

The Senate

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Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament as to whether the bills, 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.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

Chapter 1

Commentary on Bills

1.1 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

Appropriation Bill (No. 3) 2017-18

Purpose	This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the <i>Appropriations Act (No. 1) 2017-18</i>
Portfolio	Finance
Introduced	House of Representatives on 8 February 2018

Parliamentary scrutiny—ordinary annual services of the government

1.2 This bill seeks to appropriate money from the Consolidated Revenue Fund. The appropriations in the bill are said to be for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation certain measures may have been inappropriately classified as ordinary annual services.

1.3 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. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.¹

1.4 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. The Senate Standing Committee on Appropriations and Staffing² has

1 See Senate standing order 24(1)(a)(v).

2 Now the Senate Standing Committee on Appropriations, Staffing and Security.

kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration for many years.³

1.5 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 should only contain appropriations for the ordinary annual services of the government, while even-numbered bills—which are amenable by the Senate—contain all other appropriations. 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.⁴ The Senate has not accepted this assumption.

1.6 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),⁵ 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.

3 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and recent annual reports of the committee.

4 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

5 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3.

1.7 There were two other parts to the resolution: the Senate clarified its view on the correct characterisation of payments to international organisations, and resolved that all appropriation items for continuing activities, for which appropriations have been made in the past, be regarded as part of ordinary annual services.⁶

1.8 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.⁷

1.9 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.⁸

1.10 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 an 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.

1.11 For example, it appears that the initial expenditure in relation to the following items may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2017-2018:

- Menzies Institute and Library (\$7 million in 2017-18)⁹
- Australian Stockman's Hall of Fame—construction of new facilities and displays, amenity upgrades, and establishment of the Australian Rural Heritage Foundation (\$15 million in 2017-18)¹⁰
- Qantas Founders Museum—construction of roofing facilities (\$11.3 million in 2017-18)¹¹

6 *Journals of the Senate*, 22 June 2010, pp 3642–3643.

7 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

8 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

9 Mid-Year Economic and Fiscal Outlook 2017-18, p. 145.

10 Mid-Year Economic and Fiscal Outlook 2017-18, p. 171.

1.12 The committee has previously written to the Minister for Finance and considered this general matter in relation to inappropriate classification of items in other appropriation bills on a number of occasions.¹²

1.13 On each of these occasions, the committee noted the government's advice that it does not intend to reconsider its approach to the classification of items that constitute the 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.

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

1.15 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.

1.16 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.

1.17 The committee draws this matter to the attention of Senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 3) 2017-2018 which should only contain appropriations that are not amendable by the Senate).

11 Mid-Year Economic and Fiscal Outlook 2017-18, p. 174.

12 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, pp. 402-406; *Fourth Report of 2015*, pp. 267-271; *Alert Digest No. 6 of 2015*, pp. 6-9; *Fourth Report of 2016*, pp. 249-255; *Alert Digest No. 7 of 2016*, pp. 1-9; *Scrutiny Digest 2 of 2017*, pp. 1-5; *Scrutiny Digest 6 of 2017*, pp. 1-6; and *Scrutiny Digest 12 of 2017*, pp. 89-95.

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

Parliamentary scrutiny—appropriations determined by the Finance Minister¹³

1.19 Section 10 of *Appropriation Act (No. 1) 2017-18* (Appropriation Act No. 1) enables the Finance Minister to allocate additional appropriations for items when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance or parliamentary scrutiny by the Regulations and Ordinances Committee. Subsection 10(2) of Appropriation Act No. 1 provides that when the Finance Minister makes such a determination the Appropriation Act has effect as if it were amended to make provision for the additional expenditure. Subsection 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Act No. 1 at \$295 million. Identical provisions appear in *Appropriation Act (No. 2) 2017-18* (Appropriation Act No. 2), although there is a separate (\$380 million) cap in that Act.

1.20 The committee notes that the AFM provisions allow non-disallowable delegated legislation to, at least in effect, modify the operation of primary legislation, and therefore they delegate significant legislative power to the Executive. As the committee has previously noted, one of the core functions of the Parliament is to authorise and scrutinise proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.¹⁴

1.21 When the committee considered the AFM provisions in Appropriation Acts No. 1 and No. 2, the committee requested the Finance Minister's advice as to each instance in which the AFM provisions had been used over the previous ten financial years. In response, the Finance Minister confirmed that the AFM provisions had been used in 49 instances over the past twelve financial years. The committee published

13 Clause 10. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and 24(1)(a)(v).

14 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [91].

details of a selection of AFMs issued since 2006-07 in the body of its report, as well as the full list of AFMs in an appendix to the report.¹⁵

1.22 In concluding comments, the committee noted that, given determinations made under the AFM provisions are not subject to parliamentary disallowance, the primary accountability mechanism in relation to those determinations (beyond the initial passage of the authorising provision in the regular appropriations bills) is an annual report tabled in Parliament. These reports are referred to legislation committees considering estimates and are also considered in committee of the whole.¹⁶ In addition, the reports are published on the Department of Finance website.¹⁷ The committee drew this report, and the AFM provisions themselves, to the attention of Senators.

1.23 Subclause 10(1) of the present bill seeks to provide that any determinations made under the AFM provisions in Appropriation Act No. 1 are to be disregarded for the purposes of the \$295 million cap in subsection 10(3) of that Act. The note to subclause 10(1) clarifies that this means that the Finance Minister would have access to the full \$295 million for the purposes of making AFM determinations under section 10 of Appropriation Act No. 1, regardless of any amounts that have already been determined under that section.¹⁸

1.24 It appears to the committee that, for the 2017-18 financial year, the sole amount determined by the Finance Minister under the AFM provisions was \$122 million to facilitate a voluntary postal plebiscite for all Australians on the electoral roll, conducted by the Australian Bureau of Statistics. This advance was made under section 10 of Appropriation Act No. 1.¹⁹ Under clause 10 of the bill, this amount would be disregarded for the purposes of the \$295 cap imposed by subsection 10(3) of Appropriation Act No. 1.

15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, pp. 95-98 and Appendix 1.

16 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), pp 395–396.

17 See http://www.finance.gov.au/publications/advance_to_the_finance_minister/.

18 Section 13 of Appropriation Bill No. 4 contains identical provisions, which apply to determinations made under the AFM provisions in Appropriation Act No. 2.

19 Advance to the Finance Minister Determination (No. 1 of 2017-2018), <https://www.legislation.gov.au/Details/F2017L01005>.

1.25 In light of the matters raised by the committee in relation to the Advance to the Finance Minister provisions in Appropriation Acts No. 1 and No. 2, the committee draws to the attention of senators the proposal to disregard previous expenditure of \$122 million for the purposes of the cap on amounts that may be determined under the Advance to the Finance Minister provisions.

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

Appropriation Bill (No. 4) 2017-18

Purpose	This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the <i>Appropriations Act (No. 2) 2017-18</i>
Portfolio/Sponsor	Finance
Introduced	House of representatives on 8 February 2018

Parliamentary scrutiny of section 96 grants to the States²⁰

1.27 Clause 15 of the bill deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

1.28 Clause 15 delegates this power to a minister or ministers specified by the bill and, in particular, provides the relevant minister or ministers may determine:

- conditions under which payments to the States, the Australian Capital Territory, the Northern Territory and local government may be made;²¹ and
- the amounts and timing of those payments.²²

1.29 Subclause 15(4) provides that determinations made under subclause 15(2) are not legislative instruments. The explanatory memorandum states that this is:

because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 15(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.²³

1.30 The committee has commented in relation to the delegation of power in provisions of this kind in a number of previous even-numbered appropriation bills.²⁴

20 Clause 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

21 Paragraph 15(2)(a).

22 Paragraph 15(2)(b).

23 Explanatory memorandum, p. 11.

24 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511–516; *Ninth Report of 2015*, pp. 611–614; *Fifth Report of 2016*, pp. 352–357; *Scrutiny Digest 2 of 2017*, pp. 6-8; *Scrutiny Digest 3 of 2017*, pp. 51-54; *Scrutiny Digest No. 6 of 2017*, pp. 7-11; and *Scrutiny Digest No. 12 of 2017*, pp 99-107.

1.31 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine terms and conditions attaching to them is *conferred on the Parliament* by section 96 of the Constitution. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory. While some information in relation to grants to the states is publicly available, effective parliamentary scrutiny is difficult because the information is only available in disparate sources.

1.32 In relation to appropriations for payments to the states, territories and local governments in the annual appropriation bills, the committee has previously requested that additional explanatory material be made available to senators and others, including detailed information about the particular purposes for which money is sought to be appropriated. To ensure clarity and ease of use the committee has stated that this information should deal only with the proposed appropriations in the relevant bill. The committee considers this would significantly assist senators in scrutinising payments to state, territory and local governments by ensuring that clear explanatory information in relation to the appropriations proposed in the particular bill is readily available in one stand-alone location.

1.33 The committee comprehensively considered this matter in its *Eighth Report of 2016*.²⁵ At that time, the committee sought the minister's advice as to:

- whether future Budget documentation (such as Budget Paper No. 3 'Federal Financial Relations') could include general information about:
 - the statutory provisions across the Commonwealth statute book which delegate to the Executive the power to determine terms and conditions attaching to grants to the States; and
 - the general nature of terms and conditions attached to these payments (including payments made from standing and other appropriations); and
- whether the Department of Finance is able to issue guidance advising departments and agencies to include the following information in their portfolio budget statements where they are seeking appropriations for payments to the States, Territories and local government in future appropriation bills:
 - the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory);

25 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, pp 457–460.

- the specific statutory or other provisions (for example in the *Federal Financial Relations Act 2009*, the *COAG Reform Fund Act 2008*, *Local Government (Financial Assistance) Act 1995* or special legislation or agreements) which detail how the terms and conditions to be attached to the particular payments will be determined; and
- the nature of the terms and conditions attached to these payments.

1.34 At the time, the Minister for Finance advised the committee that he would ask his department, in consultation with the Treasury, to review the current suite of budget documentation and consider including additional information on payments to the states, territories and local government in time for the next budget.²⁶

1.35 The committee most recently considered these matters in Scrutiny Digest No. 6 of 2017²⁷ and Scrutiny Digest No. 12 of 2017,²⁸ in relation to its examination of Appropriation Bill (No. 2) 2017-18. The committee welcomed the significant progress made in the 2017-18 Budget to provide additional information about section 96 grants to the States. This included the addition of an Appendix E to Budget Paper No. 3, 2017-18, which provided details of the appropriation mechanism for all payments to the States and the terms and conditions applying to them, and a new mandatory requirement for the inclusion of further information in portfolio budget statements along the lines of that suggested by the committee.

1.36 However, the committee was concerned that the implementation of this new mandatory requirement in the 2017-18 Budget had been mixed, with only one of the four departments seeking appropriations for payments to the States fully implementing the mandatory information requirement. The committee requested that the minister draw the new information requirements to the attention of those departments that had not yet included the additional information in their budget documentation. The committee also requested the minister's advice as to the provision of additional general information concerning section 96 grants to the states in Budget Paper 3 in the next Budget (2018-19).

1.37 In response, the minister advised that the relevant departments had included the requested additional information on their websites, and that the mandatory information requirements would be met in the future. The minister also advised that his department would liaise with the Department of Treasury regarding the provision of additional information in Budget Paper No. 3 for the 2018-19 Budget.

26 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, p. 460.

27 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 6 of 2017*, pp. 7-11.

28 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 12 of 2017*, pp 99-107.

1.38 The committee welcomes the significant progress that has been made to provide additional information about section 96 grants to the States in Budget documentation. The committee looks forward to considering the outcome of the consultation between the Department of Finance and the Department of the Treasury regarding the provision of further general information at the time of the next Budget.

1.39 In relation to this bill, the committee leaves to the Senate as a whole the appropriateness of the proposed delegation of legislative power in clause 15 which allows the minister to determine conditions under which payments to the States, Territories and local government may be made and the amounts and timing of those payments.

Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018

Purpose

This bill seeks to amend the *Australian Citizenship Act 2007* (the Citizenship Act) and the *Migration Act 1958* (the Migration Act) to:

- increase the general residence requirement for conferral applicants to eight years of residence in Australia as permanent residents before being eligible for citizenship;
- require conferral applicants to provide evidence of a competent level of English language skills prior to applying for citizenship;
- modify provisions relating to the automatic acquisition of Australian citizenship under certain circumstances;
- require applicants to sign an Australian Values Statement in order to make a valid application for citizenship;
- allow for the Australian Citizenship Regulations 2016 or an instrument made under the Citizenship Act to determine the information or documents that must be provided with an application in order for it to be a valid application;
- extend the bar on approval to all applicants for citizenship where there are related criminal offences;
- extend the good character requirement to include applicants under 18 years of age;
- allow for the regulations or an instrument made under the Citizenship Act to introduce a two year bar on a person making an application for citizenship where the Minister has refused to approve the person becoming an Australian citizen on grounds other than failure to meet the residence requirement;
- amend key provisions concerning the residence requirements for Australian citizenship, to clarify when it commences;
- provide the minister with the discretion to revoke a person's Australian citizenship under certain circumstances;
- enable the minister to make a legislative instrument under certain circumstances in relation to acquiring Australian citizenship;
- modify provisions relating to the scope of the minister's discretion for residence requirements for spouses and de facto partners of Australian citizens, and spouses or de facto

<p>Sponsor</p> <p>Introduced</p>	<p>partners of deceased Australian citizens;</p> <ul style="list-style-type: none"> • provide for the discretionary cancellation of approval of Australian citizenship under certain circumstances; • provide the minister with the power to set aside decisions of the Administrative Appeals Tribunal concerning character and identity; • modify provisions relating to access to merits review for conferral applicants under 18 years of age; • provide that certain personal decisions made by the minister are not subject to merits review; • allow the minister, the secretary or an officer to use and disclose personal information obtained under the Citizenship Act; and • make certain consequential amendments <p>Senator Pauline Hanson</p> <p>Senate on 7 February 2018</p>
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1.40 This bill is substantially the same as the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (the 2017 bill), which was introduced into the House of Representatives on 15 June 2017.

1.41 As the bill is substantively the same as the 2017 bill the committee restates its views as outlined in its *Scrutiny Digest No 7 of 2017* and *Scrutiny Digest No 8 of 2017*.²⁹

29 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No 7 of 2017* and *Scrutiny Digest No 8 of 2017*, available at: https://www.apb.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_Digest/2017

Australian Passports Amendment (Identity-matching Services) Bill 2018

Purpose	This bill seeks to amend the <i>Australian Passports Act 2005</i> to provide a legal basis for ensuring that the minister is able to make passport data available for all the purposes of identity-matching services
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 7 February 2018

Significant matters in delegated legislation³⁰

1.42 Section 46 of the *Australian Passports Act 2005* (Passports Act) currently provides that, on request, the minister may disclose personal information, of a kind specified in a minister's determination, to a person specified in a minister's determination³¹ and for a number of listed purposes. Item 1 seeks to amend section 46 of the Passports Act, to expand the purposes for which such personal information can be disclosed to include participating in a specified service or kind of service to share or match information relating to the identity of a person. The committee notes that there are no limits in the primary legislation as to what type of personal information may be shared or who this information may be shared with. The only limit is that the purpose must relate to a service that shares or matches information relating to the identity of a person.

1.43 The committee's view is that significant matters, such as authorising the disclosure of personal information, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the statement of compatibility gives a detailed justification as to why it is necessary to disclose personal information to identity-matching services. However, it does not provide any justification for leaving the detail of the kinds of information that may be disclosed, the persons to whom such information may be disclosed, and the services to which information may be disclosed, to delegated legislation.

30 Schedule 1, item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

31 Section 57 of the *Australian Passports Act 2005* currently provides that a minister's determination is to be done by way of a legislative instrument (and therefore subject to disallowance).

1.44 The committee requests the minister's detailed advice as to why it is considered necessary and appropriate to leave to delegated legislation the details of the kind of personal information that may be disclosed, to whom such information may be disclosed, and the services to which such information may be disclosed.

Commonwealth Inscribed Stock Amendment (Debt Ceiling) Bill 2018

Purpose	This bill seeks to amend the <i>Commonwealth Inscribed Stock Act 1911</i> to establish a limit on Commonwealth inscribed stock in keeping with the present budget settings
Sponsor	Senator Cory Bernardi
Introduced	Senate on 6 February 2018

The committee has no comment on this bill.

Fair Work Amendment (Improving National Employment Standards) Bill 2018

Purpose	This bill seeks to amend the <i>Fair Work Act 2009</i> to add family and domestic violence leave to the National Employment Standards to enable an employee who is a survivor of family and domestic violence to take up to 10 days paid family and domestic violence leave per calendar year or 2 days of unpaid family and domestic violence leave for each permissible occasion
Sponsor	Mr Adam Bandt
Introduced	House of Representatives on 5 February 2018

The committee has no comment on this bill.

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-New Dwelling Interests) Bill 2018

Purpose	This bill seeks to amend the <i>Foreign Acquisitions and Takeovers Fees Imposition Act 2015</i> to impose a reconciliation fee on developers for dwellings sold to foreign persons under a near-new dwelling exemption certificate
Portfolio	Treasury
Introduced	House of Representatives on 8 February 2018

Retrospective application³²

1.45 Schedule 1 to the bill seeks to impose a reconciliation fee on developers with respect to dwellings sold to foreign persons under a near-new dwelling exemption certificate, and to set the amount of that fee. The measures complement the measures proposed in Schedule 2 to the Treasury Law Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018. Pursuant to item 5 of Schedule 1 to the bill, the amendments made by that Schedule are proposed to apply in relation to near-new dwelling acquisitions occurring on or after 1 July 2017. The amendments in Schedule 1 would therefore apply on a retrospective basis.

1.46 The committee has long-standing concerns about provisions that apply retrospectively, as such an approach challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has particular concerns where legislation will, or might, have a detrimental effect on individuals. Generally, where proposed legislation will apply retrospectively, the committee would expect the explanatory materials to set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.47 The committee also notes that, in the context of tax law, reliance on ministerial announcements, and the implicit requirement that persons arrange their affairs in accordance with such announcements rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective application or commencement, when used too widely or insufficiently justified, can diminish respect for the rule of law and its underlying values. In outlining issues around this matter previously, the committee has accepted that some amendments may apply retrospectively when legislation is introduced. However, this has been limited to the introduction of bills within six calendar months

³² Schedule 1, item 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

after the relevant announcement. In fact, where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 44). The committee notes that, in this case, the bill was introduced almost nine months after the budget announcement on 9 May 2017.

1.48 In this instance, the explanatory memorandum states:

This measure is retrospectively applied to 1 July 2017 to align with the introduction of the near-new dwelling exemption certificate, as it was always the intention to apply a reconciliation fee for each sale of a new-new dwelling to a foreign person.

The retrospective application of this measure is consistent with the announcement of the New-New Dwelling Exemption Certificate in the 2017-18 Budget...Any adverse impact is expected to be minor, given the retrospective application was included in the Explanatory Statement that accompanied the regulations that introduced the Near-New Dwelling Exemption Certificate.³³

1.49 The committee notes that item 6 of Schedule 1 also seeks to introduce a transition period, which would extend the time in which a person is required to make a reconciliation payment in relation to an acquisition of a near-new dwelling that occurred on or after 1 July 2017.

1.50 The committee reiterates its long-standing concerns that provisions with retrospective application challenge a basic value of the rule of law that, in general, laws should only operate prospectively.

1.51 In light of the explanation provided in the explanatory memorandum as to the retrospective application of the amendments in the bill, the committee draws its concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying the amendments in the bill on a retrospective basis.

33 Explanatory memorandum, p. 37. The bill shares an explanatory memorandum with the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018.

Identity-matching Services Bill 2018

Purpose	This bill seeks to provide legal authority for the Department of Home Affairs to collect, use and disclose identification information in order to operate the technical systems that will facilitate the identity-matching services envisaged by the Intergovernmental Agreement on Identity Matching Services, and agreed to by COAG in October 2017
Portfolio	Home Affairs
Introduced	House of Representatives on 7 February 2018

Privacy³⁴

1.52 The bill seeks to facilitate the exchange of identity information between the Commonwealth and state and territory governments and certain other agencies in accordance with an intergovernmental agreement entered into in October 2017. The type of identity information that may be shared includes a person's name (current and former); address (current and former); place and date of birth; current or former sex, gender identity or intersex status; any information contained in a driver's licence, passport or visa and a facial image of the person.³⁵

1.53 The bill seeks to provide that the secretary of the Home Affairs department may develop, operate and maintain an interoperability hub.³⁶ The explanatory memorandum explains that this hub will facilitate data-sharing between agencies on a query and response basis without storing any personal information (with passport, visa and citizenship images continuing to be held by the Commonwealth agencies that issue the documents).³⁷ The bill also seeks to provide that the Home Affairs secretary may develop, operate and maintain a National Driver Licence Facial Recognition Solution (NDLFRS), which the explanatory memorandum states will consist of 'a federated database of identification information contained in government identification documents (initially driver licences) issued by state and territory authorities' and a facial recognition system for biometric comparison of facial images against those held in the database.³⁸ This would appear to authorise the creation of a database that does store personal information. In addition, the bill

34 Various. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

35 Clause 5.

36 Clause 14.

37 Explanatory memorandum, p. 2.

38 Explanatory memorandum, p. 2.

provides that the Home Affairs department may collect, use or disclose identification information about an individual if that collection occurs via the interoperability hub or the NDLFRS and is for a specified purpose.³⁹ Identification information may be collected or disclosed for the following purposes:⁴⁰

- providing or developing an identity-matching service for identity and community protection activities, being an activity for:
 - preventing and detecting identity fraud;
 - preventing, detecting, investigating or prosecuting a federal, state or territory offence or starting or conducting proceedings for proceeds of crime;
 - investigating or gathering intelligence relevant to national security;
 - checking the background of a person with access to an asset, facility or person associated with government or protecting a person with a legally assumed identity or under witness protection;
 - promoting community safety, including identifying a person suffering or at risk of suffering physical harm (including missing or deceased persons or those affected by disaster) and a person reasonably believed to be involved in a significant risk to public health or safety;
 - promoting road safety, including the integrity of driver licensing systems; and
 - verifying the identity of an individual;⁴¹
- developing, operating or maintaining the NDLFRS; or
- protecting the identities of persons who have legally assumed identities or are under witness protection.

1.54 An identity-matching service is defined as including a number of listed services, including:

- the Face Identification Service (FIS): for use by law enforcement, national security and corruption agencies to identify unknown individuals from a facial image, or detect persons using multiple identities;⁴²
- the Facial Recognition Analysis Utility Service (FRAUS): for use by state and territory agencies (including local government authorities and non-

39 Clauses 17 and 18.

40 Subclause 17(2)

41 See definition of 'identity or community protection activity' at clause 6.

42 Clause 8. See the statement of compatibility, p. 49.

government entities that meet certain conditions) to compare facial images to test the accuracy and quality of their data;⁴³

- the Face Verification Service (FVS): for use by state and territory agencies (including local government authorities and non-government entities that meet certain conditions) to verify a person's claimed or suspected identity;⁴⁴
- the Identity Data Sharing Service (IDSS): for use by Commonwealth, state and territory agencies to share identification information from one entity to another through the interoperability hub;⁴⁵
- the One Person One Licence Service (OPOLS); for use by state and territory authorities to compare facial images and other biographical information held in the NDLFRS;⁴⁶ and
- a service prescribed by the rules that involves the collection, use and disclosure of identification information and involves the interoperability hub or the NDLFRS. Rules can only be made to authorise a request from a local government authority or non-government entity if it is reasonably necessary to verify the individual's identity and the individual has given consent for this.⁴⁷

1.55 These provisions would give a broad power for the Home Affairs department to collect, use and disclose personal information for a wide range of purposes to a wide range of government agencies (and some local government authorities and private entities). The committee notes its terms of reference include considering whether provisions of a bill would unduly trespass on personal rights and liberties.⁴⁸ This bill has clear implications for the privacy of the millions of individuals whose facial images and other biographical information will be available for collection, use and disclosure. The committee's view is that when provisions of a bill trespass on privacy the explanatory materials accompanying the bill should contain a clear explanation justifying this interference. In this instance, the statement of compatibility has provided a detailed analysis of the privacy implications of the bill.

1.56 While the committee considers there are a number of safeguards in the bill to help to protect privacy, the committee remains concerned that the bill may unduly trespass on personal rights and liberties in that it seeks to enable the sharing

43 Clause 9 and statement of compatibility, p. 52

44 Clause 10 and statement of compatibility, p. 45.

45 Clause 11 and explanatory memorandum, p. 26.

46 Clause 12 and explanatory memorandum, p. 27

47 Clause 7 (in particular paragraph (1)(f) and subclauses (2) and (3)).

48 Senate Standing Order 24(1)(a)(i).

of an extensive amount of personal information for a broad range of purposes to a broad range of agencies (including private sector agencies), in particular that:

- information can be shared for preventing, detecting, investigating or prosecuting any federal, state or territory offence, for road safety or for identity verification more broadly. This could allow state and territory agencies to share and seek to match facial images and other biographical information for persons suspected of involvement in very minor offences, such as jaywalking, or for verifying the identity of an individual for any purpose; and
- one-to-many face matching, which involves comparing a facial image against multiple facial images, can involve the collection, use and disclosure of information about individuals who may not be the subject of the request (but who may look similar to the subject of the request), meaning such persons may become caught up in an investigation despite having no link to the investigation.⁴⁹

1.57 The committee is also concerned that while the explanatory materials state that a number of privacy safeguards will apply in relation to the sharing of personal identification information, many of these stated safeguards are not contained in the bill:

- the statement of compatibility notes that under the intergovernmental agreement there are a range of steps that the entities seeking access to the services will need to comply with.⁵⁰ However, these requirements are not set out in the bill. There is also no information in the bill as to what the agency which receives the personal information does with that information following receipt. The statement of compatibility notes that the bill has been developed on the basis that 'other agencies or organisations participating in the identity-matching services must have their own legal authority to do so, and must comply with legislated privacy protections that apply to them';⁵¹
- the statement of compatibility states that the design of the FIS will limit the amount of identification information released about an individual, stating:

It will do this by first returning a limited gallery of possible facial matches against the facial image submitted in the request, without providing any other identification information about the individuals. The user will then need to nominate a smaller shortlist of the

49 See statement of compatibility, p. 49.

50 Statement of compatibility, p. 43.

51 Statement of compatibility, p. 44.

particular facial matches for further investigation, and will only then have access to any biographic information about those individuals.⁵²

However, the statement of capability notes that these requirements are contained in the intergovernmental agreement, but not in the bill;

- while the explanatory memorandum states that 'any private sector usage of the FVS will only return a "match or no match" response, without returning images or biographic information about the person'⁵³ this will be achieved under 'access policies and data sharing agreements supporting the implementation of the Bill'⁵⁴ rather than any legislative criteria; and
- the explanatory materials provide that there will be policy and administrative safeguards in place in addition to the obligations in the bill, noting that 'requirements for privacy impact assessments before agencies access the services and compliance audits will also help to ensure the use of the FVS remains proportionate to the need, and prevent any misuse of identification information'.⁵⁵ However, these will not be legislative requirements.

1.58 The committee seeks the minister's advice as to whether all or any of the intended policy and administrative safeguards identified in the explanatory materials can be included as legal requirements in the bill or, at a minimum, that there be a requirement in the bill that such safeguards be implemented by agencies seeking to access identification information.

Consultation prior to making delegated legislation⁵⁶

1.59 The bill seeks to facilitate the exchange of identity information between the Commonwealth and state and territory governments. Clause 5 sets out a definition of 'identification information' which includes any information that is prescribed by the rules and relates to the individual (subject to subclause 5(2) which sets out the type of information which is not identification information). Subclause 5(4) provides that before making rules prescribing such information the minister must, in addition to being satisfied that the information is reasonably necessary to identify the person and assist in the activities set out in the bill, consult the Human Rights Commissioner and the Information Commissioner. In addition, clause 7 sets out the definition of an 'identity-matching service', which includes certain services prescribed by the rules.

52 Statement of compatibility, p. 52.

53 Explanatory memorandum, p. 25.

54 Explanatory memorandum, p. 25.

55 Statement of compatibility, p. 48.

56 Subclauses 5(4) and 7(5) and clause 30. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

Subclause 7(5) also provides that before making such rules the minister must consult the Human Rights Commissioner and the Information Commissioner.

1.60 Where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill, and so welcomes the inclusion of this specific requirement to consult. However, the committee also considers that it would be appropriate for the bill to provide that compliance with these obligations is a condition of the validity of the legislative instrument. The committee also notes that, given the significant privacy implications of defining what constitutes 'identification information', it may be appropriate that the minister provide reasons if rules are made that are inconsistent with any advice provided by the Human Rights Commissioner or Information Commissioner, to ensure the expertise of such commissioners has been given appropriate weight in the decision making process.

1.61 The committee also notes that these significant matters are to be included in 'rules' rather than in 'regulations'. The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in the committee's *First Report of 2015*.⁵⁷ In relation to this matter, the committee has noted that regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel (OPC). Therefore, if significant matters are to be provided for in delegated legislation (rather than primary legislation) the committee considers they should at least be provided for in regulations, rather than other forms of delegated legislation which are subject to a lower level of executive scrutiny.⁵⁸

1.62 The committee seeks the minister's advice as to the appropriateness of amending the bill to provide:

- **that the minister must, after consulting the Human Rights Commissioner and the Information Commissioner, have regard to any submissions made by those commissioners prior to making any rules; and**
- **if the minister makes rules that are inconsistent with the advice provided by the commissioners, that the minister provide reasons explaining why the rules depart from that advice.**

57 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 21–35.

58 See also Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 17 of 2014*, 3 December 2014, pp 6–24.

1.63 The committee also requests the minister's advice as to why it is appropriate to include these matters in rules rather than regulations.

Reversal of evidential burden of proof⁵⁹

1.64 Subclause 21(1) seeks to make it an offence for an entrusted person who has obtained protected information in his or her capacity as an entrusted person to make a record of the information or to disclose the information to another person. Subclause 21(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the conduct is authorised by, or is in compliance with a requirement under, a Commonwealth, State or Territory law. The offence carries a maximum penalty of two years imprisonment.

1.65 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.66 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.67 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in clause 21 has not been addressed in the explanatory materials.

1.68 The committee notes that the *Guide to Framing Commonwealth Offences*⁶⁰ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁶¹

59 Clause 21. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

60 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 50-52.

61 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

1.69 In this case, it is not apparent that whether the conduct is authorised by, or is in compliance with, a requirement under a Commonwealth, State or Territory law are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

1.70 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.⁶²

1.71 The committee considers it may be appropriate if proposed subclause 21(1) were amended to provide that a person commits the offence if the conduct is not authorised by, or in compliance with a requirement under, a law of the Commonwealth or of a State or Territory. The committee requests the minister's advice in relation to this matter.

Adequacy of parliamentary oversight

Privacy⁶³

1.72 As noted above, clause 21 seeks to make it an offence for an entrusted person who has obtained protected information in his or her capacity as an entrusted person to make a record of the information or to disclose the information to another person. Clauses 22 to 25 provide exceptions as to when information can be disclosed, which include to lessen or prevent a serious and imminent threat to human life or health,⁶⁴ or to the Information Commissioner if it relates to corruption.⁶⁵ The committee notes that these provisions impact on privacy as it allows for further disclosure of personal information. This does not appear to have been addressed in the explanatory materials.

1.73 The committee notes that clause 28 seeks to require the secretary of the Home Affairs department to provide the minister with an annual report, which is to be tabled in Parliament, on the operation of the identity-matching services, including statistics relating to requests made under the scheme. However, the committee

62 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 50-52.

63 Clauses 23, 24 and 28. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

64 Clause 23.

65 Clause 24.

notes that there is no requirement to record instances of when information was disclosed pursuant to clauses 23 and 24.

1.74 The committee seeks the minister's advice as to the appropriateness of amending clause 28 (which sets out the matters to be included in an annual report on the operation of the scheme) to include a requirement to report on the number of instances in which an entrusted person discloses protected information pursuant to clauses 23 and 24.

Road Vehicle Standards Bill 2018

Purpose	This bill seeks to provide a new regulatory framework for the importation of road vehicles into Australia
Portfolio	Infrastructure, Regional Development and Cities
Introduced	House of Representatives on 7 February 2018

Broad delegation of legislative power⁶⁶

1.75 The bill seeks to provide a new regulatory framework for the importation of road vehicles and road vehicle components into Australia. Subclause 6(5) seeks to allow the secretary to determine, by legislative instrument, that a class of vehicles is, or is not, a road vehicle for the purposes of the bill. Similarly, subclause 7(3) seeks to allow the secretary to determine, by legislative instrument, that a class of components is, or is not, a road vehicle component for the purposes of the bill.

1.76 The committee's view is that significant matters, such as the range of vehicles and components that will be captured by the regulatory scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes to the regulatory scheme in the form of an amending bill.

1.77 The explanatory memorandum states that these provisions would allow the government to limit or expand the definition of road vehicle or road vehicle component and is necessary to ensure that the bill is able to 'capture future road vehicles that may otherwise fall outside the definition' or 'carve out certain vehicles that may have accidentally been captured by the broadness of the definition'.⁶⁷ In addition, the explanatory memorandum states that, in the absence of this power, innovations in the automotive industry could undermine the regulatory scheme set out in the bill and 'potentially compromise community safety'.⁶⁸ Finally, the explanatory memorandum states that the secretary would be expected to exercise this power 'in a manner consistent with achieving the objects of the Bill'.⁶⁹

1.78 The committee notes this justification for including a broad power to determine, by legislative instrument, the scope of vehicles and components that will

66 Subclauses 6(5) and 7(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

67 Explanatory memorandum, pp. 24–25.

68 Explanatory memorandum, p. 24.

69 Explanatory memorandum, p. 23.

be subject to the regulatory scheme. However, the committee also notes that the explanatory memorandum provides no examples of circumstances in which it is envisaged this broad power would be required, nor any details as to how regularly the scope of the regulatory scheme may need to be altered. Further, the bill does not provide any limits on how and when the powers of the secretary may be exercised, nor does it prescribe any matters that the secretary must take into account.

1.79 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of granting the secretary a broad power to determine, by legislative instrument, the scope of vehicles and components that will be subject to the regulatory scheme set out in the bill.

Broad discretionary power⁷⁰

1.80 Subclause 6(6) seeks to enable the secretary to determine, by notifiable instrument, that a specified vehicle is, or is not, a road vehicle for the purposes of the bill. Similarly, subclause 7(4) seeks to enable the secretary to determine, by notifiable instrument, that a specified component is, or is not, a road vehicle component for the purposes of the bill.

1.81 The explanatory memorandum states that these proposed powers would enable the secretary to 'make definitive decisions about individual vehicles in order to flexibly respond to the rapidly changing automotive landscape' and that the secretary 'would be expected to exercise this power in a manner consistent with achieving the objects of the Bill.'⁷¹

1.82 However, the committee notes that these provisions seek to grant a very broad power to the secretary with no legislative criteria as to the matters that the secretary must take into account when making such determinations. The bill also does not set out any right to challenge or seek review of these determinations.⁷² Further, no justification is provided for including a power to include or exclude *specific* vehicles and components in addition to the power to make determinations, by legislative instrument, with respect to *classes* of vehicles under subclauses 6(5) and 7(3). The committee also notes that notifiable instruments are not subject to the tabling, disallowance and sunseting requirements imposed on legislative instruments. Parliamentary scrutiny of determinations made by the secretary under subclauses 6(6) and 7(4) is therefore likely to be limited.

1.83 The committee therefore requests the minister's detailed advice as to:

70 Subclauses 6(6) and 7(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

71 Explanatory memorandum, p. 23.

72 The determination of review rights in the rules is discussed below at paragraphs 1.135 to 1.138.

- **why it is necessary to enable the secretary to determine, by notifiable instrument, that a specified vehicle or component is, or is not, captured by the regulatory scheme, in addition to the power set out in subclauses 6(5) and 7(3);**
- **why (at least high-level) rules or guidance about the exercise of this power cannot be included in the bill;**
- **examples of circumstances in which it is envisaged it may be necessary to make such determinations; and**
- **whether such determinations will be subject to any form of review.**

Incorporation of external material into the law⁷³

1.84 The bill contains a number of provisions that would allow instruments made under the bill to make provision for a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time. These provisions relate to:

- the determination of classes of vehicles or a specified road vehicle as being, or as not being, a 'road vehicle' (subclause 6(8));
- the determination of classes of components or a specified component as being, or as not being, a 'road vehicle component' (subclause 7(6)); and
- the determination of national road vehicle standards (subclause 12(2)).

1.85 In addition, subclause 82(6) seeks to enable the rules, and instruments made under the rules, to apply, adopt or incorporate, with or without modification, any matter contained in any instrument or other writing as in force or existing from time to time.

1.86 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and

73 Subclauses 6(8), 7(6), 12(2), 12(3) and 82(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.87 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

1.88 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.⁷⁴ This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

1.89 In this instance, the explanatory memorandum states with respect to subclauses 6(8) and 7(6) that the 'ability to adopt a broad range of documents in determinations is vital to the flexibility and adaptability in the way Australia responds to vehicles where it is unclear whether they are road vehicles or not' and that the 'ability to adopt documents in force from time to time ensures that, in appropriate circumstances, these determinations can adopt, for example, industry standards. This ensures that determinations will keep step with industry, which often moves to more effective standards before legislative change.'⁷⁵ No explanation is provided as to whether documents incorporated under these provisions would be freely and readily available.

1.90 The explanatory memorandum states that documents incorporated under subclause 12(2) would generally be technical standards developed and agreed to by the United Nations. Although the United Nations standards for motor vehicles are publically available, they do sometimes incorporate International Standards Organisation (ISO) standards or other similar written material. The explanatory memorandum states that ISO standards and Australian Standards are available to the public but are not free to access. Finally, national vehicle standards of other countries may also be adopted and these are generally publicly available.⁷⁶ The explanatory memorandum states that the drafting of this provision could be narrowed to include only documents from these entities, but the ability to adopt

74 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

75 Explanatory memorandum, p. 25.

76 Explanatory memorandum, p. 26.

other public documents is vital to the 'flexibility and adaptability' of Australia's response to changes in automotive technology.⁷⁷

1.91 With respect to clause 82(6), the explanatory memorandum states that it is intended that there will be 'a number of detailed technical legislative instruments that will sit in the Rules or be made by the Rules', and that the provision is needed to ensure the 'technical instruments can refer to documents that are referred to in the National Road Vehicle Standards'. However, the explanatory memorandum does not address the question of whether these documents will be freely and readily available, nor why it is necessary to allow their incorporation as in force or existing from time to time.⁷⁸

1.92 Noting the explanations provided in the explanatory memorandum, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of provisions that allow the application, adoption or incorporation of any matter contained in any other instrument or writing as in force or existing from time to time, where this material may not be freely and readily available to all those interested in the law.

Reversal of evidential burden of proof⁷⁹

1.93 A number of provisions in the bill seek to introduce offences which include offence-specific defences, which reverse the evidential burden of proof. Subclauses 16(1) and (2) seek to make it an offence for a person to enter, or authorise another person to enter, a vehicle on the Register of Approved Vehicles (RAV) if the vehicle does not satisfy the requirements of an 'entry pathway'.⁸⁰ Subclause 16(3) provides an exception (offence specific defence) to this offence, stating that subsections (1) and (2) do not apply if a road vehicle component was used in accordance with the national road vehicle standards in the manufacture of the vehicle; the component was represented by a supplier as being of an approved type (but the component did not in fact comply with the relevant national road vehicle standards at the time it was acquired) and there is no other reason the vehicle does not satisfy the relevant entry pathway. The offence carries a maximum penalty of 120 penalty units.

77 Explanatory memorandum, p. 26.

78 Explanatory memorandum, p. 60.

79 Subclauses 16(3), 24(3) and (4) and 32(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

80 Subclause 15(2) specifies two entry pathways—the type approval pathway, and the concessional RAV entry approval pathway—and also allows the rules to set out other pathways. Vehicles entered on the RAV under the type approval pathway must be compliant with national vehicle standards, except in certain limited circumstances, whereas vehicles under the concessional RAV entry pathway will not necessarily meet the national vehicle standards but are granted concessional approval (see explanatory memorandum, p. 28.).

1.94 In addition, subclause 24(1) seeks to make it an offence for a person to provide a road vehicle to another person in Australia for the first time when that vehicle has not been entered on the RAV. Subclause 24(3) provides an exception to this offence, stating that it does not apply if the vehicle is provided to another person to have work done on it, protect it, store it, transport it to the importer or exporter, or 'in a circumstance set out in the rules'. Subclause 24(4) provides a further exception where the person providing the road vehicle is the holder of a non-RAV entry import approval that relates to the vehicle, or the vehicle is manufactured in Australia and the person providing the vehicle makes it clear to the recipient it is not provided for use in transport on a public road or is provided for use in transport on a public road in exceptional circumstances. The offence carries a maximum penalty of 120 penalty units.

1.95 Finally subclause 32(1) seeks to make it an offence to give false or misleading information or documents under or for the purposes of the bill. Subsection 32(2) provides an exception to this offence, stating that subclause 32(1) does not apply if the information or document is not false or misleading in a material particular. The offence carries a maximum penalty of 60 penalty units.

1.96 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.97 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.98 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

1.99 The committee notes that the *Guide to Framing Commonwealth Offences*⁸¹ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

1.100 The explanatory memorandum makes the general comment that the clauses subject to reversal of the evidential burden of proof contain elements that 'would be

81 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 50-52.

significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter; or where the matter in question is peculiarly within the knowledge of the defendant.⁸² However, the committee notes that the requirement set out in the *Guide to Framing Commonwealth Offences* is that the matter subject to a reverse evidential burden meet *both* of these criteria, rather than one or the other.

1.101 With respect to paragraph 16(3)(b), the explanatory memorandum states that it is appropriate that the defendant bears the evidential burden of proof because an approval holder would be in a 'significantly better position' than the Commonwealth to present evidence in relation to whether a component was represented to them as a 'Type Approval Component', for example by presenting a contract for supply, an advertisement, or a written document from the supplier.⁸³ However, the committee notes that the defendant being in 'significantly better position' to present evidence of a matter is not equivalent to the matter being peculiarly within their knowledge. The committee also notes that the explanatory memorandum does not address why it is appropriate that the evidential burden be reversed for the matters set out in paragraphs 16(3)(a), (c) and (d).

1.102 With respect to subclauses 24(3) and (4), the explanatory memorandum states that these matters would be peculiarly within the knowledge of the defendant and therefore appropriately the subject of a reversed evidential burden.⁸⁴ However, the committee notes that it does not seem possible to determine that 'a circumstance set out in the rules', as set out under paragraph 24(3)(f), could be described as peculiarly within the knowledge of the defendant at this stage (given the rules are yet to be made). Further, it is not clear that whether a person providing a road vehicle is the holder of a non-RAV entry import approval that relates to the vehicle, as set out under paragraph 24(4)(a), is a matter that would be peculiarly within the defendant's knowledge.

1.103 Finally, with respect to subclause 32(2), the explanatory memorandum states that the 'veracity of information provided in compliance with this Bill is a matter peculiarly within the defendant's knowledge' and that it is therefore legitimate to cast the matter as a defence.⁸⁵ However, this justification does not specifically address the central matter of the defence—whether the information provided is false or misleading *in a material particular*. This matter does not appear to be peculiarly within the defendant's knowledge and it therefore remains unclear why it is appropriate to frame it as a defence.

82 Explanatory memorandum, p. 13.

83 Explanatory memorandum, p. 28.

84 Explanatory memorandum, p. 33.

85 Explanatory memorandum, p. 38.

1.104 The committee requests the minister's detailed justification as to the appropriateness of including the matters set out in paragraphs 16(3)(a), (c) and (d), 24(3)(f), 24(4)(a) and subclause 32(2) as offence-specific defences.

Strict liability offence⁸⁶

1.105 Clause 38 sets out an offence of strict liability in cases where a person refuses or fails to comply with a recall notice, or a person supplies to another person a road vehicle component to which a recall notice relates. This offence is subject to a maximum penalty of 5,250 penalty units for a body corporate and 1,050 penalty units for an individual.

1.106 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.⁸⁷

1.107 The *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.⁸⁸ As noted above, the proposed offence in this case is subject to a maximum penalty of 1,050 penalty units (\$220,500) for an individual.

1.108 The explanatory memorandum states that it is necessary to apply strict liability in this case to 'ensure the integrity of the regulatory regime, particularly when failure to comply with the recall notice could cause significant health or environmental risks to the Australian public.'⁸⁹ Further, the explanatory memorandum states that '[p]ersons who operate in this industry are already aware

86 Clause 38. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

87 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

88 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

89 Explanatory memorandum, p. 41.

of the possibility of a compulsory recall notice being issued, strict liability thresholds applying to such offences and the current penalties for non-compliance under the Australian Consumer Law'.⁹⁰ The explanatory memorandum does not, however, provide a direct justification for the very significant penalties proposed, particularly with respect to individuals, in a context where there is no requirement to prove fault.

1.109 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying strict liability to an offence subject to a maximum penalty of 1,050 penalty units for an individual.

Privilege against self-incrimination⁹¹

1.110 Clause 41 seeks to give the minister, the secretary or an SES employee the power to issue disclosure notices in certain circumstances. Subclause 42(1) provides that a person is not excused from giving information or evidence, or producing a document, as required by a disclosure notice on the ground that doing so might tend to incriminate the person or expose them to a penalty.

1.111 Subclause 42(2) provides a use immunity for individuals with respect to such self-incriminating information. It states that the information, evidence or documents provided in response to a disclosure notice are not admissible in evidence against the individual in civil or criminal proceedings, with the exception of proceedings relating to a refusal or failure to comply with a disclosure notice, knowingly providing false or misleading information in response to a disclosure notice, or knowingly giving false or misleading information to a Commonwealth entity. However, the bill does not provide a derivative use immunity, which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person.

1.112 The committee accepts that the privilege against self-incrimination may be overridden where there is a compelling justification for doing so. In general, however, the committee considers that any justification for abrogating the privilege will be more likely to be considered appropriate if accompanied by a use and derivative use immunity. In this case, the explanatory memorandum states that abrogating the privilege against self-incrimination is necessary because the 'timely gathering of information about the extent and nature of any risks is critical' where a minister or inspector believes road vehicles or components pose a danger to any person.⁹² However, no explanation is given as to why it is appropriate to provide a use immunity but not a derivative use immunity.

90 Explanatory memorandum, p. 13.

91 Clause 42. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

92 Explanatory memorandum, p. 44.

1.113 The committee requests the minister's detailed justification as to why it is proposed to abrogate the privilege against self-incrimination without also providing a derivative use immunity, particularly by reference to the matters outline in the *Guide to Framing Commonwealth Offences*.⁹³

Broad delegation of administrative powers⁹⁴

1.114 Clauses 50 and 52 seek to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) in relation to the provisions of the bill and offences against the *Crimes Act 1914* or the *Criminal Code* that relate to the bill. These monitoring and investigation powers include coercive powers such as powers of entry and inspection, to which the bill seeks to add the power to take and test samples.⁹⁵ Subclauses 50(5) and 52(4) seek to allow authorised persons to be assisted by 'other persons' when exercising powers of performing functions or duties in relation to monitoring and investigation.

1.115 The explanatory memorandum states that the Regulatory Powers Act allows for an authorised person to be assisted by other persons in exercising powers if the assistance is necessary and reasonable and the Act empowers the authorised person to be assisted. It also sets out a number of circumstances in which it is envisaged an authorised person may require assistance.⁹⁶ However, the explanatory memorandum contains no guidance as to who such 'other persons' may be, or whether they will be required to possess appropriate training and experience. By contrast, the bill states that the secretary must not appoint a person as an inspector unless he or she is satisfied that the person 'has the knowledge or experience necessary to properly perform the functions or exercise the powers of an inspector'.⁹⁷

1.116 The committee therefore requests the minister's advice as to whether it would be appropriate to amend the bill to require that any person assisting an authorised officer have specified skills, training or experience.

93 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 96-99.

94 Subclauses 50(5) and 52(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

95 See Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014* and, with respect to the power to take samples, clauses 51 and 53 of the bill.

96 Explanatory memorandum, pp. 47-48.

97 Subclause 49(3).

Limitation on judicial review⁹⁸

1.117 Subclause 62(1) provides for the minister to arrange for the use of computer programs for any purposes for which the minister may, or must, under the bill make a decision, exercise any power or comply with any obligation, or do anything else related to making a decision, exercising a power or complying with an obligation. Subclause 62(2) provides that anything done by the operation of a computer program under subsection (1) will be taken to have been done by the minister.

1.118 Subclause 63(1) seeks to enable the minister to substitute a decision for a decision made by the operation of a computer program if the computer program was not functioning correctly at the time of the decision, the substituted decision could have been made under the same provision of the bill as the initial decision, and the substituted decision is more favourable to the applicant. However, subclause 63(2) states that the minister does not have a duty to consider whether to exercise this power in respect of any decision, whether requested to do so by the applicant or by any other person, or in any other circumstances.

1.119 The explanatory memorandum states that the power to substitute a more favourable decision under subclause 63(1) would allow the minister to 'correct adverse decisions without the need for applicants to seek external review when it is the computer program itself that has made an error.'⁹⁹ The explanatory memorandum also states that nothing in this subclause is intended to affect any merits review entitlements that an applicant may have. With respect to the 'no-duty-to-consider' clause under subclause 63(2), the explanatory memorandum merely restates that the minister would not be obligated to consider whether to exercise the power to substitute a more favourable decision.¹⁰⁰

1.120 It remains unclear why it is considered necessary to include such a no-duty-to-consider clause in the bill. The committee also notes that, although the power to substitute a more favourable decision is not intended to affect any merits review entitlements an applicant may have, it is difficult to assess whether those remaining merits review entitlements are adequate because the bill allows review entitlements with respect to administrative decisions to be set out in the rules (see discussion below at paragraph 1.135).

1.121 The committee further notes that 'no-duty-to-consider' clauses do not by their terms oust the High Court or Federal Court's judicial review jurisdiction. However, they do significantly diminish the efficacy of judicial review in circumstances where no decision to consider the exercise of a power has been made.

98 Subclause 63(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

99 Explanatory memorandum, p. 53.

100 Explanatory memorandum, p. 53.

Even where a decision has been made to consider the exercise of the power, some judicial review remedies will not be available.¹⁰¹

1.122 The committee considers it may be appropriate to amend the no-duty-to-consider clause to ensure it does not apply where the minister is made aware of facts that indicate that an adverse decision has been made as a result of a computer program not functioning correctly. The committee requests the minister's response on this matter and an explanation as to why proposed subclause 63(2) is otherwise considered necessary and appropriate.

Broad delegation of administrative powers¹⁰²

1.123 Subclause 73(5) provides that the rules may provide for and in relation to the delegation of all or any of the minister's functions or powers under the rules or any instruments made under rules (other than the power to issue a recall notice or to determine specified matters by legislative instrument) to the secretary or any Australian Public Service (APS) employee.

1.124 Similarly, subclause 74(5) states that the rules may provide for and in relation to the delegation to any APS employee of all or any of the secretary's functions or powers under the rules and any instruments made under the rules.

1.125 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.126 In this instance, the explanatory materials do not address the question of why these powers and functions are proposed to be delegated to any level APS employee. However, in relation to clauses 73 and 74, the explanatory memorandum sets out the following 'core principles' with respect to delegation:

- For provisions that are a sanctions or taking something away from a person (such as suspend, vary, or cancel provisions) these should be made at a level above the level of the original decision maker and should always be at SES level.

101 For example, certiorari will be futile given that mandamus could not issue to compel the re-exercise of the power, even if it had been unlawfully exercised.

102 Subclauses 73(5) and 74(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

- If variation is requested by the applicant, then the level that made the original decision is acceptable.
- APS level officers should be able to at least make decisions on matters with high volumes and relatively clear statutory criteria. They should not make decisions in areas requiring a high degree of discretion.¹⁰³

1.127 The committee notes these principles; however, the bill does not restrict the delegation of powers and functions in line with these considerations and there would therefore be no legislative requirement that they be followed. The committee further notes that, even if these principles were to be followed, the power to make decisions on matters 'with high volumes and relatively clear statutory criteria' would still be delegable to APS officers of any level. Further, the explanatory memorandum contains no guidance as to the qualifications or attributes that would be required of person to whom these powers and functions may be delegated.

1.128 The committee requests the minister's advice as to why it is necessary to allow the rules to provide for any or all of the powers and functions of the minister and the secretary under the rules or under any instruments made under the rules (with limited exceptions) to be delegated to any APS employee at any level.

1.129 The committee also requests the minister's advice as to whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

Immunity from liability¹⁰⁴

1.130 Subclause 81(1) seeks to prevent legal proceedings being brought against the Commonwealth in respect of any loss incurred, or any damage suffered, because of a reliance on:

- (a) an entry of a road vehicle on the [Register of Approved Vehicles] or the [Specialist and Enthusiast Vehicles Register]; or
- (b) any test carried out under, or for the purposes of this Act; or
- (c) any express statement, or any statement or action implying, that a road vehicle or a road vehicle component complied with this Act; or
- (d) an approval granted under this Act.

103 Explanatory memorandum, p. 57.

104 Clause 81. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.131 Subclause 82(2) seeks to prevent both criminal and civil proceedings being brought against the minister, the secretary, an inspector or an APS employee in the department in relation to anything done, or omitted to be done, in good faith in connection with the performance or purported performance of functions and duties, or the exercise or purported exercise of powers, conferred by the bill.

1.132 This clause would therefore remove any common law right to bring an action to enforce legal rights, unless, in the context of anything done in connection with the performance or purported performance of function or duties or the exercise of powers under the Act, it can be demonstrated that lack of good faith is shown. The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve a personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.133 The committee expects that if a bill seeks to provide immunity from civil and criminal liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory materials do not address the need to provide such an immunity, with the explanatory memorandum simply restating the effect of the provision.¹⁰⁵

1.134 The committee requests the minister's advice as to why it is appropriate to prevent legal proceedings being brought against the Commonwealth, the minister, the secretary and departmental employees, such that affected persons would have their right to bring an action to enforce their legal rights removed or limited to situations where a lack of good faith is shown.

Review rights¹⁰⁶

1.135 Subclause 82(1) provides that the minister may, by legislative instrument make rules with respect to matters that are required or permitted to be prescribed by the bill, or necessary or convenient to be prescribed for carrying out or giving effect to the bill. Subclause 82(2) sets out a number of specific matters that may be addressed in the rules, including, at paragraph (c), to 'provide for and in relation to the review of a decision made under this Act, the rules or any instrument made under the rules'.

1.136 The committee notes that subclause 82(2) does not *require* that rules be made setting out review rights with respect to a decision made under the Act, the rules or any instrument made under the rules. Rather it merely provides that the rules *may* address these matters. The bill does not otherwise provide for persons

105 Explanatory memorandum, p. 59.

106 Subclause 82(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

affected by decisions to seek review, either internally or externally. As the bill does not specifically subject any decisions to review under the *Administrative Appeals Tribunal Act 1975*, persons affected by a decision would not be able to seek a review by the Administrative Appeals Tribunal (AAT). The committee further notes that the *Motor Vehicle Standards Act 1989*, which the bill is intended to replace, subjects a significant number of decisions made by the minister to review by the AAT.¹⁰⁷

1.137 The explanatory memorandum does not address the question of why it is necessary to allow the specification of review rights with respect to administrative decisions to be set out in rules, nor why it is appropriate not to *require* that the rules make provision for review rights. The committee considers that significant matters such as access to merits review should be set out in primary legislation. However, if these matters are to be left to delegated legislation, the committee considers that, at a minimum, it should be a requirement that delegated legislation set out what decisions will be subject to review rights.

1.138 The committee requests the minister's advice as to why the bill does not set out which decisions will be subject to merits review before the Administrative Appeals Tribunal, and why, at a minimum, the bill does not *require* the rules to provide for and in relation to the review of decisions made under the bill.

107 *Motor Vehicle Standards Act 1989*, s. 39.

Road Vehicle Standards (Consequential and Transitional Provisions) Bill 2018

Purpose	This bill contains transitional and consequential provisions to support the commencement of the Road Vehicle Standards Bill 2018 as it seeks to replace the <i>Motor Vehicle Standards Act 1989</i> as the Commonwealth's primary legislation for regulating road vehicles and certain road vehicle components
Portfolio	Infrastructure, Regional Development and Cities
Introduced	House of Representatives on 7 February 2018

The committee has no comment on this bill.

Road Vehicle Standards Charges (Imposition—Customs) Bill 2018

Road Vehicle Standards Charges (Imposition—Excise) Bill 2018

Road Vehicle Standards Charges (Imposition—General) Bill 2018

Purpose	These bills seek to provide for the imposition of charges for activities and services relating to the regulatory administration of the Road Vehicles Standards Bill 2018
Portfolio	Infrastructure, Regional Development and Cities
Introduced	House of Representatives on 7 February 2018

Charges in delegated legislation¹⁰⁸

1.139 Each of these three bills seeks to impose a charge as a tax in relation to prescribed matters connected with the administration of the *Road Vehicle Standards Act 2018* or the *Road Vehicle Standards (Consequential and Transitional Provisions) Act 2018* (currently bills before Parliament). The bills provide that the amount of the charge payable in each case may be prescribed by the regulations, and the regulations may either set out the amount of the charge payable or a method for working out an amount.

1.140 The explanatory memorandum makes a general comment in relation to the bills that setting the amount of the charge payable through regulations allows 'the relevant Minister to consult with stakeholders on the amounts; make appropriate and timely adjustments to the charges; and ensures that there is a level of parliamentary scrutiny for the charges' and the amount of each charge will be set in accordance with the Australian Government Charging Framework.¹⁰⁹ The explanatory memorandum also states that specifying the amount of each charge in regulations will provide 'appropriate flexibility' to change the amount over time and

108 Clause 6 of the Road Vehicle Standards Charges (Imposition—Excise) Bill 2018; and clauses 7 of both the Road Vehicle Standards Charges (Imposition—General) Bill 2018 and the Road Vehicle Standards Charges (Imposition—Customs) Bill 2018. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

109 Explanatory memorandum, pp. 2-3.

allow charges to be more easily increased or decreased in line with changes to costs for delivering services under the Road Vehicle Standards Bill.¹¹⁰

1.141 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).¹¹¹ The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The committee notes the statement in the explanatory memorandum that the charges will be imposed for the purposes of cost recovery and should not raise revenue above the cost of administering the Road Vehicle Standards Bill or the Road Vehicle Standards (Consequential and Transitional Provisions) Bill and providing services to regulated entities.¹¹² However, no guidance is provided on the face of each bill limiting the imposition of the charges in this way, nor are maximum charges specified. Where charges are to be prescribed by regulation the committee considers that, at a minimum, some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.142 The committee requests the minister's advice as to why there are no limits on the charges specified in each bill and whether guidance in relation to the method of calculation of these charges and/or a maximum charge can be specifically included in each bill.

110 Explanatory memorandum, pp. 7, 9, 10.

111 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the Bill of Rights 1688: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

112 Explanatory memorandum, pp. 6, 8, 10.

Treasury Laws Amendment (2018 Measures No. 1) Bill

Purpose	<p>This bill seeks to amend Acts relating to superannuation, corporations and taxation and to repeal certain Acts and provisions of Acts</p> <p>Schedule 1 makes a number of regulatory amendments to Treasury portfolio Acts</p> <p>Schedule 2 extends the tax relief for merging superannuation funds until 1 July 2020</p> <p>Schedule 3 enables recovery of the ongoing cost of the governance of the superannuation transaction network from the superannuation supervisory levy</p> <p>Schedule 4 transfers the regulator role for early release of superannuation benefits on compassionate grounds from the Chief Executive Medicare to the Commissioner of Taxation</p> <p>Schedule 5 requires purchasers of new residential premises and new subdivisions of potential residential land to make a payment of part of the purchase price to the Australian Taxation Office</p>
Portfolio	Treasury
Introduced	House of Representatives on 7 February 2018

Power for delegated legislation to amend primary legislation (Henry VIII clause)¹¹³

1.143 Schedule 5 to the bill seeks to establish a framework to prevent certain forms of tax evasion (relating to goods and services tax) by property developers. Within that framework, purchasers of new residential property and subdividers of residential land would be required to withhold a certain amount of the purchase price from the seller, and to pay that amount directly to the Australian Taxation Office (ATO). This is referred to as a 'withholding obligation'. The sellers of the property or land would subsequently be able to apply for a tax credit in respect of the amount withheld.

1.144 To implement the withholding obligation, proposed subsection 14-250(1) seeks to require a person who is the recipient of a taxable supply¹¹⁴ that is, or that

¹¹³ Schedule 5, item 1, proposed subsection 14-250(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

includes, a supply to which proposed subsection 14-250(2) applies, to pay to the Commissioner of Taxation (Commissioner) a certain amount.¹¹⁵ Proposed subsection 14-250(2) applies to the supply, by way of sale or long-term lease, of new residential premises and potential residential land, other than supplies of a kind determined by the Commissioner under proposed subsection 14-250(3). Proposed subsection 14-250(3) then provides that the Commissioner may, by legislative instrument, determine that proposed subsection 14-250(2) (and therefore the obligation in proposed subsection 14-250(1)) does not apply to a kind of supply specified in the determination. Proposed subsection 14-250(3) therefore appears to allow delegated legislation (the Commissioner's determination) to amend the operation of primary legislation.

1.145 A provision that enables delegated legislation to amend the operation of primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.146 In this instance, the explanatory memorandum only provides that the power of the Commissioner to override the operation of the withholding obligation by legislative instrument has been included '[t]o avoid any unintended consequences.'¹¹⁶ The explanatory memorandum does not provide any further explanation, nor does it include examples of circumstances in which the power would be used. Given the apparent significance of the withholding obligation to the anti-evasion measures sought to be introduced by Schedule 5 to the bill, the committee does not consider this to sufficiently explain or justify the inclusion of a Henry VIII clause. In this regard, the committee also notes that the bill does not appear to provide any limitations on the power to make determinations under proposed subsection 14-250(3). For example, it does not set out any criteria that must be satisfied.

114 'Taxable supply' is defined in Subdivision 9-A of the *A New Tax System (Goods and Services Tax) Act* (GST Act). Section 9-5 of that Act provides that a person makes a taxable supply if they are registered (or required to be registered) under the GST Act, they make a supply for consideration (e.g. payment), the supply is made in the course or furtherance of an enterprise that the person carried on, and the supply is connected with the indirect tax zone.

115 Under proposed section 14-250, the amount to be paid to the Commissioner is seven per cent of the contract price for the relevant supply, or the price for the relevant supply. The Commissioner may, by legislative instrument, raise that amount to up to nine per cent.

116 Explanatory memorandum, p. 51.

1.147 The committee seeks the minister's more detailed justification as to why it is proposed to allow the Commissioner to determine, by legislative instrument, that the withholding obligation does not apply to certain kinds of supply.

1.148 The committee also seeks the minister's advice as to the appropriateness of amending the bill to insert (at least high-level) guidance concerning the making of a determination under proposed subsection 14-250(3).

Strict liability offence¹¹⁷

1.149 Proposed subsection 14-255(1) seeks to require a person who makes a supply, by way of sale or long-term lease, of residential premises or potential residential land, to give to the recipient of that supply a notice stating the matters set out in proposed paragraphs 14-255(1)(a) and (b). Subsection 14-255(4) seeks to create the offence of failing to give a notice required under proposed section 14-255, punishable by 100 penalty units. Subsection 14-255(5) states that this offence is to be one of strict liability.

1.150 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.¹¹⁸ In this instance, the explanatory memorandum states:

Strict liability is appropriate in this case because the offence is committed by failing to make the required representations. It is important for the integrity of the regulatory regime to make suppliers responsible for a failure to provide an accurate notice, regardless of their intentions. Withholding is being introduced to address non-compliance by certain suppliers and it would undermine the effectiveness of the regime if suppliers could knowingly fail to provide a notice when required without

117 Schedule 5, item 1, proposed subsection 14-255(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

118 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

consequences. Suppliers have clear notice about their obligations and the matters covered in the notice are either known or readily able to be determined by the supplier.¹¹⁹

1.151 The committee notes this detailed explanation as to the appropriateness of applying strict liability to the offence in proposed subsection 14-255(4). However, the committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the relevant offence is not punishable by imprisonment and is only punishable by a fine of up to 60 penalty units for an individual.¹²⁰ In this instance, the bill proposes applying strict liability to an offence punishable by 100 penalty units. The explanatory memorandum states:

This penalty creates a strong disincentive for potential phoenix companies [that is, companies which dissolve to avoid tax liability] to misrepresent that a property is not 'new residential premises' or 'potential residential land' to avoid the withholding obligation from applying. The penalty amount is set having regard to the significant sums of money involved in such real property transactions. Without a strong disincentive, phoenix operators may not be discouraged from making such a false representation.¹²¹

1.152 While noting this explanation, the committee remains concerned about the application of strict liability in circumstances where a penalty exceeds the maximum penalty recommended by the *Guide to Framing Commonwealth Offences*.

1.153 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of applying strict liability to the offence in proposed subsection 14-255(4), which carries a penalty of 100 penalty units.

119 Explanatory memorandum, p. 57.

120 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 23.

121 Explanatory memorandum, p. 58.

Treasury Laws Amendment (2018 Measures No. 2) Bill 2018

Purpose	<p>This bill seeks to amend Acts relating to corporations, consumer credit and taxation</p> <p>Schedule 1 seeks to expand the regulation-making powers to allow the regulations to provide for exemptions from the Australian Financial Services Licence and Australian Credit Licence requirements</p> <p>Schedule 2 seeks to amend the venture capital and early stage investor tax concession provisions</p>
Portfolio	Treasury
Introduced	House of Representatives on 8 February 2018

Broad administrative powers¹²²

1.154 Section 926B of the *Corporations Act 2001* (Corporations Act) currently provides that regulations made under that Act may exempt certain persons and financial products from all or specified provisions of Part 7.6 of the Corporations Act, which relate to the licensing of financial services providers. Section 110 of the *National Consumer Credit Protection Act 2009* (NCCP Act) similarly provides that regulations made under that Act may exempt certain persons and credit activities from all or specified provisions to which Part 2.6 of the NCCP Act applies. Part 2.6 of the NCCP Act applies to the licensing of persons who engage in credit activities.

1.155 Item 2 of Schedule 1 to the bill seeks to amend section 926B of the Corporations Act, to provide that:

- an exemption from particular requirements under the Corporations Act (that is, the requirements in subsection 911A(1)) may apply unconditionally or be subject to conditions;¹²³
- if a condition is imposed on a person, the person must comply with that condition. The Australian Securities and Investments Commission (ASIC) may apply to the court for an order enforcing compliance with a condition;¹²⁴ and

122 Schedule 1, item 2, proposed subsection 926B(5); and Schedule 1, item 5, proposed subsection 110(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

123 See proposed subsection 926B(3).

124 See proposed subsection 926B(4).

- such an exemption may empower ASIC to make decisions relating to how that exemption starts or ceases to apply to a person or class of persons.¹²⁵

1.156 Item 5 of Schedule 2 seeks to make virtually identical amendments to section 110 of the NCCP Act, in relation to exemptions from subsection 29(1) of that Act to enable the testing of particular credit activities. In both cases, the bill seeks to permit the regulations to empower ASIC to determine when the relevant exemption starts or ceases to apply to a person or class of persons, thereby conferring a broad discretionary power on ASIC to determine when particular exemptions apply.

1.157 With regard to these matters, the explanatory memorandum states:

The amendment empowers ASIC to make decisions regarding how the exemption starts and ceases to apply to a person or class of persons. This is necessary so that ASIC can respond to minimise risks and protect consumers where unintended and undesirable behaviour from firms is identified.

As a result of this amendment, ASIC can respond to identified non-compliance with prescribed conditions and prevent misconduct or fraudulent behaviour in...business's provision of products or services to consumers. If a provider is not compliant with any of the conditions set out in the regulations, ASIC can stop the provider from relying on the exemption or seek an order from the court that a condition should be complied with in a particular way. ASIC could prevent a provider from relying on the exemption in appropriate circumstances (for example, if the provider had been involved in previous misconduct or repeatedly failed to adhere to legal requirements).

[By] allowing ASIC to make decisions about how the exemption starts and ceases to apply, ASIC has the flexibility to provide arrangements to transition providers effectively from the exemption to being licensed.¹²⁶

1.158 The committee notes the explanation provided in the explanatory memorandum. However, the committee remains concerned that the bill would permit the regulations to confer a broad power on ASIC to determine when particular exemptions apply. The committee is also concerned that, while the explanatory memorandum provides some guidance around when ASIC's powers would be exercised, this guidance is not reflected on the face of the bill.

1.159 With respect to the character (that is, legislative or otherwise) of decisions by ASIC as to when exemptions start or cease to apply, the explanatory memorandum further states that:

[a]s the regulations would be subject to disallowance, ASIC's powers to make decisions relating to how the exemption starts or ceases to apply to

125 See proposed subsection 926B(5).

126 Explanatory memorandum, pp. 7-9.

a person or class of persons will be subject to appropriate Parliamentary scrutiny.¹²⁷

1.160 The committee acknowledges that the relevant regulations would be disallowable legislative instruments. However, it is not apparent that decisions made *under* those regulations, as to when exemptions would start and cease to apply, would also be legislative instruments. The committee is therefore concerned that proposed paragraphs 926B(5) and 110(4) would permit ASIC to make relatively significant decisions relating to the application of exemptions without subjecting those decisions to appropriate levels of parliamentary scrutiny.

1.161 The committee seeks the Treasurer's more detailed justification for enabling the regulations to confer on ASIC a broad power to make decisions relating to how particular exemptions start and cease to apply.

1.162 The committee also seeks the Treasurer's advice as to whether a decision of this nature would be a legislative instrument, and would therefore be subject to parliamentary scrutiny.

Retrospective application¹²⁸

1.163 Item 18 of Schedule 2 to the bill seeks to amend section 102R of the *Income Tax Assessment Act 1936* (1936 Act) to provide that, in determining whether a unit trust is a public trading trust under that section, any interest disregarded under subsection 275-10(4A) of the *Income Tax Assessment Act 1997* is also to be disregarded for the purposes of section 102R of the 1936 Act. Item 19 of Schedule 2 to the bill then provides that the amendment made by item 18 applies in relation to income years on or after 1 July 2016. The amendment therefore applies retrospectively.

1.164 The committee has long-standing concerns about provisions which apply retrospectively, as such provisions challenge a basic value of the rule of law that, in general, laws should only operate prospectively. The committee will be particularly concerned if the legislation has, or may have, a detrimental effect on individuals. Where proposed legislation applies retrospectively, the committee would therefore expect the explanatory materials to explain why retrospective application is necessary, and to specify if and how any person is likely to be adversely affected.

1.165 In this instance, the explanatory memorandum states:

The amendments made by Part 4 [item 18] apply in relation to the 2016-17 year of income and later income years. This amendment applies

127 Explanatory memorandum, pp. 8-9.

128 Schedule 2, item 19. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

retrospectively to ensure the law operates as it always was intended to operate. This ensures that trusts that acted in a manner that complied with the intended operation of the law are not adversely impacted by a technical omission that was made in the *Tax Laws Amendment (Tax Incentives for Innovation) Act 2016*.¹²⁹

1.166 The committee notes that the explanatory memorandum does not specify whether any person has been, or may be, adversely affected by the retrospective application. Additionally, the explanatory memorandum indicates that the retrospective commencement of the proposed amendment is intended to ensure that trusts that complied with the *intended* operation of the law are not adversely affected by an omission in a previous amending Act. It is unclear whether trusts that complied with the law *as written* (including the omission) could be adversely affected by the retrospective application of the amendments in the present bill.

1.167 The committee seeks the Treasurer's more detailed advice as to why the amendment proposed by item 18 of Schedule 2 to the bill is intended to apply retrospectively from the 2016-17 income year, and whether this will cause detriment to any individual.

129 Explanatory memorandum, p. 22.

Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018

Purpose	<p>This bill seeks to amend the <i>Income Tax Administration Act 1993</i> and the <i>Taxation Administration Act 1953</i> to address identified issues associated with the black economy</p> <p>Schedule 1 creates new offences related to the manufacture, distribution, possession, sale and use of electronic sales suppression tools</p> <p>Schedule 2 introduces compulsory reporting to the Australian Taxation Office by businesses operating in the courier and cleaning industries</p>
Portfolio/Sponsor	Treasury
Introduced	House of Representatives on 7 February 2018

Strict liability offences¹³⁰

1.168 Item 2 of Schedule 1 to the bill seeks to introduce a new Subdivision BAA into the *Taxation Administration Act 1953* (Administration Act). The Subdivision contains a number of offences relating to the production, use, possession and distribution of electronic sales suppression tools¹³¹ (ESS tools). The offences (in proposed sections 8WAC, 8WAD and 8WAE) seek to make it unlawful for a person to:

- manufacture, develop or publish an ESS tool;¹³²
- supply or make available for use an ESS tool or a right to use such a tool; or provide a service involving the use of an ESS tool;¹³³
- acquire or possess an ESS tool, in circumstances where the person is required under a taxation law to make or keep a tax record;¹³⁴ and

130 Schedule 1, item 2, proposed sections 8WAC, 8WAD and 8WAE. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 23(1)(a)(i).

131 Proposed section 8WAB defines 'electronic sales suppression tool' as a device, software program or other thing, a part of any such thing, or a combination of any such things or parts, that is capable of, and a reasonable person would conclude has the purpose of, falsifying, manipulating, hiding, obfuscating, destroying or preventing the creation of certain tax records.

132 See proposed subsection 8WAC(1).

133 See proposed subsection 8WAC(2).

134 See proposed subsection 8WAD.

- make, alter, keep or prevent from being kept a tax record with the use of an ESS tool, in circumstances where the person is required under a taxation law to make or keep such a record.¹³⁵

1.169 The offences in proposed section 8WAC are punishable by a pecuniary penalty of 5,000 penalty units, while the offences in proposed sections 8WAD and 8WAE attract penalties of 500 and 1,000 penalty units respectively. Each of the offences is an offence of strict liability.

1.170 Under general principles of criminal law, fault is required to be provided before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.¹³⁶

1.171 With respect to the offences in proposed section 8WAC (which carry more significant penalties), a comprehensive explanation for the application of strict liability is provided in the explanatory memorandum:

Applying strict liability to these offences is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools. The provision will act as a significant and real deterrent to those entities who seek to profit by facilitating tax evasion and fraud through the tools' production and supply. Because an electronic sales suppression tool's principal function is, by definition, to facilitate tax evasion, there are no reasons for an entity to produce or supply such a tool beyond those covered by the applicable defences...The ability to prosecute at the fraud's facilitation level will significantly reduce the instances of fraud at the user level.¹³⁷

1.172 The explanatory memorandum also provides similar (though less extensive) explanations for the application of strict liability to the offences in proposed sections 8WAD¹³⁸ and 8WAE.¹³⁹

135 See proposed subsection 8WAE(1).

136 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22-25.

137 Explanatory memorandum, pp.12-13.

138 Explanatory memorandum, p. 15.

1.173 The committee notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the relevant offence is not punishable by imprisonment and is only punishable by up to 60 penalty units for an individual.¹⁴⁰ In this instance, the bill proposes applying strict liability to offences punishable by between 500 and 5,000 penalty units. The explanatory memorandum states that the magnitude of the relevant penalties is justified as the offences relate to systematic fraud and tax evasion. With regard to the offences in proposed section 8WAC, the explanatory memorandum also notes that the *Taxation Administration Act 1953* imposes a civil penalty of a similar amount on persons who promote tax exploitation.¹⁴¹ While noting this explanation, the committee remains concerned about the application of strict liability in circumstances where a very significant financial penalty may be imposed.

1.174 Further, the committee notes that proposed section 8WAD seeks to apply strict criminal liability to the mere possession of an ESS tool, and to impose a substantial penalty (500 penalty units) where possession is established. The committee is concerned that proposed section 8WAD could criminalise a broad range of conduct, up to and including mere inadvertence. For example, a person could acquire an ESS tool from a third party, never use the tool, and forget that the tool was in their possession. Owing to the application of strict liability in proposed subsection 8WAD, the person could be convicted of an offence despite not engaging or intending to engage in the type of conduct (that is, certain kinds of tax evasion) that the bill seeks to prevent. The committee's concerns are heightened by the fact that the offence would apply the day after the bill commences, meaning that there may be a number of people currently lawfully in possession of an ESS tool that would immediately commit an offence the day after the bill receives royal assent.

1.175 The committee acknowledges that the offence in proposed section 8WAD would not apply if an entity gives a notice to the Commissioner of Taxation, as soon as practicable after the commencement of Schedule 1 to the bill, that the entity acquired or assumed possession or control of the ESS tool or the right to use it before 9 May 2017.¹⁴² However, the committee remains concerned that persons who are in possession of an ESS tool, but have never used that tool, may not be aware of the proposal to criminalise possession of ESS tools, or the proposed notification provisions, and may be immediately subject to a criminal offence on the basis of mere inadvertence.

139 Explanatory memorandum, p. 17.

140 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 23.

141 Explanatory memorandum, p. 13.

142 See Schedule 1, item 4.

1.176 Finally, in relation to proposed section 8WAC, the committee notes that explanatory memorandum states that the significant pecuniary penalty (5,000 penalty units) that may be imposed in relation to that provision is justified because the offences in that section relate to *intentional* and systemic fraud and tax evasion.¹⁴³ In this regard, the committee notes the difficulty in reconciling an offence which seeks to punish intentional conduct with a proposal to remove the requirement to prove fault in relation to that conduct.

1.177 The committee seeks the minister's more detailed justification for the application of strict liability to offences attracting significant penalties of between 500 and 5,000 penalty units.

Reversal of the evidential burden of proof¹⁴⁴

1.178 As outlined above, proposed sections 8WAC and 8WAD seek to create offences relating to the use and possession of electronic sales suppression tools. Proposed subsections 8WAC(3) and 8WAD(2) seek to create exemptions (offence-specific defences) for those offences. The defences provide that the offences in sections 8WAC and 8WAD do not apply where the relevant conduct is undertaken for the purposes of preventing or deterring tax evasion or enforcing a taxation law.

1.179 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.180 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or to raise evidence to disprove, one or more elements of an offence, interferes with this important common law right.

1.181 While in this instance the defendant would bear an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. In this regard, the explanatory memorandum states:

Framing the circumstances in which an entity does not commit an offence as an offence-specific defence is appropriate because the person who undertakes the conduct is best placed to lead evidence about why their

143 Explanatory memorandum, p. 13.

144 Schedule 1, item 2, proposed subsections 8WAC(3) and 8WAD(2). The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 23(1)(a)(i).)

conduct was for the purposes of preventing or deterring tax evasion or enforcing a law.¹⁴⁵

1.182 The committee notes that the *Guide to Framing Commonwealth Offences*¹⁴⁶ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.¹⁴⁷

1.183 It is not apparent to the committee that the matters in proposed subsections 8WAC(3) and 8WAD(2) would be peculiarly within the knowledge of the defendant, and are matters that would be difficult and costly for the prosecution to establish. In particular, the question of whether a person was undertaking particular conduct for the purposes of enforcing a law does not appear to be a matter peculiarly in the defendant's knowledge. In this regard, the committee also emphasises that a defendant being 'best placed' to point to evidence in relation to a matter does not equate to the matter being 'peculiarly' within the defendant's knowledge.

1.184 The committee seeks the minister's more detailed justification for making the question of whether a person is acting to prevent or deter tax evasion, or to enforce a taxation law, an offence-specific defence, by reference to the principles set out in the *Guide to Framing Commonwealth Offences*.

1.185 The committee also seeks the minister's advice as to the appropriateness of amending the bill to provide that whether a person is acting to prevent or deter tax evasion, or to enforce a taxation law, to be an element of the offences in proposed sections 8WAC and 8WAD (rather than an offence-specific defence).

145 Explanatory memorandum, p. 18.

146 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 50-52.

147 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018

Purpose	<p>This bill seeks to amend the <i>Income Tax Assessment Act 1997</i>, the <i>Income Tax (Transitional Provisions) Act 1997</i>, the <i>Foreign Acquisitions and Takeovers Act 1995</i> and the <i>Taxation Administration Act 1953</i> to:</p> <ul style="list-style-type: none"> • remove the entitlement to the capital gains tax (CGT) main residence exemption for foreign residents; • clarify that, for the purpose of determining whether an entity's underlying value is principally derived from taxable Australian real property, the principal asset test is applied on an associate inclusive basis; • require a reconciliation payment to be made by developers who sell dwellings to foreign persons under a near-new dwelling exemption certificate; • provide an additional affordable housing capital gains discount of up to 10 per cent if a CGT event occurs to an ownership interest in residential premises that has been used to provide affordable housing
Portfolio/Sponsor	Treasury
Introduced	House of Representative on 8 February 2018

Retrospective application¹⁴⁸

1.186 Schedule 1 to the bill seeks to remove foreign residents' entitlements to the capital gains tax (CGT) main residence exemption, and to modify the foreign resident CGT regime to clarify that, for the purposes of determining whether an entity's underlying value is principally derived from taxable Australian real property (TARP), the principal asset test¹⁴⁹ is to be applied on an associate inclusive basis.

1.187 Schedule 2 to the bill seeks to create a reconciliation mechanism to ensure that where a near-new dwelling is sold by a developer to a foreign person, the developer provides a reconciliation payment in respect of that sale. The measures in Schedule 2 are complemented by the provisions of the Foreign Acquisitions and

148 Schedule 1, items 31 and 34; Schedule 2, item 10; and Schedule 3, item 7. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

149 The principal asset test applies in relation to certain membership interests held by a foreign resident entity in another entity. The test is satisfied if the market value of the other entity's TARP assets exceeds the market value of its non-TARP assets.

Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2018. Finally, Schedule 3 to the bill seeks to provide additional CGT discounts on CGT events that occur with respect to residential premises that have been used to provide affordable housing.

1.188 It is proposed that all of the measures identified above would apply retrospectively. The measures in Schedule 1 (relating to CGT exemptions for foreign residents) are proposed to apply to CGT events happening on or after those measures were announced (7:30pm on 9 May 2017).¹⁵⁰ The measures in Schedule 2 (relating to payments with respect to near-new dwellings) are proposed to apply in relation to the acquisition of a new-new dwelling occurring on or after 1 July 2017. The measures in Schedule 3 (relating to CGT discounts with respect to affordable housing) are proposed to apply to CGT events happening on or after 1 January 2018.

1.189 The committee has a long-standing concern about provisions that apply retrospectively, including provisions that back-date commencement to the date of the announcement of particular measures (i.e. 'legislation by press release'), as such an approach challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has particular concerns where legislation will, or might, have a detrimental effect on individuals. Generally, where proposed legislation will apply retrospectively, the committee would expect the explanatory materials to set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.190 The committee also notes that, in the context of tax law, reliance on ministerial announcements, and the implicit requirement that persons arrange their affairs in accordance with such announcements rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective application or commencement, when used too widely or insufficiently justified, can diminish respect for the rule of law and its underlying values. In outlining issues around this matter previously, the committee has accepted that some amendments may apply retrospectively when legislation is introduced. However, this has been limited to the introduction of bills within six calendar months after the relevant announcement. In fact, where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 44). The committee notes that, in this case, the bill was introduced almost nine months after the Budget announcement on 9 May 2017.

150 See Schedule 1, items 31 and 34.

1.191 With respect to the amendments in Schedule 1, the explanatory memorandum states:

[T]he amendments...do not apply prior to [the] announcement date to ensure that taxpayers are not adversely affected by a retrospective change. However, the measure needs to generally apply from the date of announcement...to prevent opportunities for [affected entities] to dispose of [assets] and avoid the application of the [measures in Schedule 1].¹⁵¹

1.192 With respect to the amendments in Schedule 2, the explanatory memorandum states that:

The retrospective application of this measure is consistent with the announcement of the New-New Dwelling Exemption Certificate in the 2017-18 Budget...Any adverse impact is expected to be minor, given the retrospective application was included in the Explanatory Statement that accompanied the regulations that introduced the Near-New Dwelling Exemption Certificate.¹⁵²

1.193 The committee notes that that item 11 of Schedule 2 also seeks to introduce a transition period, which would extend the time in which a person is required to make a reconciliation payment in relation to an acquisition of a near-new dwelling that occurred on or after 1 July 2017.

1.194 Finally, with respect to the amendments in Schedule 3, the explanatory memorandum states that, as the amendments provide additional CGT discounts to taxpayers and allow more concessional tax treatment to apply, the amendments are beneficial and their retrospective application will not result in any disadvantage.¹⁵³

1.195 The committee reiterates its long-standing concerns that provisions with retrospective application (including where provisions are back-dated to the date of announcement of an initiative) challenge a basic value of the rule of law that, in general, laws should only operate prospectively.

1.196 In light of the detailed explanation provided in the explanatory memorandum as to the retrospective application of the amendments proposed by the bill, the committee draws its concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying the amendments in the bill on a retrospective basis.

151 Explanatory memorandum, pp. 29-31.

152 Explanatory memorandum, p. 37. The bill shares an explanatory memorandum with the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2018.

153 Explanatory memorandum, p. 62.

Commentary on amendments and explanatory materials

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

[Previous citation: Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016]

[Alert Digest 10/16 and Digest 1 & 3/17]

1.197 On 8 February 2018 the House of Representatives agreed to two Government amendments, the Minister for Law Enforcement and Cybersecurity (Mr Taylor) presented an addendum to the explanatory memorandum and a supplementary memorandum and the bill was read a third time.

1.198 In *Scrutiny Digest No. 1 of 2017* and *Scrutiny Digest No. 3 of 2017*, the committee raised concerns regarding access to drug and alcohol testing standards by the Australian Federal Police (AFP). The amendments agreed to by the House of Representatives appear to partly address the committee's concerns in relation to that matter.

1.199 The committee welcomes the amendments that require that, where regulations make provision in relation to a matter by applying, adopting or incorporating a matter in certain drug and alcohol testing standards, the Commissioner must ensure that the text of the matter applied, adopted or incorporated is readily available, free of charge, to each AFP appointee.

1.200 The committee notes the amendments also provide that this new requirement would not apply where the text cannot be made available without infringing copyright. It is not clear to the committee what extent this may undermine the utility of the provision.

1.201 The committee thanks the minister for tabling the addendum to the explanatory memorandum, which includes key information previously requested by the committee.¹⁵⁴

Migration Amendment (Skilling Australians Fund) Bill 2017

[Digest 13 & 15/17]

1.202 On 8 February 2018 the House Representatives agreed to two Government amendments, the Minister for Citizenship and Multicultural Affairs presented a supplementary explanatory memorandum and the bill was read a third time.

154 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 1 of 2017*, pp. 65-79; and *Scrutiny Digest 3 of 2017*, pp. 55-61.

1.203 In *Scrutiny Digest No. 13 of 2017* and *Scrutiny Digest No. 15 of 2017*, the committee expressed concerns that the bill does not set an upper limit on the penalties that may be imposed by regulations in relation to the underpayment of a nomination training contribution charge. The amendments agreed by the House of Representatives appear to address the committee's concerns.

1.204 The committee welcomes the amendments limiting the penalty that may be imposed by the regulations in relation to the underpayment of a nomination training contribution charge to a civil penalty not exceeding 60 penalty units.

National Health Amendment (Pharmaceutical Benefits Budget and Other Measures) Bill 2017

[Digest 13 & 15/17]

1.205 On 7 February 2018 the Minister for Health (Mr Hunt) presented an addendum to the explanatory memorandum and a correction to the explanatory memorandum to the bill.

1.206 The committee thanks the Minister for providing this addendum to the explanatory memorandum which includes key information previously requested by the committee.¹⁵⁵

Regional Investment Corporation Bill 2017

[Digest 7 & 8/17]

1.207 The Senate agreed to two Government amendments on 18 October 2017; one Opposition amendment on 6 December 2017; seven Opposition amendments on 6 February 2018; and the bill was read a third time on 6 February 2018. On the same day, the House of Representatives agreed to the Senate amendments and the bill was passed.

1.208 In *Scrutiny Digest 7 of 2017*, the committee raised concerns regarding the following matters:

- *Parliamentary scrutiny: section 96 grants to the States.* The bill sought to delegate to the executive government and to the proposed Regional Investment Corporation (RIC) the power to make agreements with the States for the grant of financial assistance, and to determine the terms and conditions attaching to those agreements. However, the bill did not provide any guidance as to the terms and conditions that may be imposed, nor

155 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2017*, pp. 36-37; and *Scrutiny Digest 15 of 2017*, pp. 76-84.

impose any requirement that agreements be published on the internet or tabled in the Parliament.

- *Exemption from disallowance and sunseting.* The bill sought to empower the minister to give the RIC directions in relation to its operating mandate, as well as directions relating to farm business loans, agreements for grants to the States, and the location of the RIC. However, the bill sought to provide that these directions would not be subject to disallowance or sunseting. Additionally, the committee was concerned that the bill did not set out any specific consultation requirements to be observed before a direction is given.
- *No requirement to table report in Parliament.* The bill sought to require the Agriculture Minister to arrange for a review of the operation of the *Regional Investment Corporation Act 2018*. The committee expressed concerns that while the bill sought to require a written report of the review to be given to the Agriculture Minister, there was no requirement for the report to be made public or tabled in the Parliament.

1.209 Following receipt of ministerial responses, the committee concluded in *Scrutiny Digest No. 8 of 2017* and left to the Senate as a whole the appropriateness of the bill's proposed approach to the matters above.

1.210 In *Scrutiny Digest No 7 of 2017*, the committee also raised concerns that the bill would allow any of the powers or functions of the RIC, the Board, or the CEO, to be delegated or sub-delegated to any member of staff of the RIC, without setting any limits on the level to which powers and functions could be delegated or providing any guidance as to the skills, qualifications or expertise that delegated should possess. The minister provided a detailed explanation for the broad delegation of administrative powers, including setting out relevant safeguards. The committee concluded in *Scrutiny Digest No. 8 of 2017*, and requested that the information provided by the minister be included in the explanatory memorandum.

1.211 The government and opposition amendments agreed by the Senate and the House of Representatives appear to address the majority of the committee's concerns in relation to the matters above.

1.212 The committee welcomes government¹⁵⁶ and opposition amendments¹⁵⁷ that:

- **set out a number of requirements that ministers must observe when giving a direction to the Regional Investment Corporation to enter into an agreement on behalf of the Commonwealth to provide grants of financial assistance to a State or Territory in relation to a particular water infrastructure project;**

156 Government amendments (1) and (2).

157 Opposition amendments (1), (2), (3), (4), (5), (6) and (12).

- provide that directions given under clause 11 of the bill, relating to the Regional Investment Corporation's operating mandate, would be subject to disallowance;
- provide that any terms and conditions attached to a grant agreement must be in accordance with the rules;
- provide that the rules must prescribe the terms and conditions, or kinds of terms and conditions, that may be included in a grant agreement, as well as the matters the Corporation must consider when specifying terms and conditions to be included in such an agreement;
- require the Agriculture Minister to cause a copy of any grant agreement, and any direction given under clause 12(3) relating to that agreement, to be tabled in the Parliament and published on the internet; and
- require the Agriculture Minister to cause a copy of the report of the review of the *Regional Investment Corporation Act 2018* to be tabled in the Parliament and published on the internet.

1.213 In light of the fact that this bill has already passed both Houses of Parliament, the committee makes no further comment on this bill.

Social Services Legislation Amendment (Cashless Debit Card) Bill 2017

[Digest 10 & 12/17]

1.214 On 6 February 2018 the Minister for International Development and the Pacific (Senator Fierravanti-Wells) tabled an addendum to the explanatory memorandum.

1.215 The committee thanks the minister for providing this addendum to the explanatory memorandum which includes key information previously requested by the committee.¹⁵⁸

No comments

1.216 The committee has no comments on amendments made or explanatory material relating to the following bill:

- Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2017.¹⁵⁹

158 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, pp. 134-139.

159 On 8 February 2018 the House of Representatives agreed to one Government amendment, the Minister for Revenue and Financial Services presented a supplementary explanatory memorandum and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

2.1 No responses received.

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.¹ It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.²

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Helen Polley
Chair

- 1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.
- 2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

