Australia. In any event, the impact of this provision applying to decisions made prior to commencement is likely to be small as the Minister is yet to exercise his power under section 501BA to cancel a visa.

Subitem 22(7): application of item 21 – Protected information

Broadly speaking, section 503A of the Migration Act protects the disclosure of confidential information communicated to an authorised migration officer by a gazetted agency that is relevant to the exercise of a power under section 501, 501A, 501B or 501C. Section 503B broadly provides that if confidential information is given to the Department by a gazetted agency that is relevant to the exercise of a power under section 501, 501A, 501B or 501C, and the information is relevant to proceedings before the Federal Court or Federal Circuit Court, either of those courts can make orders to protect the disclosure of that information.

The Bill proposes to amend sections 503A and 503B of the Migration Act by including references to sections 501BA and 501CA. These amendments will ensure the protection of confidential information provided by a gazetted agency that is relevant to the exercise of power under sections 501BA and 501CA, and allow the Federal Court and the Federal Circuit Court to make orders protecting this information from the applicant, the legal representative of the applicant, or any other member of the public in legal proceedings. This will ensure that confidential information used in section 501BA and 501CA decision-making receives the same level of protection as confidential information that is relevant to the exercise of a power under section 501, 501A, 501B or 501C.

Confidential information provided in relation to the exercise of one of the character cancellation powers needs to be protected for use in the exercise of any of the other character cancellation powers.

This is particularly the case because some character cancellation powers are not enlivened until another power has been used (for example, the Minister's power to set-aside a non-adverse delegate or Tribunal decision is only enlivened once the power in section 501 has been exercised). It is therefore necessary to ensure that confidential information provided to the Department by a gazetted agency that was relevant to the exercise of a power under section 501 prior to the introduction of this amendment continues to be protected and able to be used during the exercise of the decision-making powers under section 501BA and 501CA.

The retrospective application of this amendment will ensure the continued protection of confidential information which is relevant, for example, to the revocation consideration of a mandatory cancellation decision, in circumstances where that information was provided to the department before commencement.

These amendments strengthen protection for criminal intelligence and related information that is critical to decision making under sections 501BA and 501CA of the Migration Act.



THE HON JOSH FRYDENBERG MP
MINISTER FOR RESOURCES, ENERGY AND NORTHERN AUSTRALIA

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

MC16-001849

Dear Senator Polley

I am writing in response to comments contained in the Senate Scrutiny of Bills Committee's Alert Digest No. 2 of 2016 concerning the *Offshore Petroleum and Greenhouse Gas Storage Amendment Bill 2016* (the Bill).

The Bill amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) to validate past Joint Authority decisions to grant renewals, or extensions of the term, of 'prior usage rights' petroleum titles where the consent of the Minister for the Environment was not sought.

Background

The amendments made by the Bill ensure that affected petroleum titleholders are placed in the legal position that they would have been in, had the administrative oversight not occurred, and the Minister for the Environment had granted consent to the renewal or extension of the term of the affected titles. The purpose of the retrospective operation of the Bill is to ensure that titleholders have, and at all relevant times are taken to have had, the requisite authority to undertake activities under the title. It also ensures that titleholders can continue to operate under the title that they believed they were operating under, and on the basis of which they may have made commercial and financial decisions. Only retrospective legislation can achieve that purpose.

Response

It is the titleholder's legal and financial interests that could be affected if the amendments were not made with retrospective operation. That is, the retrospective operation of the amendments made by the Bill will not result in any detrimental legal consequences for affected petroleum titleholders or any other person. On the contrary, as noted above, it ensures certainty for titleholders, who may have invested a considerable amount of money in their title areas. There are no new or additional legal requirements that will apply to a titleholder, or any other person, as a result of the retrospective operation of the amendments. The relevant titleholders' title-related rights and obligations will continue to apply as they would have if the initial extension or renewal decisions had been correctly made.

A petroleum titleholder has the exclusive right to conduct petroleum activities in its title area in accordance with the requirements of the OPGGS Act and regulations, and any title conditions. The titleholder also has the exclusive right, in accordance with the legislation, to apply for renewals of its title, and for successor titles, e.g. a production licence or retention lease. It is on the basis of this

tenure of title that the titleholder makes the, often substantial, investment involved in offshore petroleum exploration. In this context, it is appropriate that the effect on the titleholder of both the administrative oversight in relation to certain title decisions, and of the amendments made by the Bill to validate those title decisions, be given the greatest consideration.

In conclusion, there are no legal consequences for any other person due to the amendments made by the Bill; it is the titleholder's legal and financial interests that could be affected if the amendments were not made, with retrospective operation.

I trust that this additional information will be sufficient to address the Committee's comments in Alert Digest No. 2 of 2016 in relation to the Bill.

Yours sincerely

JOSH FRYDENBERG