

The Senate

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Standing  
Committee for the  
Scrutiny of Bills

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# Membership of the Committee

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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.

### **Australian Human Rights Commission Repeal (Duplication Removal) Bill 2018**

<b>Purpose</b>	This bill seeks to repeal the <i>Australian Human Rights Commission Act 1986</i>
<b>Sponsor</b>	Senator Cory Bernardi
<b>Introduced</b>	Senate on 15 February 2018

*The committee has no comment on this bill.*

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## Banking Amendment (Rural Finance Reform) Bill 2018

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<b>Purpose</b>	This bill seeks to amend the <i>Banking Act 1959</i> to provide certain requirements that Authorised Deposit-taking Institutions must comply with in relation to loans to primary production businesses
<b>Sponsor</b>	Ms Rebekha Sharkie MP
<b>Introduced</b>	House of Representatives on 26 February 2018

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*The committee has no comment on this bill.*

## Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Bankruptcy Act 1966</i> to reform Australia's debt agreement system
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 14 February 2018

### Significant matters in delegated legislation<sup>1</sup>

1.2 Division 2 of Part IX of the *Bankruptcy Act 1966* (Bankruptcy Act) sets out the process for giving a debt agreement proposal<sup>2</sup> to the Official Receiver<sup>3</sup> for processing. Within that Division, subsection 185C(4) sets out the circumstances in which a debtor *cannot* give a debt agreement proposal to the Official Receiver. Item 20 of the bill proposes to insert a new paragraph 185C(4)(e), which provides that a debtor cannot give a debt agreement to the Official Receiver if the total of the payments under the agreement would exceed the debtor's yearly after tax income by a certain percentage. Item 21 proposes to insert a new paragraph 185C(4B), which provides that the minister can determine this percentage by legislative instrument.

1.3 Proposed paragraph 185C(4)(e) and proposed subsection 185C(4B) would therefore appear to allow the minister to determine significant elements of the debt agreements framework in the Bankruptcy Act (that is, who may not submit a debt agreement to the Official Receiver) by delegated legislation.

1.4 The committee's longstanding view is that significant matters, such as eligibility requirements for entering into a debt agreement, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

Currently paragraph 185C(2D) of the Bankruptcy Act contains the only restriction on the size or frequency of a debtor's proposed payments under a debt agreement. It specifies that a debt agreement administrator should certify that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due. While this

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- 1 Schedule 1, item 21, proposed subsection 185C(4B). The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).
  - 2 Pursuant to subsection 185C(1), a 'debt agreement proposal' is a written proposal for a debt agreement. Section 185C sets out the requirements for a debt agreement proposal.
  - 3 The 'Official Receiver' is a statutory appointee who acts as a trustee in bankruptcy for debtors in certain circumstances. Official Receivers are appointed by the minister under section 16 of the Bankruptcy Act.

certification provides a safeguard against the submission and adoption of unsustainable payment schedules, it does not always prevent debt agreements that could cause the debtor undue financial hardship. For example, a debtor could propose to devote a significant proportion of their after tax income to debt agreement payments. The payment schedule could be sustainable but the debtor could suffer undue financial stress in discharging the obligations.

Item 20 inserts a new paragraph 185C(4)(e), which provides that a debtor cannot give the Official Receiver a debt agreement proposal if the total payments under the agreement exceed the debtor's income by a certain percentage. Item 21 provides that the Minister can determine this percentage by legislative instrument under new subsection 185C(4B).<sup>4</sup>

1.5 The committee appreciates that the intention of proposed paragraph 185C(4)(e) and proposed subsection 185C(4B) is to provide additional safeguards within the debt administration framework, to prevent debtors' exposure to additional financial hardship. However, the committee notes that the explanatory memorandum does not explain why it is necessary to allow the minister to determine eligibility requirements for entering into a debt agreement by delegated legislation, nor does it provide any examples of the circumstances in which it is envisaged that this power would be exercised.

1.6 The committee also notes that the bill does not set a minimum threshold on the percentage that the minister may determine under proposed subsection 185C(4B), or any other guidance as to how the power in that subsection should be exercised. The committee is concerned that, without a minimum threshold, proposed subsection 185C(4B) could permit the minister to set a percentage that would enable debtors to enter into a debt agreements without the capacity to meet agreed repayments. This could substantially undermine the safeguards that proposed paragraph 185C(4)(e) seeks to establish.

**1.7 The committee seeks the Attorney-General's detailed advice as to:**

- **why it is considered necessary and appropriate to allow the minister to determine certain eligibility requirements for entering into debt agreements by delegated legislation; and**
- **the appropriateness of amending the bill to set a minimum threshold on the percentage that the minister may determine under proposed subsection 185C(4B).**

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4 Explanatory memorandum, p. 15.

## Custodial penalties of less than six months<sup>5</sup>

1.8 Proposed subsection 185EC(6) seeks to make it an offence for the proposed administrator in relation to a debt agreement proposal to give, or to agree or offer to give, valuable consideration to an affected creditor,<sup>6</sup> with a view to securing the creditor's acceptance or non-acceptance of the proposal. Proposed subsections 185MC(6) and 186PC(6) similarly seek to make it an offence for the administrator of a debt agreement to give, or agree to give, valuable consideration to an affected creditor, with a view to securing the creditor's acceptance or non-acceptance of a proposal to vary or terminate the agreement. It is proposed that each of the offences would be punishable by a term of imprisonment of three months.

1.9 The committee notes that the *Guide to Framing Commonwealth Offences* provides that if imprisonment is chosen as a penalty for a Commonwealth offence, a term of at least six months should be applied. This is because imprisonment should be reserved for serious offences.<sup>7</sup> The *Guide* further provides that if a longer term of imprisonment (that is, a term of imprisonment of six months or more) would never be justified, a fine should be used.<sup>8</sup>

1.10 Where a bill proposes to impose a custodial penalty of less than six months for a Commonwealth offence, the committee would therefore expect a detailed justification to be provided in the explanatory memorandum. In this instance, the explanatory memorandum states that '[t]his punishment is appropriate to deter fraudulent conduct in the financial sector which can have severe consequences for both affected creditors and debtors.'<sup>9</sup> This would suggest the offence is relatively serious, yet imposing a custodial penalty of three months suggests a fine might be more appropriate. The committee notes that under section 4B of the *Crimes Act 1914*, one month imprisonment equates to a pecuniary penalty of five penalty units.

1.11 Additionally, the committee would expect that penalties involving terms of imprisonment should be justified by reference to similar penalties for similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the

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5 Schedule 1, item 41, proposed subsection 185EC(6), Schedule 2, item 12, proposed subsection 185MC(6) and Schedule 2, item 16, proposed subsection 185PC(6) The committee draws the Senate's attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

6 Pursuant to section 185 of the *Bankruptcy Act 1966*, 'affected creditor' means a creditor who is a party to a debt agreement (in relation to a proposal to vary or terminate debt agreements) or would be a party to a proposed debt agreement (in relation to a debt agreement proposal).

7 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 41.

8 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 41

9 Explanatory memorandum, pp 21, 28, 30. See also statement of compatibility, p. 7.

application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for...offences of a similar kind or of a similar seriousness. This should include a consideration of...comparable offences in Commonwealth legislation'.<sup>10</sup> In this instance, the explanatory memorandum does not make reference to penalties for comparable offences in Commonwealth legislation.

**1.12 The committee seeks the Attorney-General's more detailed justification for setting a custodial penalty of three months' imprisonment in relation to the offences in proposed subsections 185EC(6), 185MC(6) and 186PC(6) instead of a pecuniary penalty. The committee's consideration of the appropriateness of the proposed penalty would be assisted if the justification explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>11</sup>**

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10 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 39.

11 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 41

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## Competition and Consumer Amendment (Free Range Eggs) Bill 2018

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<b>Purpose</b>	This bill seeks to amend the <i>Competition and Consumer Act 2010</i> to ensure that eggs marketed as 'free range' are eggs laid by hens that are able move freely on an open range during daylight hours on most days
<b>Sponsor</b>	Ms Rebekha Sharkie
<b>Introduced</b>	House of Representatives on 12 February 2018

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*The committee has no comment on this bill.*

## Competition and Consumer Amendment (Misleading Representations About Broadband Speeds) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Competition and Consumer Act 2010</i> to ensure that, when a representation is made about the speed, quality or price of a broadband service in trade or commerce, that representation also includes all information that might affect the performance of the service
<b>Sponsor</b>	Mr Andrew Wilkie MP
<b>Introduced</b>	House of Representatives on 26 February 2018

### Strict liability offence<sup>12</sup>

1.13 Proposed section 159A(1) seeks to make it an offence for a person, in trade or commerce, to make misleading representations in connection with supply or possible supply of broadband services. This offence is subject to a maximum penalty of \$1,100,000 for a body corporate or \$220,000 for individuals. Proposed subsection (2) seeks to make the offence in subsection (1) an offence of strict liability.

1.14 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*.<sup>13</sup>

1.15 In this instance, the explanatory memorandum states that 'strict liability is appropriate because it is consistent with other similar provisions in this part of the Act'.<sup>14</sup> Further, the explanatory memorandum states that strict liability is also

12 Schedule 1, item 2, proposed section 159A. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

14 Explanatory memorandum p. 2.

appropriate in this context because of the nature of the loss or damage that may be suffered when a misleading representation is made. However, the explanatory memorandum does not provide justification for the significant penalty proposed. The committee notes that 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 (currently \$12,600)<sup>15</sup> for an individual.<sup>16</sup> However, the offence in proposed section 159A is subject to a penalty of \$220,000 for an individual.

**1.16 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 which is subject to a maximum penalty of \$220,000 for individuals.**

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15 Pursuant to section 4AA of the *Crimes Act 1914*, a penalty unit is currently set at \$210. This amount is subject to indexation on a triennial basis.

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

## Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Crimes Act 1914</i> to create exceptions to provisions that would prevent the disclosure of spent, quashed and pardoned convictions for persons who work or seek to work with people with disability in the NDIS
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives on 15 February 2018

### Privacy<sup>17</sup>

1.17 Divisions 2 and 3 of Part VIIC of the *Crimes Act 1914* (Crimes Act) establish protections relating to the disclosure and use of criminal history information. Under those divisions, a person is not required to disclose criminal history information about a conviction that is spent, pardoned or quashed, and may positively state that they were not convicted of or charged with the offence to which the conviction relates. Those divisions also make it unlawful for a person to disclose information regarding the spent, pardoned or quashed convictions of another person without that person's consent, and prevent persons and agencies from taking information relating to spent, pardoned or quashed convictions into account.

1.18 Proposed Subdivision AA seeks to create exceptions to Divisions 2 and 3 of Part VIIC of the Crimes Act. Proposed section 85ZZGH provides that the object of that subdivision is to protect persons with disabilities from harm by:

permitting criminal history information to be disclosed and taken into account in assessing whether a person who works, or seeks to work, with a person with disability poses a risk to such a person.

1.19 Within proposed Subdivision AA, proposed sections 85ZZGI, 85ZZGJ and 85ZZGK provide that Divisions 2 and 3 of Part VIIC of the Crimes Act do not apply to the disclosure of information to or by, or to the taking into account of information by, prescribed persons or bodies. The proposed sections limit the circumstances in which information may be disclosed or taken into account to where:

- the relevant person or body is required or permitted under a prescribed Commonwealth, State or Territory law to obtain and deal with information about persons who work or seek to work with persons with disabilities;<sup>18</sup> and

<sup>17</sup> Schedule 1, item 2, proposed sections 85ZZGI, 85ZZGJ and 85ZZGK. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

- the disclosure or taking into account is for the purpose of obtaining and dealing with the information in accordance with, or as required by, a Commonwealth, State law or Territory law.

1.20 The effect of proposed sections 85ZZGI, 85ZZGJ and 85ZZGK is to enable information relating to spent, pardoned or quashed convictions to be exchanged with and taken into account by prescribed persons and bodies, for the purposes of determining whether a person is suitable to work with people with disability in the National Disability Insurance Scheme (NDIS). This forms part of a broader NDIS worker screening policy.

1.21 Proposed section 85ZZGL seeks to establish a safeguard on the disclosure and taking into account of information, providing that, before the minister prescribes a person or body for the purposes of 85ZZGI, 85ZZGJ and 85ZZGK, the minister must be satisfied that the person or body is required or permitted by law to obtain and deal with information about persons who work, or seek to work, with a person with disability; complies with applicable privacy, human rights and records management legislation and with the principles of natural justice; and that the person or body has in place an appropriate risk assessment framework.

1.22 The statement of compatibility explains that the exceptions in proposed sections 85ZZGI, 85ZZGJ and 85ZZGK are necessary as existing screening processes do not always capture matters relevant to a person's suitability as a disability worker,<sup>19</sup> and the bill will enable screening units to 'make a more accurate and informed assessment of the risk that a person may pose to people with disability in the NDIS.'<sup>20</sup> The statement of compatibility further states that:

[t]he Bill provides access to...detailed criminal history information to state-based worker screening units to enable a thorough risk-based worker screening assessment proportionate to determining the potential risk of harm to people with disability receiving services under the NDIS. Further, the permission to access such information will be obtained from a worker applying for a worker screening check as part of the application process.<sup>21</sup>

1.23 The committee acknowledges the importance of protecting persons with disabilities from violence, abuse, exploitation and neglect. The committee also notes the safeguards provided by the bill to ensure the suitability of prescribed persons and bodies, and to seek to ensure that a person's criminal history information is not used for an improper purpose. However, the committee remains concerned that the

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18 'Person with disability' is defined in proposed section 85ZZGM, and includes a person who is a participant in the National Disability Insurance Scheme, a person who is receiving support or services under that scheme, or a person who is receiving support or services of a kind prescribed by the regulations for the purposes of that section.

19 Statement of compatibility, p. 9.

20 Statement of compatibility, p. 9.

21 Statement of compatibility, p. 12.

exceptions proposed by the bill may unduly trespass on rights and liberties, in particular, the right to privacy. The committee notes that spent convictions regimes (such as the regime in Part VIIC of the Crimes Act) are designed to ensure that persons who have been convicted of offences do not have to suffer the consequences of those offences for the rest of their lives,<sup>22</sup> and to improve prospects for offenders' rehabilitation by facilitating their transition into mainstream society. As the Australian Law Reform Commission states:

An old conviction, followed by a substantial period of good behaviour, has little, if any, value as an indicator as to how the former offender will behave in the future. In such circumstances reliance on the old conviction will result in serious prejudice to the offender which will outweigh to a great degree its value as an indicator of future behaviour.<sup>23</sup>

1.24 The exceptions proposed by the bill would allow prescribed persons and bodies to disclose, and to take into account, a person's entire criminal history, including minor convictions resulting in a fine (for example shoplifting), and not just criminal history relating to serious offences (for example, violence or sexual assault) or offences that would otherwise be directly relevant to a person's suitability as a disability worker.

1.25 While noting the safeguards in the bill regarding the persons and bodies that may be prescribed, and the purposes for which criminal history may be disclosed or taken into account, the committee is concerned that the exceptions proposed by the bill could lead to the disclosure and the taking into account of a person's entire criminal history, rather than only serious offences or offences that are directly relevant to a person's suitability as a disability worker, which could result in substantial prejudice to certain persons working in, or seeking work, in the disability sector. The committee finds it difficult to reconcile such an outcome with the statement that 'it is critical that NDIS worker screening does not unreasonably exclude offenders from working in the disability sector.'<sup>24</sup>

1.26 In light of these matters, it is not apparent to the committee that the exceptions proposed by the bill would be necessary and appropriate in order to protect people with disability. The committee notes that the explanatory memorandum does not explain why it is necessary or appropriate to require the disclosure of all of a person's criminal history (including, for example, convictions that happened in a person's youth) regardless of the nature of the offence.

1.27 It is also unclear to the committee why it is necessary and appropriate to apply the exceptions proposed by the bill in circumstances where a person has been

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22 Law Reform Commission of Western Australia, *Project No. 80: The Problem of Old Convictions*, Report (1986), p. 31.

23 Australian Law Reform Commission, *Spent Convictions*, Report No. 37 (1997), pp. xi-xii.

24 Statement of compatibility, p. 11.

pardoned for a wrongful conviction, or where a conviction has been quashed. For example, a person may be wrongfully convicted owing to deficiencies in available forensic science, and may be factually and legally innocent of the offence with which they were charged. In those circumstances, it is not apparent that the person's criminal history is an appropriate indicator of their suitability as a disability worker.

**1.28 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to allow the disclosure and the taking into account of a person's entire criminal history, including:**

- **minor offences, and offences that may not be relevant to a person's suitability as a disability worker; and**
- **wrongful convictions for which a person has been pardoned, and convictions that have been quashed.**

## Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend various Acts in relation to student loans to:</p> <ul style="list-style-type: none"><li>• amend the Higher Education Loan Program (HELP) repayment arrangements;</li><li>• change the order of repayment of various student loan debts; and</li><li>• introduce a new, combined loan limit on how much students can borrow under HELP to cover their tuition fees</li></ul>
<b>Portfolio</b>	Education and Training
<b>Introduced</b>	House of Representatives on 14 February 2018

*The committee has no comment on this bill.*

## Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Intelligence Services Act 2001</i> to establish the Australian Signals Directorate as an independent statutory agency
<b>Portfolio</b>	Defence
<b>Introduced</b>	House of Representatives on 15 February 2018

### Broad delegation of administrative powers<sup>25</sup>

1.29 Proposed subsection 27N(1) seeks to allow the Director-General of the Australian Signals Directorate (ASD)<sup>26</sup> to delegate all or any of his or her functions or powers under proposed Part 5A to any staff member at the Executive Level 1 (EL1) level or above. Proposed Part 5A sets out the Director-General's powers in relation to employment and termination, engagement of consultants and service providers, secondments, the application of the principles of the *Public Service Act 1999* to ASD employees, voluntary movement of ASD staff to the Australian Public Service and staff grievance procedures.

1.30 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.

1.31 In this case, the explanatory materials provide no information about why these powers are proposed to be delegated to ASD staff members holding positions at the EL1 level or higher.

25 Schedule 1, item 27, proposed subsection 27N(1). The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

26 The Director-General of ASD is a position the bill seeks to create. See Schedule 1, item 27, proposed section 27B.

**1.32 The committee requests the minister's advice as to why it is necessary to allow the powers and functions of the Director-General under proposed Part 5A to be delegated to Executive Level 1 employees or above, rather than to members of the Senior Executive Service.**

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## Privacy<sup>27</sup>

1.33 Item 43 of Schedule 1 proposes to insert a new section 133BA in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The proposed section would allow the Director-General of ASD to communicate AUSTRAC information to a foreign intelligence agency if he or she is satisfied that it is appropriate in all the circumstances of the case to do so and the foreign intelligence agency has given appropriate undertakings for protecting the confidentiality of the information, controlling the use of the information, and ensuring the information will only be used for the purpose for which it is communicated to the foreign country.

1.34 The committee notes that AUSTRAC information<sup>28</sup> may include a wide array of personal and financial information and the proposed section does not limit the purposes for which the Director-General may communicate such information with a foreign intelligence agency, other than that the Director-General considers it is appropriate to do so in all the circumstances. The explanatory materials accompanying the bill do not provide any information on why it is necessary to provide the Director-General with a broad discretion with respect to the purposes for which such information can be communicated to foreign intelligence agencies, merely explaining the operation of proposed section.<sup>29</sup>

**1.35 The committee therefore requests the minister's advice as to why it is considered necessary and appropriate to provide the Director-General with a broad discretion as to the purposes for which AUSTRAC information may be communicated with a foreign intelligence agency.**

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27 Schedule 1, item 43, proposed section 133BA. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

28 AUSTRAC information is defined in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* as meaning eligible collected information (or a compilation or analysis of such information) and 'eligible collected information' is defined as information obtained by the AUSTRAC CEO under that Act or any other Commonwealth, State or Territory law or information obtained from a government body or certain authorised officers, and includes financial transaction report information as obtained under the *Financial Transaction Reports Act 1988*.

29 Explanatory memorandum, p. 20.

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**1.36 The committee also requests the minister's advice as to the appropriateness of amending the bill so as to include at least high-level guidance as to the purposes for which AUSTRAC information may be communicated to a foreign intelligence agency.**

## Interstate Road Transport Legislation (Repeal) Bill 2018

<b>Purpose</b>	This bill seeks repeal the <i>Interstate Road Transport Act 1985</i> and the <i>Interstate Road Transport Charge Act 1985</i> to facilitate the eventual closure of the Federal Interstate Registration Scheme by 30 June 2019
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Introduced</b>	House of Representatives on 28 February 2018

*The committee has no comment on this bill.*

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## Marine Safety (Domestic Commercial Vessel) Levy Bill 2018

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<b>Purpose</b>	This bill seeks to impose an annual levy on defined vessels and also authorises that the Minister may make rules to set the amount of levy
<b>Portfolio</b>	Infrastructure and Transport
<b>Introduced</b>	House of Representatives on 28 February 2018

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*The committee has no comment on this bill.*

## Marine Safety (Domestic Commercial Vessel) Levy (Consequential Amendments) Bill 2018

<b>Purpose</b>	<p>This bill seeks make consequential amendments to various Acts in relation to marine safety to:</p> <ul style="list-style-type: none"> <li>• include payments under the new domestic commercial vessel levy to the Australian Maritime Safety Authority (AMSA);</li> <li>• clarify that leviable domestic commercial vessels are exempt from the Marine Navigation (Regulatory Functions) levy; and</li> <li>• suspend or revoke certificates of survey or detain a domestic commercial vessel in response to non-payment of an amount or instalment of the new domestic commercial vessel levy</li> </ul>
<b>Portfolio</b>	Infrastructure and Transport
<b>Introduced</b>	House of Representatives on 28 February 2018

*The committee has no comment on this bill.*

## Marine Safety (Domestic Commercial Vessel) Levy Collection Bill 2018

<b>Purpose</b>	This bill seeks to define when and how the levy on domestic commercial vessels is payable, and authorises the minister to make rules concerning prescribed matters
<b>Portfolio</b>	Infrastructure and Transport
<b>Introduced</b>	House of Representatives on 28 February 2018

### Broad delegation of administrative powers<sup>30</sup>

1.37 Subclause 19(1) of the bill provides that section 58 of the *Australian Maritime Safety Authority Act 1990* (AMSA Act) applies to a power conferred on the Australian Maritime Safety Authority (AMSA) by the legislative rules<sup>31</sup> in the same way in which it applies to a power conferred on AMSA by the bill. Subclause 19(2) would restrict the persons to whom AMSA may delegate powers under the bill or under the legislative rules to members of AMSA's staff.

1.38 Section 58 of the AMSA Act confers a very broad power of delegation on AMSA. The section permits AMSA, by written instrument, to delegate any or all of its powers under the AMSA Act, or any other Act, to any person. Subsection 58(2) of the AMSA Act then provides that certain powers may only be delegated to a member or officer of AMSA. The effect of clause 19 of the bill would therefore be to permit AMSA to delegate any of its powers under the legislative rules to any member of the staff of AMSA (which may be any APS-level employee).

1.39 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 on either 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 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

30 Clause 19. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

31 Clause 20 of the bill would permit the minister, by legislative instrument, to make rules (legislative rules) prescribing matters required or permitted by the bill to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the bill. Subclause 20(4) provides that the legislative rules may make provision with respect to a matter by conferring a power on AMSA.

considered necessary should be included in the explanatory memorandum. In this instance, the explanatory memorandum states:

AMSA requires this ability to delegate within the limits of its workforce to be able to operate effectively and deliver services to the 27,000 domestic and commercial vessels around and across Australia.

Powers are expected to be delegated appropriately to specific, expert offices within AMSA through an instrument of delegation signed by AMSA's Chief Executive Officer. For example, the power to detail a vessel is expected to be delegated to marine safety inspectors, while the power to make written assessments of amounts of levy payable and the power to refund an amount of levy are expected to be delegated to administrative officers.

Additionally, the Chief Executive Officer's delegation instrument is expected to: set minimum qualifications, training and experience requirements for delegates specific to each power and function; set conditions and requirements to be satisfied by a delegate when exercising a power; and be supported by AMSA's governance policies and processes to ensure delegates understand how to exercise powers appropriately and consistently.<sup>32</sup>

1.40 The committee notes the explanation in the explanatory memorandum as to why a broad power of delegation is required, and as to how it is anticipated this power would be exercised. However, the committee remains concerned that there is nothing on the face of the bill that would limit the scope of the powers that may be delegated, nor is there anything in the bill that would require persons exercising powers under delegation to be confined to persons to a particular APS level (or equivalent), or to persons holding particular qualifications, attributes or expertise.

**1.41 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of permitting AMSA to delegate powers conferred on AMSA by the legislative rules to any member of AMSA's staff, without any statutory requirement that a delegate hold special qualifications, attributes or expertise.**

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32 Explanatory memorandum, p. 16.

## Migration Amendment (Clarification of Jurisdiction) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Migration Act 1958</i> (the Act) to clarify the allocation of jurisdiction between the Federal Circuit Court and the Federal Court in relation to a migration decision (as defined in the Act)
<b>Portfolio</b>	Immigration and Border Protection
<b>Introduced</b>	House of Representatives on 14 February 2018

*The committee has no comment on this bill.*

## National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>National Consumer Credit Protection Act 2009</i> and the National Credit Code in relation to small amount credit contracts and consumer leases
<b>Sponsor</b>	Mr Tim Hammond MP
<b>Introduced</b>	House of Representatives on 26 February 2018

### Significant matters in delegated legislation<sup>33</sup>

1.42 The bill seeks to create a number of offences and civil penalty provisions relating to small amount consumer contracts (SACCs)<sup>34</sup> (commonly known as payday loans) and to consumer leases<sup>35</sup> for household goods (commonly known as rent-to-buy arrangements). In several cases, significant elements of these offences and civil penalty provisions (including threshold amounts, conditions, and the persons to which the offence or civil penalty applies) are left to regulations or to other delegated legislation (e.g. determinations). For example:

- proposed subsection 133CC(1) creates a prohibition on entering into, or offering to enter into, a SACC, where the repayments that would be required under the SACC would not meet the requirements prescribed by regulations. It is proposed to make breaches of this prohibition subject to a civil penalty of 2000 penalty units. Additionally, existing subsection 133CC(2) of the *National Consumer Credit Protection Act 2009* provides that a breach of subsection 133CC(1) constitutes an offence;
- proposed section 133CD seeks to make it an offence for a licensee or 'a person prescribed by the regulations' to require or accept payment under a SACC. Proposed subsection 133CD(2) provides that the offence does not

33 Schedule 1, item 19, proposed subsection 133CC(1), Schedule 1, item 21, proposed sections 133CD and 133CE, and Schedule 1, item 34, proposed sections 156A and 156B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

34 'Small amount credit contract' is defined in section 5 of the *National Consumer Credit Protection Act 2009* as a finite (non-continuing) contract with a term of between 16 days and one year, for an amount of \$2,000 or less. Additionally for a contract to be a SACC, the credit provider under the contract must not be an authorised deposit-taking institution (ADI).

35 'Consumer lease' is defined in section 169 of the *National Credit Code* as a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or obligation to purchase the goods.

- apply to the extent that the repayment does not exceed the amount that meets the requirements prescribed by regulations;
- proposed section 133CE seeks to make it an offence for a licensee to enter into, or to offer to enter into, a SACC, where the repayment amounts under the SACC are unequal. A breach of proposed section 133CE would also be subject to a civil penalty. Proposed paragraph 133CE(2)(c) provides that repayments will be equal if they meet conditions determined by ASIC in a legislative instrument;
  - proposed section 156A seeks to make it an offence for a person to enter into, or to offer to enter into, a consumer lease for household goods if the amount that would be required to be paid under the lease would not meet the requirements prescribed by the regulations. Breaches of proposed section 156A would also be subject to a civil penalty; and
  - proposed section 156B seeks to make it an offence for a lessor or 'a person prescribed by the regulations' to require or accept payment of an amount under a consumer lease. Proposed subsection 156B(2) provides that the offence does not apply to the extent that the amount does not exceed the amount that meets the requirements prescribed by regulations.

1.43 From a scrutiny perspective, it is desirable for the content of an offence, or civil penalty provision to be clear from the provision itself, so that the scope and effect of the offence or civil penalty provision is clear and so that affected persons may readily ascertain their obligations. It appears to the committee that, from the way the offences and civil penalty provisions identified above are structured, persons may be required to consult the regulations (and other instruments) to determine whether an offence or civil penalty provision applies to their conduct.

1.44 **The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of leaving significant elements of the offences or civil penalty provisions in proposed sections 133CC, 133CD, 133CE, 156A and 156B to regulations and other forms of delegated legislation.**

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### Strict liability offences<sup>36</sup>

1.45 Proposed section 133CE seeks to make it an offence for a licensee to enter into, or to offer to enter into, a SACC where the repayment amounts, or the intervals between payment dates, are not equal. Proposed section 31C seeks to make it an offence for a credit provider to charge or require the payment of an unexpired

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36 Schedule 1, item 21, proposed section 133CE, and item 42, proposed section 31C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

permitted monthly fee in certain circumstances. The bill proposes that both of those offences would be offences of strict liability, punishable by up to 100 penalty units.

1.46 Under general principles of criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is only imposed 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*.<sup>37</sup>

1.47 In this instance, the explanatory memorandum only states that strict liability is proposed to be applied 'given the need for deterrence and the significant consequences that breaches...can have for customers'.<sup>38</sup>

1.48 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.<sup>39</sup> In this instance, the bill proposes to apply strict liability to offences punishable by 100 penalty units.

**1.49 The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of applying strict liability to the offences in proposed sections 133CE and 31C, which attract a penalty of 100 penalty units.**

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### **Power for delegated legislation to amend primary legislation (Henry VIII clause)<sup>40</sup>**

**1.50** Proposed Division 1A sets out measures (anti-avoidance measures) to prohibit schemes that are designed to avoid the operation of the *National Consumer Credit Protection Act 2009* (NCCP Act), and in particular provisions of the Act that

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

38 Explanatory memorandum, p. 6.

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

40 Schedule 1, item 38, proposed section 323D. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

relate to SACCs and consumer leases. Within that Division, proposed section 323A provides that a person must not enter into, or carry out, a scheme if it is reasonable to conclude that a purpose of doing so is to prevent certain contracts from being SACCs or consumer leases. Proposed section 323C similarly provides that a person must not enter into, or carry out, a scheme if it is reasonable to conclude that a purpose of doing so is to avoid a provision of the NCCP Act that would apply in respect of a SACC or a consumer lease. Breaches of those provisions are proposed to be subject to a civil penalty of 2000 penalty units and criminal offences punishable by a penalty of up to 2 years imprisonment, 120 penalty units, or both.

**1.51** Proposed section 323D provides that ASIC may, by legislative instrument, exempt a scheme, or a class of schemes, from all or specified provisions of proposed sections 323A and 323C. Proposed subsection 323D(2) provides that an exemption may apply subject to any specific conditions imposed by ASIC. Proposed section 323D appears to allow delegated legislation (that is, an instrument made by ASIC) to amend the operation of primary legislation.

**1.52** 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 levels 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 any Henry VIII clauses to be provided in the explanatory memorandum. In this instance, the explanatory memorandum provides no justification for the use of a Henry VIII clause in proposed section 323D, merely stating the operation and intent of the anti-avoidance measures.

**1.53** **The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing ASIC to exempt a scheme, or a class of schemes, from the operation of proposed sections 323A and 323C, by way of delegated legislation.**

## National Housing Finance and Investment Corporation Bill 2018

<b>Purpose</b>	This bill seeks to establish the National Finance and Investment Corporation
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 15 February 2018

### Parliamentary scrutiny: section 96 grants to the states<sup>41</sup>

1.54 The bill seeks to establish the National Housing Finance and Investment Corporation (NHFIC). The functions of the NHFIC would include making loans, investments and grants to improve, directly or indirectly, housing outcomes; determining terms and conditions for such loans, investments and grants; and providing business advisory services and other capacity-building assistance to community housing providers.<sup>42</sup> Subclause 8(2) provides that the NHFIC's functions would include granting financial assistance to states and territories in relation to these matters and determining terms and conditions for such grants of financial assistance.<sup>43</sup>

1.55 The explanatory memorandum states that the bill enables the NHFIC to perform its functions for purposes related to specific constitutional powers, and further states that the NHFIC is likely to perform its functions in relation to the corporations power, the external affairs power, a Territory and/or 'granting financial assistance to which section 96 of the Constitution applies'.<sup>44</sup>

1.56 The committee notes that section 96 of the Constitution confers on the *Parliament* the power to make grants to the states and to determine terms and conditions attaching to them.<sup>45</sup> Where the Parliament delegates this power, the committee considers that it is appropriate that the exercise of this power be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 of the Constitution and the role of senators in representing the people of their state or territory.

41 Subclause 8(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

42 Paragraphs 8(1)(a) and (b).

43 Subclause 8(2).

44 Explanatory memorandum, p. 19.

45 Section 96 of the Constitution provides that: '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

1.57 The committee notes that the bill contains no guidance on its face as to the terms and conditions that will attach to financial assistance granted to the states by the NHFIC. The bill does, however, seek to allow the minister to direct, by legislative instrument, the board of the NHFIC in relation to the performance of its functions and provides that these directions may, among other matters, set out decision-making criteria and limits for the granting of financial assistance to states and territories.<sup>46</sup> Such ministerial directions will be known as the 'investment mandate', and by reason of regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003* will not be subject to disallowance.<sup>47</sup>

1.58 The committee further notes that, although the bill provides that the investment mandate may set out decision-making criteria and limits for the granting of financial assistance to the states and territories, the exposure draft of the NHFIC investment mandate direction does not appear to contain any such guidance.<sup>48</sup>

1.59 The committee is concerned that the level of parliamentary scrutiny afforded to grants made by the NHFIC to the states and territories will be very limited, given that the bill does not contain on its face any guidance as to the terms and conditions attaching to such grants, the draft investment mandate for the NHFIC contains no such guidance, and the legislative instruments making up the investment mandate will not be subject to disallowance.

**1.60 Noting that section 96 of the Constitution confers on the *Parliament* the power to make grants to the states and to determine terms and conditions attaching to them, the committee suggests it may be appropriate for the bill to be amended to:**

- **include some high-level guidance as to the terms and conditions under which financial assistance may be granted by the NHFIC to the states and territories; and**
- **subject the legislative instruments making up the NHFIC investment mandate to disallowance (despite regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003*).**

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46 See clause 12 and paragraph 13(b)(ii).

47 See note to subclause 12(1).

48 Exposure draft of the National Housing Finance and Investment Corporation Investment Mandate Direction 2018, available at <https://treasury.gov.au/consultation/c2018-t263622/>.

**1.61 The committee seeks the Treasurer's advice in relation to the above. The committee also seeks the minister's advice as to why the exposure draft of the NHFIC investment mandate does not include any directions about the decision-making criteria for granting financial assistance to states and territories, including guidance as to the terms and conditions under which financial assistance may be granted to the states and territories.**

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### **Broad delegation of administrative powers<sup>49</sup>**

1.62 Clause 55 provides for the delegation and subdelegation of the powers and functions of the Chief Executive Officer (CEO) of the NHFIC. Subclause 55(1) seeks to allow the CEO to delegate any of his or her powers or functions under the bill to a 'senior member' of staff of the NHFIC, and subclause 55(2) seeks to allow the CEO to subdelegate to a senior member of staff of the NHFIC powers or functions originally delegated by the board.

1.63 The committee notes that neither the bill nor the explanatory memorandum provide any definition of a 'senior member of the staff' of the NHFIC.<sup>50</sup> Although the explanatory memorandum states that allowing the delegation of powers or functions to senior staff is 'a normal administrative arrangement',<sup>51</sup> it does not provide any guidance as to the level at which an NHFIC staff member would be considered to be a senior member of staff, nor any guidance as to the qualifications or attributes they will be required to possess.

1.64 The committee is concerned that, although the bill restricts the delegation and subdelegation of powers and functions by the CEO to 'senior members' of staff, the range of staff that could be included under this term remains unclear. It is therefore difficult to assess the appropriateness of allowing the delegation and subdelegation of powers and functions to this category of staff members.

**1.65 The committee requests the Treasurer's advice as to the intended meaning of 'senior member' of the NHFIC staff under the bill. The committee also requests the Treasurer's advice as to whether the bill or explanatory memorandum could be amended to provide some guidance as to the staff levels that will be considered to be 'senior members' of staff and the skills and attributes they will be required to possess.**

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49 Clause 55. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

50 Clause 45 provides that the NHFIC may employ such persons as it considers necessary and subclause 45(3) provides that the NHFIC may make arrangements for the services of officers or employees of the Commonwealth or a State or Territory or any other organisation or body to be made available to the NHFIC.

51 Explanatory memorandum, p. 40.

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## National Housing Finance and Investment Corporation (Consequential Amendments and Transitional Provisions) Bill 2018

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<b>Purpose</b>	This bill seeks to make consequential and transitional amendments arising from the National Housing Finance and Investment Corporation Bill 2018
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 15 February 2018

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*The committee has no comment on this bill.*

## Protection of the Sea Legislation Amendment Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend various Acts in relation to the protection of the sea to:</p> <ul style="list-style-type: none"> <li>• ensure that shippers classify and declare their solid bulk cargoes as harmful to the marine environment (HME), or non-HME, and inform the master of this classification;</li> <li>• update provisions in the <i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> relating to regulations and Marine Orders; and</li> <li>• remove the need for regulations to prescribe the manner in which a Protection of the Sea levy notice may be served in particular circumstances</li> </ul>
<b>Portfolio</b>	Infrastructure and Transport
<b>Introduced</b>	House of Representatives on 28 February 2018

*The committee has no comment on this bill.*

## Social Services Legislation Amendment (14-month Regional Independence Criteria) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Social Services Legislation Amendment (Simplifying Student Payments) Act 2017</i> to ensure that the '14-month period' in the Youth Allowance regional workforce independence criteria is applied to all new and existing claimants
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives on 15 February 2018

*The committee has no comment on this bill.*

## Social Services Legislation Amendment (Drug Testing Trial) Bill 2018

<b>Purpose</b>	This bill seeks to establish a trial of drug testing for 5,000 new recipients of Newstart Allowance and Youth Allowance (other) from 1 July 2018 in three discrete locations over two years
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives on 28 February 2018

1.66 This bill is substantially the same as Schedule 12 of the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (Welfare Reform Bill), on which the committee previously commented and corresponded with the then Minister for Social Services.<sup>52</sup> As this bill raises the same issues as the committee previously commented on, the committee restates its comments, and sets out the former minister's response, in relation to this bill (with updated references to the relevant item numbers of this bill).<sup>53</sup>

### Significant matters in delegated legislation<sup>54</sup>

#### *Initial scrutiny – extract*

1.67 Schedule 1 provides for a two year trial in three areas for the mandatory drug testing of 5,000 recipients of Newstart Allowance and Youth Allowance. Proposed section 38FA provides that the minister may make rules (legislative instruments) providing for a number of matters relating to the establishment of the drug testing trial. This includes a number of significant matters, such as the confidentiality and disclosure of drug test results and the keeping and destroying of records relating to samples and drug tests. Proposed section 64A also provides that the drug test rules may require contracts for the carrying out of drug tests to meet certain requirements, including provisions requiring the giving, withdrawal or revocation of a notice to the secretary saying that a person should be subject to

52 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 8 of 2017* and *Scrutiny Digest No. 10 of 2017* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest).

53 The committee notes that Schedule 1, item 24, proposed subsections (1C) and (1D) differs from that originally contained in Schedule 12 of the Welfare Reform Bill. Amendments were made to these provisions in response to scrutiny concerns raised by the committee in its *Scrutiny Digest No. 8 of 2017* and addressed by the former minister's response in *Scrutiny Digest No. 10 of 2017* at pp. 91-3. As such, the committee has omitted reference to these comments in relation to the current bill.

54 Schedule 1, item 3, proposed section 38FA; item 18, proposed section 64A; and item 24, proposed subsection 123UFAA(1B). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

income management,<sup>55</sup> with the intention that the circumstances in which such a notice may be given to be provided in the drug test rules.<sup>56</sup>

1.68 In addition, proposed subsection 123UFAA(1B) provides that the secretary may, by legislative instrument, determine a period longer than 24 months as to when a person may be subject to income management. This would give the secretary the power, via legislative instrument, to extend the period of income management for longer than the 24 month trial period.<sup>57</sup>

1.69 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum does not explain why the confidentiality and disclosure of drug test results, the keeping and destroying of records relating to samples and drug tests, and requirements regarding the contractual arrangements for drug testing are to be included in delegated legislation rather than set out in the primary legislation. In relation to extending the trial period beyond 24 months, the explanatory memorandum suggests this might be used 'where it is considered to be beneficial to a person's drug rehabilitation outcome to remain on income management for a longer period of time'.<sup>58</sup> The committee notes that no time limit is set in the bill on the period that the trial could be extended via legislative instrument.

1.70 The committee requests the minister's advice as to:

- why it is considered necessary to leave significant matters of the type referred to above to delegated legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of rules and determinations and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

### ***Minister's response***

1.71 The former Minister for Social Services advised, in relation to equivalent provisions in the Welfare Reform Bill:

As described in the House of Representatives Practice (6th Edition), delegated legislation is necessary and often justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for other matters such as those of technical detail. Once Parliament has laid

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55 Schedule 1, item 18, proposed section 64A.

56 Explanatory memorandum, p. 17.

57 See explanatory memorandum, p. 17.

58 Explanatory memorandum, p. 20.

down the principles of a new law, delegated legislation is the appropriate method through which to work out the application of the law in greater detail within, but not exceeding, those principles. The items on which you seek further advice fall within this category of business.

#### *Drug Test Rules*

With respect to Schedule 12 of the Social Security Legislation Amendment (Welfare Reform) Bill 2017 (the Welfare Reform Bill), the introduction of a two year drug testing trial for new claimants of Newstart Allowance and Youth Allowance (other), clause 38FA allows for the creation of Drug Test Rules via legislative instrument that will set out certain details relating to the establishment and operation of the trial. This includes the rules for conducting the tests, including the taking of samples, carrying out of the tests and disclosure of results.

The reason for the use of delegated legislation to set out the rules for conducting the tests is that these technical and more administrative details rely to an extent on the advice of the preferred tenderer for the provision of drug testing trial services as well as other stakeholders. Use of a legislative instrument gives the necessary flexibility to ensure that the arrangements for the drug testing will meet the intention of the legislation but can accommodate practicalities that may have been unknown at time the Bill was drafted.

The Drug Test Rules will also set out the three areas in which the trial will operate. The Government had not finalised the selection of the trial sites at the time the Bill was drafted. Using subordinate legislation to set out these areas gives flexibility for consultation, and consideration of the relevant factors in making this decision, after introduction of the Bill to the Parliament.

The Department has been engaging with stakeholders from the health, alcohol and other drug, and welfare sectors and this consultation will be ongoing. The Department has spoken to all state and territory governments as well as a range of drug and alcohol treatment providers and peak bodies, and related experts across the country. The advice and feedback of stakeholders will be considered in finalising the Drug Test Rules.

#### *Income Management*

New paragraph 1(B) of 123UFAA of the *Social Security Administration Act 1999* (the Administration Act) will give the Secretary the power to determine a longer period of time than 24 months for a person to remain on Income Management. It is intended that this power would be used where it is considered to be beneficial to the person and/or their drug rehabilitation outcome to remain on Income Management. For example, to return the job seeker to unrestricted welfare payments part way through their rehabilitation could jeopardise their long term outcomes, if

the use of Income Management as a tool in helping them to manage their payments is proving successful overall.

***Committee's previous comment***

1.72 The committee thanks the minister for this response. The committee notes the minister's advice that the reason for the use of delegated legislation for details relating to drug testing is that the matters to be included are technical and administrative detail that rely, to an extent, on the advice of the preferred tenderer for the provision of drug testing trial services and other stakeholders.

1.73 However, the committee notes that many of the matters relating to drug testing that will be included in the drug testing rules appear to go beyond merely technical and administrative detail. In particular, the rules are to provide for the confidentiality and disclosure of results of drug tests and the keeping and destroying of records relating to drug tests and samples for use in drug tests.<sup>59</sup> The committee notes that an exposure draft of the Drug Test Rules has been tabled by the minister in another inquiry.<sup>60</sup> These Rules provide for matters such as when a drug test notice will be considered to be invalid, withdrawn or revoked; how a drug test is to be carried out (i.e. affording reasonable privacy and in a respectful manner); when samples (which contain highly personal information) are to be destroyed; and the steps that occur when a drug test is disputed. The committee does not consider that these matters are technical and administrative detail. The committee considers that these are significant matters that are not appropriate to be left to delegated legislation, which is subject to significantly less parliamentary oversight than primary legislation.

1.74 The committee also notes the minister's advice that the power of the secretary to determine that a person may be subject to income management for a longer period than 24 months is intended to be used when it is considered to be beneficial to the person. However, the committee notes that the legislation is not limited in this way: proposed subsection 123UFAA(1B) simply provides that the secretary may, by legislative instrument, determine a period longer than 24 months. There is also no cap on the length of time that the secretary could prescribe under this provision.

**1.75 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including significant matters, such as how a drug test is to be conducted and the confidentiality of that test, and the extension of the period of income management, in delegated legislation.**

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59 Schedule 1, item 3, proposed paragraphs 38FA(f) and (h).

60 See Senate Standing Committee on Community Affairs, Inquiry on the Social Services Legislation Amendment (Welfare Reform) Bill 2017, Additional Documents, tabled on 30 August 2017 by the Department of Social Services.

**1.76 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

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### **Broad delegation of administrative power<sup>61</sup>**

#### ***Initial scrutiny – extract***

1.77 Proposed section 64A provides that the secretary may enter into contracts for the carrying out of drug tests of drug trial pool members. Such a contract must meet any requirements to be prescribed in rules (legislative instruments). Proposed paragraph 123UFAA(1A)(c) provides that a person will be subject to income management on a number of specified bases, including that the contractor who carried out the drug test has given a written notice to the secretary 'saying that the person should be subject to the income management regime'.<sup>62</sup> Additionally, a person will not be subject to the income management regime if the contractor has withdrawn or revoked its notice,<sup>63</sup> and a person will not be required to pay for a drug test 'if the contractor who carried out the test gives a written notice to the secretary that the test should not be taken into account'.<sup>64</sup> These provisions appear to give the contractor the power to determine who should be subject to the income management regime.

1.78 The explanatory memorandum states that if a person's drug test result is positive 'the contractor will give a notice to the secretary that the person should be subject to income management'.<sup>65</sup> The circumstances under which such a notice may be given are intended to be provided for in the drug test rules 'for instance, if the drug test result is positive'.<sup>66</sup> The explanatory memorandum also notes that the contractor can withdraw or revoke a notice or give notice that a positive drug test should not be taken into account:

For example, if a person requests a second drug test which results in a negative result or if the contractor receives evidence that the person is taking legal medication which could cause a false positive result, the

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61 Schedule 1, item 18, proposed section 64A and item 24, proposed paragraph 123UFAA(1A)(c). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

62 See Schedule 1, item 18, proposed paragraph 64A(3)(b) and item 24, proposed paragraph 123UFAA(1A)(c).

63 See Schedule, item 24, proposed paragraph 123UFAA(1A)(d), together with item 18, proposed paragraph 64A(3)(c).

64 See Schedule 1, item 11, proposed subsection 1206XA(5).

65 Explanatory memorandum, p. 17.

66 Explanatory memorandum, p. 19.

contractor can withdraw or revoke a notice that was previously given a notice under paragraph 123UFAA(1A)(c)

...

For example, if the contractor becomes aware...of a false positive test result such as if the contractor received evidence that the person is taking legal medication which could cause a false positive result, the contractor will be required under the drug testing rules to notify the Secretary that the test should not be taken into account for the purposes of a drug test repayment deduction.<sup>67</sup>

1.79 The bill states that the criteria for guiding when the contractor would give a written notice may be provided in the drug test rules, but no detail is provided in the bill itself. Additionally, proposed paragraph 64A(3)(a)<sup>68</sup> provides that the rules may include provisions noting that any subcontracts should include similar provisions to those set out for contractors, which suggests a subcontractor may also be able to determine if a person is to be subject to income management.

1.80 The explanatory memorandum provides no details as to who is likely to be contracted to perform the task of determining which social security recipients are to be subject to income management, and what their qualifications must be. Contractors will not be subject to the same level of accountability and oversight that apply to members of the public service. For example, the APS Code of Conduct applies only to employees of the Australian Public Service.

1.81 There is also nothing in the primary legislation, nor any indication that it will be in the rules, as to how the contractor is to 'receive evidence', for example that a person is taking legal medication. There is no information in the bill or explanatory materials as to what are the review rights of a person who is made subject to income management based on a contractor's written notice. It appears that a person will be made subject to income management automatically once certain criteria is met, including that a contractor has given written notice to this effect. It is unclear whether the contractor's provision of a notice to the secretary stating that a person should be subject to income management is a 'decision' that would be reviewable.

1.82 The committee requests the minister's advice as to:

- the appropriateness of allowing contractors to make a determination as to who is to be subject to income management;
- the qualifications to be required of such contractors;
- any accountability or oversight mechanisms that contractors will be subject to (covering matters such as the protection from unauthorised disclosure of personal information obtained by a contractor); and

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67 Explanatory memorandum, p. 17.

68 Schedule 1, item 18.

- the availability of review of a contractor's decision to give, vary or revoke a written notice to the secretary subjecting a person to income management or a refusal to vary or revoke such a notice.

### ***Minister's response***

1.83 The former Minister for Social Services advised, in relation to equivalent provisions in the Welfare Reform Bill:

#### *Referral to Income Management and Review of this Referral*

The drug testing provider does not make determinations as to who is subject to Income Management. The contracted provider will be contracted by the Department of Human Services (DHS) to drug test individuals and to notify DHS of test results under the drug testing trial. The circumstance in which the drug test provider is to provide DHS with a notice of the test results will be if the individual returns a positive drug test. DHS then cross reference the results of the drug test with customer information to confirm the drug test relates to a specific customer.

The notice of decision that an individual will be placed on Income Management is provided in a letter sent by DHS to the individual requiring attendance at an initial Income Management interview. At this initial interview, an individual can request a wellbeing review if being placed on Income Management will be a serious risk to the person's mental, physical or emotional wellbeing. DHS officers can then refer the individual to DHS social workers to review whether this would be the case. While the drug testing provider is responsible for the drug testing and the notification of test results to DHS, the decision to place an individual on Income Management will be a decision made by a DHS officer under social security law.

This safeguard has been strengthened in response to comments made by the Senate Standing Committee for the Scrutiny of Bills in Scrutiny Digest No.8 of 2017. These comments noted it might be appropriate to review the provisions in the *Social Services Legislation Amendment 5 (Welfare Reform) Bill 2017* governing when and how the Secretary might make determinations to remove people from Income Management. In response, the Government made amendments to the provisions in the Bill to limit the Secretary's discretion to make determinations to remove people from Income Management.

The drug testing provider will also be required to notify DHS to revoke a person's referral to Income Management if they subsequently become aware that the positive test result was in error. This may be because:

- the job seeker requested a re-test and the sample was subsequently found to return a negative result;
- the drug test provider was given evidence (by the job seeker or their representative) of legal medications or other circumstance which

would, in their professional opinion, produce a positive drug test result without the consumption of illicit drugs; or

- they became aware of any other error within their testing process for that person's sample.

These circumstances and requirements will be stipulated in the Drug Test Rules.

Referral of a person to Income Management by an external party is already an established process under existing Income Management provisions in the Administration Act. For example, the local child protection authority or, in Queensland, the Families Responsibility Commission can refer people to Income Management under certain circumstances.

The decision that a person is subject to Income Management, based on a referral from a third party (such as the drug testing provider) is a decision under social security law. Any decision made under social security law, including implementation of the drug test provider's referral of a person to Income Management, may be appealed in accordance with existing review and appeal provisions. Under existing review and appeal mechanisms in the Administration Act, recipients can request a review of the decision by a DHS Authorised Review Officer and, if they disagree with the decision by this officer, can appeal the decision to the Administrative Appeals Tribunal.

#### *Qualifications of the Drug Test Provider*

The minimum requirements, including qualifications, of the drug test provider and its officers will also be set out in the Drug Test Rules. It is intended that the drug testing provider will need to deliver testing services in accordance with the relevant Australian Standards (where these exist) being *AS/NZS 4308:2008 Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* and *AS4760: 2006 Procedures for specimen collection and the detection and quantitation of drugs in oral fluid*. It is also intended that the provider will also be required by the Rules to utilise authorised laboratories – those accredited by the National Association of Testing Authorities, Australia - and to use authorised analysts for the purposes of analysing the results of samples taken for drug testing. The final details of the Drug Test Rules may be subject to further consultation with stakeholders.

#### *Privacy*

With respect to privacy concerns, there are existing privacy safeguards in place under the *Privacy Act 1988* and the confidentiality provisions in Division 3 of Part 5 of the Administration Act.

These confidentiality provisions stipulate that protected information, including any personal information such as health information, can only be accessed, used or disclosed in limited circumstances. This includes for the purposes of administering the social security law; for research, statistical

analysis or policy development; and where it has been certified as being in the public interest.

These existing safeguards will apply to any information gathered as part of this trial, including that obtained or generated by the drug test provider. Any accessing, use or disclosure of this information, including test results, will only occur in accordance with these existing laws.

### ***Committee's previous comment***

1.84 The committee thanks the minister for this response. The committee notes the minister's advice that the drug testing provider does not make determinations as to who will be subject to income management. Rather, the minister advises that the decision to place an individual on income management will be a decision made by a DHS officer under social security law, and an individual can request a wellbeing review. The committee also notes the minister's advice that referral of a person to income management by an external party is already an established process under the existing income management provisions in the *Social Security (Administration) Act 1999* (the Administration Act). The committee notes the advice that the decision that a person is to be subject to income management 'based on a referral from a third party (such as the drug testing provider)' is a decision that may be appealed in accordance with existing review and appeal provisions.

1.85 However, the committee notes that the only relevant decision that is subject to review under the Administration Act is the decision that determines whether the conditions in proposed subsection 123UFAA(1A) have been met, namely that, at or before the test time:

- the person is an eligible recipient of a relevant welfare payment;
- there was a positive drug test for the person;
- the contractor who carried out the test gave the secretary a written notice saying that the person should be subject to the income management regime, and that notice has not been withdrawn or revoked;
- the person is not covered by a determination that the person should not be subject to the income management regime; and
- any payment nominee is not an excluded nominee and the person is otherwise subject to income management.

1.86 In relation to the contractor's decision that the person should be subject to income management, there appears only to be a requirement that the DHS officer is satisfied that a written notice has been provided. The decision as to whether the notice has been provided would be a reviewable decision under the Administration Act.<sup>69</sup> However, there is no right of review under the Administration Act of the contractor's decision to issue the notice. Similarly, the fact of whether there was a

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69 See Part 4 of the *Social Security (Administration) Act 1999*, relating to decisions of 'officers'.

positive drug test would appear to simply require the DHS officer to be satisfied that the drug test was positive, but would not enable the officer to look behind whether the test results were accurate.

1.87 As the minister's response notes, the contractor's notice is analogous to the existing referral to income management by a third party. The government's *Guide to Social Security Law* notes that a review of a decision to impose income management when there is a referral by a third party, is a review as to whether the legislative conditions have been met, but the decision of the third party whether to issue the notice is 'not made under the social security law'<sup>70</sup> and is therefore not reviewable under the Administration Act. As the Guide states in relation to referrals by State or Territory authorities:

The decision by the recognised state or territory officer or employee to issue the notice is not reviewable under the social security law, although *the question of whether or not the notice was actually given is reviewable*. The decision by the a recognised state or territory officer or employee to give the notice to the Commonwealth may be able to be appealed or reviewed in the relevant state or territory jurisdiction.<sup>71</sup>

1.88 In this instance there is no applicable State or Territory jurisdiction by which a decision of the contractor to refer a person to income management can be reviewed. The committee notes the minister's response that the contractor will be required to notify DHS to revoke the referral if they subsequently become aware the positive test result was in error because the contractor was 'given evidence (by the job seeker or their representative) of legal medications or other circumstance which would, *in their professional opinion*, produce a positive drug test result without the consumption of illicit drugs'.<sup>72</sup>

1.89 From a scrutiny perspective, the committee is concerned that it appears that the only way a person subject to income management under this proposed provision could seek review of the results of the drug test itself is by asking the contractor to review its own processes. The committee notes that an exposure draft of the Drug Test Rules has been tabled by the minister in another inquiry.<sup>73</sup> This draft suggests that there will be a process by which an affected person can provide evidence to the contractor about the drug test and the contractor will need to satisfy itself, having regard to that evidence, as to the validity of the drug test. The details of this process,

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70 Australian Government, *Guide to Social Security Law*, version 1.235, released 14 August 2017, Chapter 11.9.7.

71 Australian Government, *Guide to Social Security Law*, version 1.235, released 14 August 2017, Chapter 11.9.7.10. Emphasis added.

72 Emphasis added.

73 See Senate Standing Committee on Community Affairs, inquiry on the Social Services Legislation Amendment (Welfare Reform) Bill 2017, Additional Documents, tabled on 30 August 2017 by the Department of Social Services.

as to how a person will apply to the contractor and how the contractor will assess any submissions or evidence, do not appear to be set out in legislation. Indeed, the draft explanatory statement accompanying the exposure draft of the rules states that the rules only set out 'high level requirements' and that more detailed requirements will be set out in the government's contract with the selected providers.<sup>74</sup>

**1.90 The committee has significant scrutiny concerns about private contractors making a referral as to who will be subject to income management. The committee notes that private contractors are not subject to the same level of accountability and oversight that apply to members of the Australian Public Service. The committee's scrutiny concerns are heightened by the fact that it does not appear that the contractor's decision to make the referral will be subject to any form of merits or judicial review, as only the question of whether or not the notice was actually given appears to be reviewable under the Administration Act. The committee also has scrutiny concerns that the process by which an affected person can seek to challenge a positive drug test is not contained in any legislation. The committee draws these significant scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of this proposed approach.**

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74 Explanatory statement to the exposure draft of the Social Security (Drug Test) Rules 2017, p. 1. See Senate Standing Committee on Community Affairs, inquiry on the Social Services Legislation Amendment (Welfare Reform) Bill 2017, Additional Documents, tabled on 30 August 2017 by the Department of Social Services.

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## Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018

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<b>Purpose</b>	This bill seeks to amend various Acts to increase or introduce newly arrived resident's waiting periods for various social security payments, concession cards, allowances, family tax benefits and paid parental leave
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives on 15 February 2018

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*The committee has no comment on this bill.*

## Treasury Laws Amendment (2018 Measures No. 3) Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend the <i>Competition and Consumer Act 2010</i> to:</p> <ul style="list-style-type: none"> <li>• increase the maximum civil pecuniary penalties and penalties for criminal offences;</li> <li>• provide protection, through a safe harbour, for egg producers who comply with the requirements of the Free Range Egg Labelling Information Standard; and</li> <li>• ensure that confidential supplier information obtained by the Australian Energy Regulator during its wholesale market monitoring and reporting functions remains confidential under the Commonwealth law</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 15 February 2018

### Strict liability<sup>75</sup>

1.91 Parts 4-1, 4-3 and 4-4 of Schedule 2 to the *Competition and Consumer Act 2010* (Consumer Law) set out a number of offences relating to false and misleading practices, safety of consumer goods and product-related services, and information standards. The majority of the offences in those Parts are currently punishable by a pecuniary penalty of \$1.1 million for bodies corporate, and \$220,000 for individuals.<sup>76</sup> All of the offences in those parts are offences of strict liability (which removes the requirement for the prosecution to prove the defendant's fault in relation to all elements of the offence).

1.92 Items 2 to 47 in Schedule 1 of the bill seek to increase the penalty imposed in relation to the offences in Parts 4-1, 4-3 and 4-4 of the Consumer Law to:

- for individuals, \$500,000.
- for bodies corporate, the greater of:
  - \$10 million; or

75 Schedule 1, items 2 – 47. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i)

76 As the Consumer Law is a national uniform scheme, it is appropriate that the penalty amounts are expressed in dollars rather than in penalty units.

- if the court can determine the value of the benefit that the body corporate obtained, directly or indirectly, by the commission of the relevant offence, three times the value of that benefit; or
- if the court cannot determine the value of that benefit, 10 per cent of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the body corporate committed, or began committing, the relevant offence.

1.93 The effect of this proposal would be to significantly increase the penalties for the offences to which strict liability applies.

1.94 Under general principles of criminal law, fault is required to be proven 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). Offences of strict liability remove 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 to engage in that conduct, or was reckless or negligent. The committee notes that the *Guide to Framing Commonwealth Offences*<sup>77</sup> states that the application of strict liability is only considered appropriate where the relevant offence is punishable by up to 60 penalty units (currently \$12,600) for an individual.<sup>78</sup> In this case, the bill proposes to increase the penalty applicable to individuals in relation to a number of strict liability offences from \$220,000 to \$500,000.

1.95 As the imposition of strict liability undermines fundamental criminal law principles, the committee expects a clear justification for the application of strict liability to be included in the explanatory memorandum. This includes where a bill proposes to increase penalties applicable to strict liability offences within an existing Act. Moreover, in all cases where a bill proposes to impose a significant penalty on individuals, the committee would expect a justification for the magnitude of the proposed penalty to be included in the explanatory memorandum.

1.96 In this instance, the explanatory memorandum explains that the proposal to increase penalties followed a review of the penalty and enforcement provisions in the Consumer Law, which found that those provisions were 'insufficient to deter non-compliance conduct that can be highly profitable.'<sup>79</sup> The explanatory memorandum further states:

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

78 The monetary amount of penalty units in Commonwealth legislation is set by section 4AA of the *Crimes Act 1914*. The amount is subject to triennial indexation. Currently, one penalty unit is set at \$210.

79 Explanatory memorandum, p. 7.

It is important that the penalties imposed under the ACL [Consumer Law] are set so as to deter breaches. The amendments increase the existing financial penalties of \$1.1 million for a body corporate and \$220,000 for persons other than a body corporate, to align with the existing financial penalties available under the competition provisions of the CCA.

As a result, the penalties take into account the size of the business and the benefit gains from the breach so as to make a contravention or offence much more costly for the perpetrator.<sup>80</sup>

1.97 The committee notes the explanation provided in the explanatory memorandum for the *magnitude* of the penalties imposed. However, the committee remains concerned that the bill proposes to significantly increase the financial penalty imposed in relation to offences where strict liability applies, well beyond the recommended limit in the *Guide to Framing Commonwealth Offences* of 60 penalty units. In this regard, the committee notes that the explanatory memorandum does not address the application of strict liability to the relevant offences.

**1.98 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of increasing criminal penalties for individuals (from \$220,000 to \$500,000) in relation to offences to which strict liability applies.**

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### Reversal of the evidential burden of proof<sup>81</sup>

1.99 Section 18, paragraph 29(1)(a) and paragraph 151(1)(a) of the Consumer Law make it unlawful for a person to engage in misleading and deceptive conduct or to make false or misleading representations about goods or services. A breach of paragraph 151(1)(a) constitutes an offence. Contraventions of section 18 and paragraph 29(1)(a) are subject to civil penalties.

1.100 Proposed section 137A seeks to provide a specific exemption (an offence-specific 'safe harbour' defence) to the offence and civil penalty provisions in section 18, paragraphs 29(1)(a) and paragraph 151(1)(a). Proposed subsection 137A(1) provides that the relevant offence and civil penalty provisions do not apply in relation to the labelling or displaying of eggs as free range eggs if, when doing so, the person is complying with all requirements:

- specified in an information standard for eggs; and
- relating to the labelling or displaying of free range eggs, including requirements about:

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80 Explanatory memorandum, p. 9.

81 Schedule 2, item 2, proposed section 137A. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

- the use of the words 'free range'; or
- representing that eggs are free range eggs.

1.101 Proposed subsection 137A(2) then provides that, if a person seeks to rely on proposed subsection 137A(1) in proceedings brought against the person in respect of section 18 or paragraph 29(1)(a) or 151(1)(a) of the Consumer Law, the person bears an evidential burden in relation to the matters set out in subsection 137A(1).

1.102 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important part 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.

1.103 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. However, the committee would still expect the reversal of the burden of proof to be justified.

1.104 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences*<sup>82</sup> provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the relevant 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.

1.105 In this instance, the explanatory memorandum states:

In placing an evidential burden on the respondent/defendant, consideration has been given to the Attorney-Generals Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition.

This evidential burden is appropriate in these circumstances because the evidence as to whether a respondent/defendant has complied with the information standard and the free range egg labelling or display requirements is peculiarly within the knowledge and control of the respondent/defendant.

For the current information standard, *Australian Consumer Law (Free Range Eggs Labelling) Information Standard 2017*, compliance would require consideration of whether:

- the hens had meaningful and regular access to an outdoor range during daylight hours during a laying cycle;

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

- the hens were able to roam and forage on the outdoor range; and
- the eggs were laid by hens subject to a stocking density of 10,000 hens per hectare or less.

It is the respondent/defendant who can readily access evidence of this kind, which would not be easily accessible and available to the applicant/prosecution. It would be significantly more difficult and costly for the applicant/prosecution to obtain evidence that could be easily adduced by the defendant.<sup>83</sup>

1.106 The committee notes the explanation provided for the reversal of the burden of proof in proposed section 137A. However, while the committee appreciates that it may be easier for the defendant than for the prosecution to adduce evidence relating to the matters in proposed subsection 137A(1), it is not apparent that those matters would be *peculiarly* within the defendant's knowledge, or that the matters would be significantly more costly and difficult for the prosecution to establish.

1.107 The committee further notes that the reversal of the burden of proof in proposed section 137A may relate to civil penalties (where that section is relied on as a defence to section 18 or paragraph 29(1)(a)). However, the committee recognises that, in certain cases, there may be a blurring of distinctions between criminal and civil penalties, with civil penalties applied in circumstances that are akin to criminal offences. The committee considers that reversals of the burden of proof in such cases merit careful scrutiny,<sup>84</sup> as there could be a risk that reversing the burden of proof in such cases may unduly trespass on personal rights and liberties. This is particularly the case where more significant penalties are imposed. In this case, the committee notes that contraventions of section 18 and paragraph 29(1)(a) are punishable by a civil penalty of \$220,000 for individuals. Moreover, the bill proposes to increase the penalty imposed in relation to these sections to \$500,000.<sup>85</sup>

**1.108 The committee seeks the assistant minister's more detailed advice as to the appropriateness of reversing the evidential burden of proof in relation to the 'safe harbour' defence in proposed section 137A, noting that the offence and civil penalty provisions to which the defence applies carry significant financial penalties.**

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83 Explanatory memorandum, p. 23.

84 In this regard, see also Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129), December 2015, p. 284.

85 See Schedule 1, items 48 and 49.

## Treasury Laws Amendment (Illicit Tobacco Offences) Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend the <i>Excise Act 1901</i>, the <i>Income Tax Assessment Act 1997</i> and the <i>Taxation Administration Act 1953</i> to:</p> <ul style="list-style-type: none"> <li>• provide a comprehensive set of offences that can be applied to illicit tobacco: <ul style="list-style-type: none"> <li>- that has been domestically manufactured or produced; or</li> <li>- for which the origin of production or manufacturing is unknown or uncertain;</li> </ul> </li> <li>• create new offences for possession of equipment for producing or manufacturing illicit tobacco;</li> <li>• provide that illicit tobacco for which the origin of production or manufacturing is unknown or uncertain can be seized and forfeited; and</li> <li>• amend the meaning for excise and excise-equivalent customs duty purposes so that the amount of duty on dutiable products is determined in a consistent manner.</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 15 February 2018

### Absolute liability offences<sup>86</sup>

1.109 Proposed Subdivision 308-A seeks to create a number of offences ('reasonable suspicion offences') relating to the possession, purchase, sale, manufacture and production of illicit tobacco (that is, tobacco on which excise or customs duty has not been paid). Proposed Subdivision 308-B seeks to create additional offences ('fault-based offences') relating to the possession, manufacture and production of illicit tobacco. The penalties for the offences in proposed Subdivisions 308-A and 308-B vary depending on the weight of the tobacco, and range from the greater of 200 penalty units and five times the excise duty that would be payable on the tobacco, to 10 years imprisonment, the greater of 1,500 penalty units and five times the excise duty that would payable on the tobacco, or both.

<sup>86</sup> Schedule 1, item 6, proposed Subdivisions 308-A and 308-B. The committee draws Senators' attention to the provisions in those proposed subdivisions pursuant to Senate Standing Order 24(1)(a)(i).

1.110 The bill proposes to apply absolute liability to the weight of the tobacco as an element of the offences in proposed Subdivisions 308-A and 308-B. Additionally, the bill proposes to apply absolute liability as to whether it is reasonable to suspect that excise or customs duty has not been paid on the tobacco, and that no exemption to the payment of excise or customs duty exists under a law of the Commonwealth, as an element of the reasonable suspicion offences in proposed Subdivision 308-A.

1.111 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 absolute 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.

1.112 As the imposition of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>87</sup> In this regard, the committee notes that the *Guide* states that absolute liability should only be applied to particular elements of an offence (as opposed to the offence as a whole) where one of the following applies:

- requiring proof of fault would undermine deterrence, and there are legitimate grounds for penalising persons lacking fault and persons who make a reasonable mistake of fact in relation to the relevant element; or
- the element is a jurisdictional element, rather than an element going to the essence of the offence.<sup>88</sup>

1.113 The explanatory memorandum provides a detailed explanation for the application of absolute liability to the weight of the tobacco as an element of the offences in proposed Subdivisions 308-A and 308-B:

Absolute liability is appropriate for [the weight of the tobacco] ... as it is essentially a precondition of the offence and the state of mind of the defendant with respect to this element is not relevant to that element. There would be inherent difficulties of establishing a mental element in relation to the weight of the thing that would otherwise undermine deterrent. The prosecution must still prove the weight of the tobacco at the time of the offence.

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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.

1.114 The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised — a defence that remains available where strict liability is applied. The committee notes the explanation that there would be inherent difficulties in establishing a mental element as to the weight of a thing. The committee also notes the explanation in the explanatory memorandum that it is not considered appropriate to apply strict liability, instead of absolute liability, as this would mean there could be 'a significant risk that offenders may escape conviction solely on the basis of a mistaken belief about weight'.<sup>89</sup> However, the committee notes that the bill proposes to make it an offence to possess, buy or sell 5kg or more of tobacco (with more significant penalties applying depending on the weight of the tobacco). Possessing, buying or selling less than 5kg of tobacco is not proposed to be an offence. The committee is concerned that applying absolute liability to the weight of the tobacco could lead to a person being convicted of a criminal offence,<sup>90</sup> despite holding a reasonable belief that they had in their possession (or bought or sold) less than 5kg of tobacco (which is not an offence), and despite having taken reasonable steps to confirm the tobacco's weight.

1.115 In addition, the bill seeks to impose absolute liability on whether it is reasonable to suspect that excise or customs duty has not been paid or is exempt from being paid (for the offences in proposed Subdivision 308-A). In this regard, the explanatory memorandum states:

It is for the Court to determine whether it is reasonable to suspect that duty has not been paid or an exemption applies. Therefore, it is appropriate that absolute liability applies to this element of the offence.

The state of mind that the defendant had at the time they possessed, bought or sold the tobacco is not relevant to the objective existence of reasonable suspicion (although it is relevant to the physical element of conduct (possessing, buying or selling) which is contained in a separate element to which the fault element of intention applies).<sup>91</sup>

1.116 The committee acknowledges that the element of 'reasonable suspicion' does not refer to the state of mind of the defendant, and refers instead to whether a court considers it reasonable to suspect that payable excise or customs duty has not been paid. In this regard, the committee notes that proposed section 308-55 sets out a number of circumstances that are taken to satisfy the 'reasonable suspicion' element of the offences in proposed Subdivision 308-A.

1.117 However the explanatory memorandum does not address why it is not appropriate to apply strict liability to the 'reasonable suspicion' element of the offences in proposed Subdivision 308-A, instead of absolute liability or why it is

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89 Explanatory memorandum, p. 23.

90 Under proposed section 308-20, 308-35, 308-50 or 308-120.

91 Explanatory memorandum, p. 16.

inappropriate to exclude the defence of reasonable mistake of fact. The committee is concerned that a person could be convicted of an offence under proposed Subdivision 308-A despite reasonably believing that excise duty or excise-equivalent customs duty had been paid. This is of particular concern with respect to the offences relating to the possession of tobacco in proposed sections 308-10, 308-15 and 308-20. For example, proposed subparagraph 308-55(1)(a) provides that the 'reasonable suspicion' element is taken to be satisfied if the tobacco is not in retail packaging that complies with the requirements in Chapter 2 of the *Tobacco Plain Packaging Act 2011* (Plain Packaging Act). If strict liability were applied to the 'reasonable suspicion' element, a person could raise a defence (to the offences relating to possession) if they came into possession of tobacco in packaging that they reasonably (yet mistakenly) believed to comply with the Plain Packaging Act. This appears consistent with the aims of the 'reasonable suspicion' element, which is to 'encourage persons dealing in tobacco to ensure that they comply with legislative requirements that apply to tobacco and tobacco products.'<sup>92</sup>

1.118 However, as absolute liability is applied that element, the person could be convicted of a possession offence (which may carry a significant custodial penalty) despite reasonably believing that the tobacco was packaged in accordance with the requirements of the Plain Packaging Act, and therefore reasonably believing that excise or customs duty had been paid.

**1.119 The committee requests the Treasurer's more detailed justification for the application of absolute liability (rather than strict liability) to:**

- **the weight of the tobacco, as an element of the offences in proposed Subdivisions 308-A and 308-B; and**
- **whether it is reasonable to suspect that excise or customs duty has not been paid, or is exempt from being paid under Commonwealth law, as an element of the offences in proposed Subdivision 308-A.**

**1.120 The committee's consideration of the appropriateness of applying absolute liability to these elements would be assisted if the justification explicitly addresses the principles set out in the *Guide to Framing Commonwealth Offences*.<sup>93</sup>**

**1.121 The committee also requests the Treasurer's advice as to the appropriateness of amending the bill to apply strict liability, rather than absolute liability, to the elements identified above.**

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92 Explanatory memorandum, p. 17.

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

## Reversal of the evidential burden of proof<sup>94</sup>

1.122 As noted above, proposed Subdivisions 308-A and 308-B seek to create a number of offences relating to the possession, purchase, sale, manufacture and production of tobacco. The penalties imposed in relation to those offences vary depending on the weight of the tobacco in question, and range from the greater of 200 penalty units and five times the excise duty that would be payable on the tobacco, to 10 years imprisonment, the greater of 1,500 penalty units and five times the excise duty that would be payable on the tobacco, or both. Proposed Subdivision 308-C seeks to create two offences relating to the possession of equipment for the manufacture or production of tobacco. Those offences are punishable by imprisonment for 12 months, 120 penalty units, or both

1.123 In relation to each of the proposed offences, the bill proposes to include exemptions (offence-specific defences). The following exemptions are included in relation to all of the offences in proposed Subdivision 308-A, as well as in relation to a number of the offences in proposed Subdivision 308-B:<sup>95</sup>

- that the tobacco is kept or stored at premises specified in a licence under the Customs Act or the Excise Act;<sup>96</sup>
- that the defendant is specified in a movement permission under the Customs Act or the Excise Act, or has an authority to take the tobacco into warehousing under the Customs Act;<sup>97</sup> and
- that the defendant has permission under the Excise Act to possess, move or transfer the tobacco, or to deliver the tobacco for home consumption.<sup>98</sup>

1.124 With respect to the offences in proposed Subdivision 308-A, the bill provides an additional defence. The defence applies where excise or customs duty has been paid, where there is an exemption to the payment of excise or customs duty under a

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94 Schedule 1, item 6, proposed Subdivisions 308-A, 308-B and 308-C. The committee draws Senators' attention to the provisions in those proposed subdivisions pursuant to Senate Standing Order 24(1)(a)(i).

95 The exemption relating to permission under the Excise Act to possess, move or transfer the tobacco, or to deliver the tobacco for home consumption, does not apply to the offences in proposed sections 308-125, 308-130 and 308-135.

96 See proposed subsections 308-10(7), 308-15(7), 308-20(7), 308-25(7), 308-30(7), 308-35(7), 308-40(7), 308-45(7), 308-50(7), 308-110(6), 308-115(6), 308-120(6), 308-125(6), 308-130(6) and 308-135(6).

97 See proposed subsections 308-10(8), 308-15(8), 308-20(8), 308-25(8), 308-30(8), 308-35(8), 308-40(8), 308-45(8) and 308-50(8), 308-110(7), 308-115(7), 308-120(7), 308-125(7), 308-130(7) and 308-135(7).

98 See proposed subsections 308-10(9), 308-15(9), 308-20(9), 308-25(9), 308-30(9), 308-35(9), 308-40(9), 308-45(9) and 308-50(9), 308-110(8), 308-115(8) and 308-120(8).

law of the Commonwealth, or where the defendant has reasonable grounds to suspect that one of those circumstances exists.<sup>99</sup>

1.125 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.

1.126 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.

1.127 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. Additionally, the committee notes that the *Guide to Framing Commonwealth Offences*<sup>100</sup> provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the relevant 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.

1.128 With respect to the defences in proposed Subdivision 308-A, the explanatory memorandum states:

This is appropriate [that the defendant bears an evidential burden] given the knowledge that the defendant has concerning the possession, buying or selling of the tobacco, the capacity of defendants to provide that information, the difficulty of law enforcement agencies obtaining the information and the seriousness of the offence.

...

Having defences with an evidential burden of proof is appropriate and is consistent with the *Guide to Framing Commonwealth Offences*.<sup>101</sup>

1.129 The explanatory memorandum indicates that this explanation also applies to the defences in proposed Subdivision 308-B.<sup>102</sup> The explanatory memorandum does

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99 See proposed subsections 308-10(10), 308-15(10), 308-20(10), 308-25(10), 308-30(10), 308-35(10), 308-40(10), 308-40(10), 308-45(10) and 308-50(10).

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

101 Explanatory memorandum, p. 24.

102 Explanatory memorandum, p. 31 (paragraph 1.132).

not provide further information about the defences in proposed Subdivisions 308-A and 308-B, merely restating the operation of the relevant provisions.

1.130 The committee notes the brief explanation in the explanatory memorandum. However, it remains unclear to the committee that all of the matters captured by the defences in proposed Subdivisions 308-A and 308-B would be *peculiarly* within the knowledge of the defendant. For example, the committee considers it likely that whether premises are covered by a licence, or whether a person is covered by movement permission, could be established by the prosecution through reasonable inquiries. The question of whether customs or excise duty has been paid, or whether an exemption exists to the payment of duty under a law of the Commonwealth (as a defence to the offences in proposed Subdivision 308-A) could similarly be established by the prosecution through reasonable inquiries.

1.131 The committee acknowledges that whether a person *has reasonable grounds to suspect* that excise or customs duty has been paid, or that an exemption to the payment of duty exists under a Commonwealth law (as a defence to the offences in proposed Subdivision 308-A), could in some circumstances be matters that are peculiarly within the knowledge of the defendant. However, the committee would expect a more detailed explanation of whether this is the case to be provided in the explanatory memorandum.

**1.132 As the explanatory memorandum does not adequately address this issue, the committee requests the Treasurer's more detailed justification for the reversal of the evidential burden of proof in the defences in proposed Subdivisions 308-A and 308-B. The committee's consideration of the appropriateness of provisions that reverse the evidential burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>103</sup>**

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

## Treasury Laws Amendment (Income Tax Consolidation Integrity) Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend the <i>Income Tax Assessment Act 1997</i> to:</p> <ul style="list-style-type: none"> <li>• remove a double benefit which can arise when an entity with a deductible liability joins a consolidated group;</li> <li>• simplify the operation of the entry and exit tax cost setting rules by ensuring that deferred tax liabilities are disregarded;</li> <li>• remove anomalies that arise when an entity that has securitised assets joins or leaves a tax consolidated group by modifying the tax cost setting rules to disregard liabilities relating to the securitised assets;</li> <li>• prevent non-residents churning assets between different consolidated groups to access double deductions;</li> <li>• clarify the operation of the Taxation of Financial Arrangements provisions when an intra-group asset or liability that is, or is part of, a Division 230 financial arrangement emerges from a consolidated group because a subsidiary member leaves the group; and</li> <li>• remove provisions which allow consolidated groups to access double deductions by shifting value across entities in the group</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 15 February 2018

*The committee has no comment on this bill.*

## Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 1) Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend various Acts in relation to veterans' affairs and military rehabilitation and compensation</p> <p>Schedule 1 seeks to introduce a range of additional family support measures for current and former members of the Australian Defence Force (ADF) and their families</p> <p>Schedule 2 seeks to create a new veteran payment to provide financial support until a claim for a mental health injury is determined</p> <p>Schedule 3 seeks to create a new pilot mental health program available to veterans in rural and regional areas</p> <p>Schedule 4 seeks to provide veterans with catastrophic injury or disease with at least the same entitlements as civilian employees</p> <p>Schedule 5 seeks to enable the automation of a qualifying service determination prior to or at the time a veteran engages with the Department of Veterans' Affairs or makes an application for any benefit or payment</p> <p>Schedule 6 seeks to provide for technical amendments to the <i>Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988</i></p> <p>Schedule 7 seeks to make a number of minor amendments to the Specialist Medical Review Council provisions</p> <p>Schedule 8 seeks to extend the gold card eligibility for those members of the ADF who served in Japan prior to the British Commonwealth Occupation Force</p>
<b>Portfolio</b>	Veterans' Affairs
<b>Introduced</b>	House of Representatives on 15 February 2018

### Standing appropriation<sup>104</sup>

1.133 Item 8 of Schedule 1 expands the purposes for which the Consolidated Revenue Fund can be appropriated to include for the purposes of paying assistance or benefits of a certain kind, such as child care, counselling or household services under the *Military Rehabilitation and Compensation Act 2004*.

<sup>104</sup> Schedule 1, item 8. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

1.134 As set out in Chapter 3 of this Digest, 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.

1.135 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish or extend 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.

1.136 The committee's long-standing expectation is that the explanatory memorandum to a bill establishing or expanding a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the explanatory memorandum states that this ensures that the Consolidated Revenue Fund may be appropriated for the purposes of providing assistance or benefit provided under new section 268B.<sup>105</sup>

**1.137 The committee draws the expansion of this standing appropriation to the attention of the Senate.**

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105 Explanatory memorandum, p. 21.

## Commentary on amendments and explanatory materials

### Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017

#### [Digest 5 & 7/17]

1.138 On 28 February 2018 the House of Representatives agreed to seven Government amendments, the Minister representing the Minister for Communications (Mr Fletcher) presented an addendum to the explanatory memorandum and a supplementary explanatory memorandum, and the bill was read a third time.

**1.139 The committee thanks the minister for providing this addendum to the explanatory memorandum, which includes key information previously requested by the committee.<sup>106</sup>**

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### Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018

#### [Digest 1/18]

1.140 On 13 February 2018 the Senate agreed to one Opposition amendment. On 14 February 2018 the Senate agreed to one Nick Xenophon Team amendment and the bill was read a third time.

1.141 The amendment proposed by the Nick Xenophon Team seeks to introduce criminal offences relating to the use of carriage services<sup>107</sup> to engage in conduct relating to intimate images.<sup>108</sup> It is proposed that the offences would be punishable by a custodial penalty of between three and 10 years imprisonment. Proposed section 474.24J seeks to create a number of exemptions (offence-specific defences), which provide that a person is not criminally responsible for certain offences where:

- the relevant conduct is of public benefit, and does not extend beyond what is of public benefit;
- the person engaged in the relevant conduct for the purposes of collecting, preparing for the dissemination of or disseminating news media material, did not intend the conduct to cause harm to the subject, and reasonably believed the conduct to be in the public interest;

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106 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, pp. 44-50.

107 'Carriage service' is defined in section 7 of the *Telecommunications Act 1997* as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

108 'Intimate image' (defined in proposed section 9B of the bill) includes any still or moving visual image which depicts a person's private parts, depicts a person engaged in a private activity, or depicts a person without attire of religious or cultural significance (in certain circumstances).

- the person is a law enforcement officer or intelligence or security officer engaging in his or her duties, and the relevant conduct is reasonable in the circumstances for the purpose of performing those duties; or
- the person engaged in the conduct in good faith for the sole purpose of assisting the Children's e-Safety Commissioner to detect prohibited content or potential prohibited content, or manufacturing, developing or updating content filtering technology.

1.142 Each of the defences in proposed section 474.24J reverses the evidential burden of proof — requiring the defendant to raise evidence to prove the matters to which the defences relate. The committee has longstanding concerns about provisions that reverse the evidential burden of proof, as such provisions interfere with the common-law right to be presumed innocent until proven guilty. Additionally, the committee notes that the *Guide to Framing Commonwealth Offences*<sup>109</sup> states that a matter should only be included in a 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.<sup>110</sup>

1.143 It is not apparent to the committee that all of the matters in the proposed defences are peculiarly within the defendant's knowledge, or are matters that would be significantly more difficult or costly for the prosecution to establish. For example, whether a person is a law enforcement officer, and whether particular conduct is reasonable in the context of performing that person's duties, could be established by the prosecution through reasonable inquiries, taking into account the legislative and policy context within which the person operates.

1.144 It is also not apparent that whether conduct is of public benefit is a matter that is peculiarly within the defendant's knowledge. Rather, it is likely that whether conduct is in the public benefit would be left to the court to determine. In this regard, the committee notes that proposed subsection 474.21J(1) (which sets out the defence relating to public benefit) states that 'whether the conduct is of public benefit is a question of fact and the person's motives... are irrelevant.'

**1.145 The committee draws its scrutiny concerns to the attention of Senators in relation to the reversal of the evidential burden of proof in proposed section 474.24J.**

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

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

**Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017****[Digest 12, 13 & 15/17]**

1.146 On 12 February 2018 the House of Representatives agreed to three Government amendments, the Minister for Social Services (Mr Tehan) presented an addendum to the explanatory memorandum and a supplementary explanatory memorandum, and the bill was read a third time.

**1.147 The committee thanks the minister for providing this addendum to the explanatory memorandum, which includes key information previously requested by the committee.<sup>111</sup>**

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**Social Services Legislation Amendment (Cashless Debit Card) Bill 2017****[Digest 10 & 12/17]**

1.148 On 12 February 2018 the Senate agreed to one Government amendment and the Minister for International Development and the Pacific (Senator Fierravanti-Wells) tabled a supplementary explanatory memorandum. On 13 February 2018 the House of Representatives agreed to the Senate amendment and the bill was passed.

1.149 In *Scrutiny Digest 10 of 2017*,<sup>112</sup> the committee raised concerns that the bill would remove existing limitations on trials of the cashless debit card program, including the duration of trials, the maximum number of trial sites and the maximum number of trial participants, and leave these significant matters to be determined by the minister by legislative instrument. Prior to the government amendment, the effect of the bill would have been to convert a tightly controlled trial program into one that could be expanded, by legislative instrument, so as to apply to any site chosen by the government.

1.150 The government amendment preserves existing statutory restrictions on trial parameters, specifies trial areas in the primary legislation, and removes the ability for the minister to determine the parameters of program trials by delegated legislation. The amendment appears to address the majority of the committee's concerns.

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

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111 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 13 of 2017*, pp. 98-105, and *Scrutiny Digest 15 of 17*, pp. 51-59

112 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, pp. 25-26.

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

- Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017;<sup>113</sup> and
- Treasury Laws Amendment (National Housing and Homelessness Agreement) Bill 2017.<sup>114</sup>

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113 On 15 February 2018 the Senate agreed to one Government amendment. On the same day the House of Representatives agreed to the Senate amendment and the bill was passed.

114 On 1 March 2018 the House of Representatives agreed to seven Government and one Opposition amendment, the Assistant Minister to the Treasurer (Mr Sukkar) presented a supplementary explanatory memorandum, and the bill was read a third time.

## Chapter 2

### Commentary on ministerial responses

2.1 This chapter considers the responses of ministers to matters previously raised by the committee.

### Australian Passports Amendment (Identity-matching Services) Bill 2018

<b>Purpose</b>	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
<b>Portfolio</b>	Foreign Affairs and Trade
<b>Introduced</b>	House of Representatives on 7 February 2018
<b>Bill status</b>	Before the House of Representatives

2.2 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2018*. The minister responded to the committee's comments in a letter dated 7 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>1</sup>

#### Significant matters in delegated legislation<sup>2</sup>

##### *Initial scrutiny – extract*

2.3 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 determination<sup>3</sup> and for a number of listed purposes. Item 1 seeks to amend

1 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

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

3 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).

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.

2.4 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.

2.5 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.

### ***Minister's response***

2.6 The minister advised:

Section 46 of the *Australian Passports Act 2005* (the Act) lists particular purposes for which personal information may be disclosed under the Act. Section 46 further provides that the kind of personal information disclosed for these purposes, and the persons to whom it may be disclosed, are to be specified in a Minister's determination.

Section 46 currently lists five purposes for which personal information may be disclosed:

- (a) confirming or verifying information relating to an applicant for an Australian travel document or a person to whom an Australian travel document has been issued
- (b) facilitating or otherwise assisting the international travel of a person to whom an Australian travel document has been issued
- (c) law enforcement
- (d) the operation of family law and related matters
- (e) the purposes of a law of the Commonwealth specified in Minister's determination.

The *Australian Passports Determination 2015* (the Determination) specifies in section 23 the kinds of information that may be disclosed for each of

these purposes, the persons to whom it may be disclosed and, with regard to paragraph 46(e) of the Act, laws in respect of which it may be disclosed.

The matters regulated in section 23 are matters of administration and detail and are subject to frequent technical changes, such as changes to the titles of the agencies and office-holders to whom different disclosures may be made. In enacting the Act, Parliament considered it appropriate that these matters be regulated through delegated legislation.

The *Australian Passports Amendment (Identity-matching Services) Bill 2018* (the Bill) will amend the Act to add a new purpose for disclosing information, namely to participate in a service to share or match information relating to the identity of an individual. It is appropriate, and consistent with the general operation of the Act, that this new purpose be inserted into the list in section 46, and that, by normal operation of that section, details about the kinds of information that may be disclosed, the persons to whom it may be disclosed, and the services or kinds of service by which such disclosures may be made, be specified in the Determination.

### **Committee comment**

2.7 The committee thanks the minister for this response. The committee notes the minister's advice that section 23 of the Australian Passports Determination 2015, made pursuant to section 46 of the Passports Act, regulates matters that are of administration and detail and are subject to frequent technical changes, such as changes to the titles of the agencies and office-holders to whom different disclosures may be made. The committee further notes the minister's view that it is appropriate, and consistent with the general operation of the Act, that this new purpose be inserted into the list in section 46, and that, by normal operation of that section, details about the kinds of information that may be disclosed, the persons to whom it may be disclosed, and the services or kinds of service by which such disclosures may be made, be specified in the Determination.

2.8 The committee appreciates the importance of flexibility in this area of frequent technological change. However, the committee remains concerned that the proposed new provision is broadly expressed, permitting disclosure of personal information for 'a service...to share or match information relating to the identity of a person', and there would be no limits in the primary legislation as to what type of personal information may be shared or who this information may be shared with.

2.9 The committee reiterates its view that significant matters, such as authorising the disclosure of personal information, should be included in primary legislation rather than delegated 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 seeking proposed changes in the form of an amending bill.

**2.10** The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the question of the appropriateness of authorising the disclosure of personal information in broad terms in delegated rather than primary legislation.

**2.11** The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

## Broadcasting Legislation Amendment (Digital Radio) Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend the <i>Broadcasting Services Act 1992</i> and the <i>Radiocommunications Act 1992</i> (Radiocommunications Act) to:</p> <ul style="list-style-type: none"> <li>• remove the requirement that the Australian Communications and Media Authority (ACMA) give written notice of its intention to declare a digital radio start-up day;</li> <li>• remove specific requirements in the Radiocommunications Act that ACMA consult before preparing or varying a digital radio channel plan;</li> <li>• amend timeframes associated with the formation of eligible joint venture companies and clarify the invitation and acceptance process for the formation of such companies;</li> <li>• amend timeframes associated with the formation of digital community radio broadcasting representative companies and clarify the invitation and acceptance process for the formation of such companies;</li> <li>• amend timeframes associated with issuing a foundation digital radio multiplex transmitter (DRMT) licence in accordance with a price-based allocation system;</li> <li>• amend timeframes associated with DRMT licensees giving the Australian Competition and Consumer Commission access undertakings; and</li> <li>• clarify how excess multiplex capacity on foundation DRMT licences is determined</li> </ul>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	Senate on 6 December 2017
<b>Bill status</b>	Passed both Houses on 15 February 2018

2.12 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 21 February 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>4</sup>

4 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

## Consultation prior to making delegated legislation<sup>5</sup>

### *Initial scrutiny – extract*

2.13 Schedule 1, item 4 of the bill seeks to repeal subsections 44A(5) and (7) of the *Radiocommunications Act 1992* (Radiocommunications Act). Repealing those provisions would remove the requirement for the Australian Communications and Media Authority (ACMA) to, before preparing or varying a digital radio channel plan, publish a draft of the plan or variation on ACMA's website, invite members of the public to make submissions for a period of at least 30 days, and consider any submissions received from members of the public within that period. In explaining the repeal of those provisions, the explanatory memorandum states:

As digital radio channel plans and variations to digital radio channel plans are legislative instruments (subsections 44A(1) and (6)), the general consultation requirements for legislative instruments in Chapter 3 of the Legislation Act also apply...

Those general requirements are sufficient to ensure that the ACMA undertakes appropriate, and reasonably practicable, consultation when preparing or varying digital radio channel plans. Therefore, it is proposed to remove the separate, but duplicate, requirement in subsections 44A(5) and (7) of the Radcomms Act.<sup>6</sup>

2.14 However, the committee notes that section 17 of the *Legislation Act 2003* (Legislation Act) does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker be satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule-maker does not think that consultation is appropriate, there is no requirement that consultation be undertaken.

2.15 Further, although the explanatory memorandum states that the consultation requirements in subsection 44(5) and (7) of the Radiocommunications Act duplicate those in the Legislation Act, it is not apparent to the committee that the consultation requirements are equivalent. The Radiocommunications Act currently imposes specific, mandatory consultation requirements on ACMA, which provide for at least 30 days for members of the public to make submissions on a draft plan or variation and for those submissions to be considered. By contrast, the Legislation Act provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.<sup>7</sup>

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5 Schedule 1, item 4. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

6 Explanatory memorandum, p. 9.

7 See sections 18 and 19 of the *Legislation Act 2003*.

2.16 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) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity.

2.17 The committee requests the minister's detailed justification for removing the current, specific requirements for consultation by ACMA prior to the preparation or variation of a digital radio channel plan by legislative instrument.

### ***Minister's response***

2.18 The minister advised:

The nature of digital radio planning necessarily requires that the ACMA consults with affected broadcasters. Digital radio channel plans are technical documents that are prepared by the ACMA following a detailed analysis of the number and type of digital radio multiplex transmitter licences that are likely to be required in the relevant licence area and having regard to the availability of suitable spectrum in that licence area. It would not be possible for the ACMA to properly undertake the steps necessary to prepare a digital radio channel plan without consultation with commercial, community and national broadcasters in those areas.

In practice, digital radio channel plans are the outcome of a lengthy, multi-stage consultative process. In response to the Digital Radio Report prepared by the Department of Communications in 2015, the Digital Radio Planning Committee for Regional Australia was established. The Planning Committee is chaired by the ACMA and has representatives from the commercial radio industry peak body, the community radio peak body, ABC, SBS and the Department of Communications and the Arts and the Australian Competition and Consumer Commission. It meets two to three times a year, and is the formal collaborative mechanism for driving the rollout of digital radio into regional Australia.

The Planning Committee recommended that the ACMA endorse planning principles which were developed by its technical sub-committee over a 12 month period. These planning principles are informing the ACMA's development of indicative regional allotment plans, which form the basis for making the detailed digital radio channel plans. The ACMA invited broadcasters to a workshop that explained the ACMA's approach to the development of the allotment plans. The ACMA has sought on-going feedback from broadcasters on iterations of the allotment planning through a consultation site which broadcasters may subscribe to.

The Bill would not alter the form by which digital radio channel plans are made or varied by the ACMA; they would continue to be through legislative instruments and the consultation provision under section 17 of the *Legislation Act 2003* would still apply in respect of the making of such instruments. However, the proposed amendment will provide the ACMA

with greater flexibility in how and when it conducts consultation for digital radio planning.

This is consistent with the ACMA's flexibility in relation to planning for analogue radio services, as licence area plans are not subject to specific legislative consultation requirements. The increased flexibility will enable the ACMA to target consultation to the affected parties, including in relation to minor variations of digital radio channel plans. It would also assist to avoid delays that may be caused by the existing requirement to allow at least 30 days for public submissions, particularly in circumstances where consultation and drafting occur concurrently or iteratively, or where affected parties provide quick feedback.

### **Committee comment**

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that the nature of digital radio channel planning necessarily requires that the ACMA consults with affected broadcasters and that, in practice, digital radio channel plans are the outcome of a lengthy, multi-stage consultation process. The committee also notes the minister's advice that the removal of the specific consultation obligations in subsections 44A(5) and (7) of the *Radiocommunications Act 1992* (Radiocommunications Act) is intended to increase flexibility and to drive efficiencies in the drafting process. Finally, the committee notes the minister's advice that the bill would not alter the form by which digital radio channel plans are made or varied by the ACMA, and that the making and variation of plans would continue to be through legislative instruments — which are subject to consultation requirements under the *Legislation Act 2003* (Legislation Act).

2.20 While noting this advice, the committee retains concerns that specific requirements for consultation prior to the making of delegated legislation are sought to be removed. The committee does not generally consider a desire for efficiency or flexibility, on its own, to be a sufficient justification for removing specific consultation requirements. The committee takes this opportunity to reiterate its general view that, where the Parliament delegates its legislative power in relation to significant regulatory schemes, it is appropriate that specific consultation obligations (beyond those in section 17 of the Legislation Act) are included in the bill and that compliance with those obligations is a condition of the validity of the relevant legislative instrument. Where the standard consultation requirements in the Legislation Act are relied on (in this case, because specific consultation requirements are to be removed) it is possible for no consultation to be undertaken if a rule-maker considers it to be unnecessary or inappropriate. Further, the fact that consultation does not occur cannot affect the validity or enforceability of an instrument. Therefore, the committee does not consider that the consultation provisions in the Legislation Act are equivalent to the specific consultation requirements that existed in subsections 44A(5) and (7) of the Radiocommunications Act.

**2.21** In light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment on this matter.

## Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Broadcasting Services Act 1992</i> to: <ul style="list-style-type: none"> <li>• establish a Register of Foreign Ownership of Media Assets; and</li> <li>• introduce a new 'local content' criterion in relation to applications and renewals of community radio broadcasting licences</li> </ul> <p>The bill also seeks to make a minor amendment to the <i>Australian Communications and Media Authority Act 2005</i></p>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	Senate on 6 December 2017
<b>Bill status</b>	Before the Senate

2.22 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 21 February 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>8</sup>

### **Broad delegation of administrative powers<sup>9</sup>**

#### ***Initial scrutiny – extract***

2.23 Section 50 of the *Australian Communications and Media Authority Act 2005* (ACMA Act) provides that the Australian Communications and Media Authority (ACMA) may delegate any or all of its functions and powers to a Division of ACMA.<sup>10</sup> Section 52 of the ACMA Act provides, subject to section 53, that a Division within ACMA may delegate all or any of the functions and powers delegated to it to a member of the Division, an associate member, an ACMA staff member, or a person

8 See correspondence relating to *Scrutiny Digest No.3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

9 Schedule 1, item 1. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

10 Section 46 of the *Australian Communications and Media Authority Act 2005* establishes how ACMA may establish a Division, which must consist of at least three members chosen by ACMA.

whose services are made available to the ACMA under subsection 55(1). Section 53 places limits on the powers that are delegable to persons other than Divisions.

2.24 Proposed paragraph 53(2)(k) seeks to amend section 53 to provide an exception to the limit on the powers that may be delegable, in effect providing that ACMA can delegate to a broad range of persons, including any ACMA staff member (who may be of any APS level), the power to issue notices under new Division 10A of the *Broadcasting Services Act 1992* (Broadcasting Act) (which would require certain foreign stakeholders in Australian media companies to notify ACMA of certain matters).

2.25 The explanatory memorandum explains that the effect of this amendment is that 'ACMA is able to delegate directly to any ACMA staff member the power to issue notices under new Division 10A [of the Broadcasting Act]'.<sup>11</sup> However, it provides no information about why the power to issue notices under new Division 10A is proposed to be delegated to a broad range of persons, including any ACMA staff member.

2.26 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.

2.27 The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

2.28 The committee requests the minister's advice as to why it is considered necessary for ACMA to have a broad power to delegate the power to issue notices under new Division 10A of the *Broadcasting Services Act 1992*, and seeks the minister's advice as to the appropriateness of amending the bill to confine delegates to the holders of nominated offices or members of the Senior Executive Service.

### ***Minister's response***

2.29 The minister advised:

It is not unusual for Commonwealth agencies to be permitted to delegate statutory powers and functions to individual members or staff. The Australian Communications and Media Authority's (ACMA) source of

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11 Explanatory memorandum p. 26.

legislative authority to delegate its powers is found in Part 4 of the *Australian Communications and Media Authority 2005* (ACMA Act).

The proposed amendment, under item 1 of Schedule 1 to the Bill, to section 53 of the ACMA Act has the effect that sections 51 and 52 of that Act will not apply to the issuing of a notice under proposed Division 10A of the *Broadcasting Services Act 1992* (BSA). This will enable the ACMA to delegate directly to any ACMA staff member the power to issue the abovementioned notices, providing greater flexibility and efficiency in the day to day administration of the proposed Register of Foreign Owners of Media Assets (the Register).

Although the proposed delegation power would enable the ACMA to delegate the issuing of notices to officers below the Senior Executive Service (SES) level, this does not necessarily mean that the ACMA would exercise the power in such a way. Ultimately this would be a matter for the ACMA, as an independent statutory body, and it will have in place appropriate governance and supervisory arrangements for all staff, including for those staff exercising delegations below the SES Band 1 level. Prior to the commencement of the Register, the ACMA will have in place procedures that will ensure that only those staff with appropriate qualifications and experience, and relevant training, are delegated key functions associated with the administration of the Register. I am satisfied that, in light of the above safeguards, that amendments to the proposed delegation powers are not necessary.

### **Committee comment**

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that the ACMA would not necessarily exercise its broad power to delegate the power to issue notices under proposed Division 10A of the *Broadcasting Services Act 1992* and that, prior to the commencement of the proposed Register of Foreign Owners of Media Assets, the ACMA will have in place procedures that will ensure that only those staff with appropriate qualifications and experience, and relevant training, are delegated key functions associated with the administration of the Register.

2.31 However, the committee reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, that a limit is set on the scope and type of powers that may be delegated. While the committee notes the minister's advice as to how it is intended this power will be exercised, there is nothing on the face of the bill to limit it in the way set out in the response. Further, while the minister has advised that the ACMA will have in place appropriate governance and supervisory arrangements for all staff, there is nothing on the face of the bill that would require persons exercising powers under delegation to possess appropriate qualifications, attributes or expertise.

**2.32** The committee considers that it would be appropriate for the bill to be amended to require that the ACMA be satisfied that persons authorised to issue notices under proposed Division 10A of the *Broadcasting Services Act 1992* and related provisions hold appropriate qualifications, attributes or expertise.

**2.33** The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the delegation of administrative powers to a broad range of persons as provided for in proposed paragraph 53(2)(k) of the bill.

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## **Immunity from civil liability<sup>12</sup>**

### ***Initial scrutiny – extract***

2.34 Proposed section 74T seeks to provide broad immunity to the Commonwealth, to the ACMA and to ACMA officials from liability for acts or omissions done in good faith in the performance or purported performance or exercise of functions or powers in administering the new Register of Foreign Owners of Media Assets. This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless 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 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.

2.35 The committee expects that if a bill seeks to provide civil immunity, particularly where such immunity could affect individual rights, this should be soundly justified. It is not clear, in particular, why it is necessary to grant immunity to the Commonwealth as an entity. In this instance, the explanatory memorandum provides little explanation for this provision, merely stating that this 'guard[s] against the risk of the ACMA (or its officers) and the Commonwealth being sued' and that it is expected that the ACMA will undertake all reasonable efforts to ensure the accuracy of the information on the Register.<sup>13</sup>

2.36 The committee requests the minister's advice as to why it is considered appropriate to provide the Commonwealth, the ACMA and ACMA officials with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

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12 Schedule 1, item 5, proposed section 74T. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

13 Explanatory memorandum p. 42.

### **Minister's response**

#### 2.37 The minister advised:

Proposed section 74T (at item 5 of Schedule 1 to the Bill) would provide an immunity to the Commonwealth, the ACMA, and ACMA officials for an act or matter in the performance or purported performance of any function, or in the exercise or purported exercise of any power conferred on the ACMA by proposed Subdivision B, unless bad faith can be established. As noted in the Explanatory Memorandum to the Bill, the operation of this provision is designed to prevent the Commonwealth, ACMA or individual ACMA officials from being sued for any error in the information published on the Register.

The granting of immunities to public authorities is both appropriate and necessary to ensure that public authorities can perform their statutory duties effectively. The grant of executive immunities is also relatively common across Commonwealth legislation. In this regard, the civil immunity provision under proposed section 74T was modelled on, and consistent with, similar immunities that protect Commonwealth agencies and their officials against liability for acts performed in good faith in the performance of legislative functions. These include:

- subsection 68(6) of the *Interactive Gambling Act 2001*;
- section 58 of the *Age Discrimination Act 2004*;
- section 246 of the *Australian Securities and Investments Commission Act 2001*;
- section 57 of the *Australian Sports Commission Act 1989*; and
- section 35 of the *Australian Information Commissioner Act 2010*.

Proposed section 74T is also sufficiently constrained such that any impact on the rights of an individual to bring a civil action against the Commonwealth, the ACMA, or ACMA officials, is proportionate having regard to the stated objective of the Register. The immunity provisions only apply to the Commonwealth, the ACMA, or ACMA officials to the extent that such persons were performing, or purporting to perform, their functions as required for the effective administration of the Register. The immunity is therefore targeted to particular persons in a specific regulatory context.

In a practical sense, the proposed immunity is both necessary and justified. In the absence of immunity, it would be extremely difficult to achieve an effective administration of the Register, as ACMA officials may be unwilling to perform the necessary functions in light of the risk of being held personally liable. The effect would be that even acts done honestly and in good faith could expose such persons unjustifiably to liability. On the basis of the above analysis, I am satisfied that the immunity from civil liability is appropriate.

**Committee comment**

2.38 The committee thanks the minister for this response. The committee notes the minister's advice that the immunity is targeted to particular persons in a specific regulatory context and that, in the absence of immunity, it would be extremely difficult to achieve an effective administration of the proposed Register of Foreign Owners of Media Assets, as ACMA officials may be unwilling to perform the necessary functions in light of the risk of being held personally liable.

2.39 The committee notes that this explanation may justify the proposed immunity in relation to individual ACMA officials. However, the explanation, with its emphasis on personal liability, does not appropriately justify the proposed immunity in relation to the ACMA itself or the Commonwealth.

**2.40 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.41 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the immunity from civil liability in proposed section 74T of the bill in relation to the ACMA and the Commonwealth.**

## Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017

<b>Purpose</b>	This bill seeks to amend various Acts in relation to communications to: <ul style="list-style-type: none"> <li>• create a regulatory framework (online content service provider rules) which can be used by the Australian Communications and Media Authority (ACMA) to impose gambling promotions restrictions on online content service providers; and</li> <li>• provide for ACMA to (if directed by the minister) determine program standards about gambling promotional content which apply to certain broadcasters and subscription providers</li> </ul>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	Senate on 6 December 2017
<b>Bill status</b>	Before the Senate

2.42 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 21 February 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>14</sup>

### **Broad delegation of administrative powers<sup>15</sup>**

#### ***Initial scrutiny – extract***

2.43 Section 51 of the *Australian Communications and Media Authority Act 2005* (ACMA Act) permits the Australian Communications and Media Authority (ACMA) to delegate any or all of its functions and powers to a member or associate member of the ACMA, a member of the ACMA's staff, or a person whose services are made available to the ACMA under subsection 55(1) of the ACMA Act. Section 52 of the

14 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

15 Schedule 1, item 2. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

ACMA Act permits a Division<sup>16</sup> to sub-delegate any or all of the functions and powers delegated to it by the ACMA to the same persons to whom delegation is permitted under section 51.

2.44 Section 53 of the ACMA Act provides for limits on the powers that may be delegated or sub-delegated under sections 51 and 52. Relevantly, paragraph 53(2)(k) of the ACMA Act provides that sections 51 and 52 do not apply to issuing, or extending the time for compliance with, a notice under the *Broadcasting Services Act 1992* (Broadcasting Act), other than a notice under Part 9C of that Act.

2.45 Item 23 of the bill proposes to amend paragraph 53(2)(k) to exempt notices under proposed Schedule 8 to the Broadcasting Act<sup>17</sup>, and notices under any other provision of the Broadcasting Act so far as the provision relates to that Schedule, from the operation of paragraph 53(2)(k). The effect of the amendment made by item 23 would be to allow the ACMA to delegate, or a Division of the ACMA to sub-delegate, the power to issue notices under proposed Schedule 8 to the Broadcasting Act and related provisions to a broad range of persons, including any member of staff of the ACMA – which can be any APS level employee.<sup>18</sup>

2.46 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's preference is that legislation sets a limit either on the scope of the powers that may be delegated or on the categories of people to whom those powers might be delegated. The committee prefers 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.

2.47 In this instance, the explanatory memorandum states that the intent of the amendment 'is to allow for greater administrative convenience for the ACMA in relation to service of notices in relation to new Schedule 8 [of the Broadcasting Act]'.<sup>19</sup> The committee notes that it has generally not accepted a desire for administrative convenience as a sufficient justification for allowing a broad

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16 Divisions of the ACMA are established under section 46 of the ACMA Act to deal with particular matters. Current ACMA Divisions include Communications Infrastructure, Corporate and Research, and Legal Services. Under section 50 of the ACMA Act, the ACMA may delegate any or all of its functions and powers to a Division so far as they relate to the kinds of matters the Division can deal with.

17 Schedule 8 to the Broadcasting Act is a new Schedule, proposed to be inserted by item 22 of the bill.

18 See section 54 of the ACMA Act.

19 Explanatory memorandum, p. 25.

delegation of administrative powers to officials at any level. The committee also notes that there is nothing in the bill or in either the ACMA Act or the Broadcasting Act that would limit the delegation of power to issue, or extend the time for compliance with, a notice under proposed Schedule 8 to the Broadcasting Act and related provisions, to persons with appropriate expertise, qualifications or attributes.

2.48 The committee requests the minister's more detailed justification for amending paragraph 53(2)(k) of the ACMA Act to permit the delegation to a broad class of persons of the power to issue and extend the time for compliance with notices under proposed Schedule 8 to the *Broadcasting Services Act 1992* and related provisions.

2.49 The committee considers it may be appropriate to amend the bill to require that persons authorised to issue notices under proposed Schedule 8 to the *Broadcasting Services Act 1992* and related provisions hold special attributes, qualifications or qualities, and seeks the minister's advice in relation to this matter.

### **Minister's response**

2.50 The minister advised:

It is not unusual for Commonwealth agencies to be permitted to delegate statutory powers and functions to individual members or staff. The Australian Communications and Media Authority's (ACMA) source of legislative authority to delegate its powers is found in Part 4 of the *Australian Communications and Media Authority [Act] 2005* (ACMA Act).

The proposed amendment, by item 2 of Schedule 1 to the Bill, to paragraph 53(2)(k) of the ACMA Act has the effect that sections 51 and 52 of that Act will not apply to the issuing of a notice under proposed Schedule 8 of the *Broadcasting Services Act 1992* (BSA), or under any other provision of the BSA that relates to Schedule 8. This will enable the ACMA, or a Division of the ACMA, to delegate directly to a range of persons, including any member of staff of the ACMA the power to issue the abovementioned notices, providing greater flexibility and efficiency in the day to day administration of the proposed online content service provider rules (the rules).

Although the proposed delegation power would enable the ACMA to delegate the issuing of notices to officers below the Senior Executive Service (SES) level, this does not necessarily mean that the ACMA would exercise the power in such a way. Ultimately this would be a matter for the ACMA, as an independent statutory body, having regard to the particular circumstances, and it is expected it will have in place appropriate governance and supervisory arrangements for all staff, including for any staff exercising delegations below the SES Band 1 level.

### **Committee comment**

2.51 The committee thanks the minister for this response. The committee notes the minister's advice that that it is not unusual for Commonwealth agencies to be

permitted to delegate statutory powers and functions to individual members or staff, as well as the minister's advice that permitting the ACMA to delegate the power to issue notices will provide greater flexibility in the day to day administration of the proposed online content service provider rules.

2.52 The committee also notes the minister's advice that the ACMA would not necessarily delegate the power to issue notices to officers below the Senior Executive Service (SES) level, and that it is expected that the ACMA will have in place appropriate governance and supervisory arrangements for all staff, including staff exercising delegations below the SES Band 1 level.

2.53 As the committee previously noted, the committee has not generally accepted a desire for administrative flexibility or efficiency as sufficient justification for the broad delegation of administrative powers at any level. The committee therefore reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or to senior officials or, alternatively, that a limit is set on the scope and type of powers to be delegated.

2.54 The committee also remains concerned that, while the minister has advised that the ACMA may not necessarily delegate the power to issue notices to officers below the SES level, there is nothing on the face of the bill that would ensure that delegations will be confined in this way. Further, while the minister has advised that the ACMA will have in place appropriate governance and supervisory arrangements for all staff, there is nothing on the face of the bill that would require persons exercising powers under delegation to possess appropriate qualifications, attributes or expertise.

**2.55 The committee considers that it would be appropriate for the bill to be amended to require that the ACMA be satisfied that persons authorised to issue notices under proposed Schedule 8 to the *Broadcasting Services Act 1992* and related provisions hold appropriate qualifications, attributes or expertise.**

**2.56 The committee otherwise draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of permitting the ACMA to delegate the power to issue such notices to officers at any APS level.**

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## Limitation on merits review<sup>20</sup>

### *Initial scrutiny – extract*

2.57 The bill seeks to empower the ACMA to determine gambling promotion program standards and to make online content provider rules,<sup>21</sup> and provides that

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20 Schedule 1, item 15. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

gambling promotion program standards and online content provider rules (respectively) may make provision in relation to matter by empowering the ACMA to make decisions of an administrative character.<sup>22</sup>

2.58 Current section 204 of the Broadcasting Act prescribes decisions in relation to which an application for merits review may be made to the Administrative Appeals Tribunal (AAT), as well as specifying the provision under which the relevant decision is made and the person who may make the application. Item 15 of the bill proposes to amend section 204 to insert new subsections 204(3) and (4). These new provisions would provide that an application may be made to the AAT for review of a decision made by the ACMA under:

- a gambling promotion program standard, so long as the standard provides that the decision is a reviewable decision for the purposes of section 204; and
- the online content provider rules, so long as those rules provide that the decision is a reviewable decision for the purposes of section 204.

2.59 In effect, the new provisions would empower the ACMA, in determining gambling promotion program standards and making online content provider rules, to determine which of its decisions under those instruments are subject to merits review. In this regard, the explanatory memorandum states:

As some, but not all, decisions the ACMA may empower itself to make ...may be appropriate for merits review, new subsections 204(3) and (4) would enable the ACMA, in developing any standard or rules, to provide for merits review where it is appropriate. For example, it is likely that the ACMA would provide for merits review where its decision would affect the interests of a person, but that it may not be necessary to do so where decisions would be of a procedural or preliminary nature, would have no appropriate remedy or would have such limited impact that the costs of review cannot be justified.<sup>23</sup>

2.60 The committee appreciates that certain decisions may be unsuitable for merits review – including decisions that are preliminary or procedural in nature, decisions where there is no appropriate remedy, and decisions which have such limited impact that the costs of review cannot be justified.<sup>24</sup> However, the

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21 Schedule 1, item 13, proposed section 125A and Schedule 1, item 22, clause 11 of proposed Schedule 8.

22 Schedule 1, item 13, proposed section 125A(15) and Schedule 1, item 22, clause 12 of proposed Schedule 8.

23 Explanatory memorandum, p. 35.

24 In this regard, see Administrative Review Council, *What Decisions Should be Subject to Merits Review* (1999) available online at <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttoheritreview.aspx>.

committee is concerned that the bill confers on the ACMA significant discretion to determine which of its decisions will or will not be reviewable.

2.61 The committee notes that the bill does not set any limits on the ACMA's power to determine which of its decisions will be subject to merits review, nor does it set out any matters that the ACMA must consider before making such a determination. The committee also notes that while the explanatory memorandum sets out broad categories of decisions that may or may not be suitable for merits review, it does not provide examples of specific decisions that would be reviewable.

2.62 The committee seeks the minister's more detailed justification for why it is considered necessary and appropriate to permit the ACMA to determine, by delegated legislation, which decisions under gambling promotion program standards and online content provider rules will be subject to merits review, including examples of decisions that would or would not be reviewable.

2.63 The committee also seeks the minister's advice as to the appropriateness of amending the bill to prescribe classes of decision that must be subject to review, or to prescribe matters that the ACMA must take into account before determining whether a particular decision will be reviewable.

### ***Minister's response***

2.64 The minister advised:

The gambling promotions reforms to be made by the Bill will mean that, for the first time, broadcast-like program standards may be applied to online content services in the form of online content service provider rules to be made by the ACMA. The content of the rules is not yet known, although the bill provides guidance on matters that may be covered, and it is envisaged that the ACMA may make decisions under those rules that could be appropriate for merits review. Item 15 of Schedule 1 to the Bill proposes to amend section 204 of the BSA by inserting two new subsections 204(3) and (4) to give the ACMA power to determine which decisions under any gambling promotion program standard or online content service provider rules would be reviewable. I note the committee's concern that this gives the ACMA significant discretion. As neither the content of any gambling promotion program standard nor the online content service provider rules is yet known, it is not possible to identify particular types of decisions of an administrative character that might be made by the ACMA under those instruments.

The range and type of available online content services is not static, and it is not therefore possible to predict the types of online content services and providers who may be regulated by Schedule 8 into the future. The Bill is designed to be adaptable to respond to changes in the future, and to legislatively prescribe classes of decisions that must be subject to review in this circumstance could be premature, and reduce the future flexibility of the ACMA to regulate services in a fast changing environment.

I note that gambling promotion program standards or online content service provider rules made by the ACMA will be subject to scrutiny and potential disallowance by either House of Parliament.

***Committee comment***

2.65 The committee thanks the minister for this response. The committee notes the minister's advice that, as neither the content of any gambling promotion program standard nor the content of the online content service provider rules is yet known, it is not possible to identify particular types of decisions of an administrative character that might be made by the ACMA under those instruments.

2.66 The committee also notes the minister's advice that it not possible to predict the types of online content services and providers that may be regulated by proposed Schedule 8 in the future, and that the bill is designed to be adaptable to respond to changes. The committee further notes the minister's advice that to legislatively prescribe classes of decisions could be premature, and could reduce the future flexibility of the ACMA to regulate services in a fast changing environment.

2.67 The committee notes the difficulty in identifying the relevant decisions that could be made under rules that are yet to be made. However, it remains unclear to the committee why the bill could not be amended to prescribe general matters that the ACMA must take into account before determining whether a particular decision, or class of decisions, will be subject to merits review, or otherwise to provide (at least high-level) guidance for the making of such a determination.

**2.68 The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of permitting the ACMA to determine which of its decisions under gambling promotion program standards and online content service provider rules would be subject to merits review.**

**2.69 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

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**Broad delegation of legislative power<sup>25</sup>**

***Initial scrutiny – extract***

2.70 Clause 11 of proposed Schedule 8 seeks to empower the ACMA to make rules (online content service provider rules) prescribing matters required or permitted by the Broadcasting Act to be prescribed. Subclauses 13(1) and (2) of proposed Schedule 8 provide that the online content service provider rules may make provision for or in relation to:

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25 Schedule 1, item 22, clauses 15 and 16 of proposed Schedule 8 to the *Broadcasting Services Act 1992*. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- prohibiting or regulating gambling promotional content provided on online content services in conjunction with live coverage of a sporting event; and
- requiring online content service providers to ensure that explanatory content relating to the application of the online content provider rules is made available in certain circumstances.

2.71 Clause 15 of proposed Schedule 8 seeks to empower the ACMA to determine that individual online content services and service providers are exempt from all or specified provisions of online content service provider rules made for the purposes of subclauses 13(1) or (2). Subclauses 15(5) and (6) also set out a number of matters to which the ACMA must have regard before making such a determination, including the likely impacts of a failure to make a determination on the financial circumstances of the relevant content service provider and on the quality of the content on the relevant service.

2.72 Clause 16 of proposed Schedule 8 similarly seeks to empower the ACMA to determine that specified classes of online content services and service providers are exempt from all or specified provisions of online content service provider rules made for the purposes of subclause 13(1) or (2). The clause does not set out any matters to which the ACMA must have regard before making such a determination.

2.73 In the view of the committee, clauses 15 and 16 of proposed Schedule 8 appear to confer a broad legislative power on the ACMA to exempt online content services and service providers from the application of the law. They are therefore akin to Henry VIII clauses, which enable delegated legislation to alter or override the operation of primary legislation. The committee has significant concerns with Henry VIII-type clauses, as such clauses have the potential to impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.

2.74 In this instance, the committee acknowledges that clauses 15 and 16 of proposed Schedule 8 do not enable delegated legislation to alter the operation of primary legislation, but rather enable the ACMA to override the operation of all or specified provisions of certain legislative instruments. However, the committee remains concerned about the breadth of the proposed power in those clauses, and its potential impact on parliamentary scrutiny.

2.75 In this regard, the committee notes that clause 15 would empower the ACMA to override the operation of a legislative instrument by a written determination. This written determination would not be a legislative instrument and, unlike a legislative instrument, would not be subject to parliamentary scrutiny. Additionally, the committee notes that, while a determination made under clause 16 of proposed Schedule 8 would be a legislative instrument (and would be subject to parliamentary scrutiny), the bill does not set out any matters to which the ACMA must have regard prior to making such a determination.

2.76 In light of these matters, the committee would expect a sound justification for the powers conferred on the ACMA under clauses 15 and 16 of proposed Schedule 8 to be provided in the explanatory memorandum. The committee notes that the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.

2.77 The committee seeks the minister's detailed justification as to why it is proposed to confer on the ACMA broad powers to exempt online content services and service providers from online content service provider rules made for the purposes of subclauses 13(1) and (2) of proposed Schedule 8, including examples of when it is envisaged that such powers would be exercised.

2.78 Noting that clause 15 of proposed Schedule 8 specifies matters to which the ACMA must have regard before making a determination, the committee also seeks the minister's advice as to whether it would be appropriate to amend the bill to insert similar guidance concerning the exercise of the ACMA's powers under clause 16 of that Schedule.

### ***Minister's response***

2.79 The minister advised:

The Government recognises that there are a range of online content services, with different business models and technical characteristics, and that the online content service provider rules will not need to regulate all online content services. The Government recognises that online content services are rapidly changing and evolving, with new online content services emerging with relative frequency.

It is therefore essential that the regulatory framework established by Schedule 8 is flexible enough to address new services as they emerge, and for the ACMA to identify whether or not online content service provider rules should apply to these services. An example of when it is envisaged the exemption powers would be exercised may include instances where children are unable to access the content provided by a particular online content service (and so there is minimal risk a child would be exposed to gambling promotional content provided on the online content service).

It is not considered appropriate to amend the bill to insert guidance concerning the exercise of the ACMA's powers under clause 16 of Schedule 8. Class exemption determinations made under clause 16 will be legislative instruments and subject to the standard legislative instrument consultation requirements. As legislative instruments, class exemption decisions will also be subject to scrutiny and potential disallowance by either House of Parliament. This is considered an adequate check on the ACMA's power.

I note also that subclause 15(12) is designed to ensure transparency around the exercise of the ACMA's individual exemption power (i.e. by requiring that an ACMA determination under subclause (1), (2), (3) or (4)

must be published on its website). In addition, a provider of an online content service to which an individual exemption determination relates may seek AAT review of an ACMA decision to refuse to make, vary or revoke the exemption determination.

***Committee comment***

2.80 The committee thanks the minister for this response. The committee notes the minister's advice that, owing to the pace with which online content services change and evolve, it is necessary that the regulatory framework in proposed Schedule 8 is sufficiently flexible to address new services as they emerge, and for the ACMA to identify whether or not online content service provider rules should apply to these services. The committee also notes the example provided of when it is envisaged the powers of exemption under clauses 15 and 16 would be used.

2.81 Further, the committee notes the minister's advice that it is not considered appropriate to insert guidance concerning the exercise of the ACMA's powers under clause 16 of proposed Schedule 8, as determinations made under that clause will be legislative instruments and will therefore be subject to standard consultation, scrutiny and disallowance processes. The committee also notes the advice that these processes are considered to be adequate checks on the ACMA's powers.

2.82 However, the committee remains concerned that clauses 15 and 16 of the bill confer on the ACMA a broad legislative power to exempt classes of online content services and online content service providers from the application of the rules.

**2.83 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to and understanding of the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.84 The committee draws the breadth and nature of powers in clauses 15 and 16 of the bill to the attention of senators, and leaves to the Senate as a whole the appropriateness of the scope of this delegation of legislative power.**

**2.85 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

## Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Broadcasting Services Act 1992</i> to: <ul style="list-style-type: none"> <li>• provide that the Australian Communications and Media Authority (ACMA) may make a grant of financial assistance to a publisher of a newspaper, magazine or other periodical, or a content service provider;</li> <li>• provide that ACMA can only make a grant of financial assistance in the financial year commencing 1 July 2018, and in the following two financial years;</li> <li>• require ACMA to enter into an agreement with the recipient setting out the terms and conditions of the grant;</li> <li>• provide authority for the Minister to constitute a committee to advise ACMA in relation to the exercise of ACMA's powers to make grants of financial assistance; and</li> <li>• require ACMA to include particular information in its annual report relating to the making of grants</li> </ul>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	Senate on 6 December 2017
<b>Bill status</b>	Before the Senate

2.86 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 21 February 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>26</sup>

### Significant matters in non-statutory guidelines<sup>27</sup>

#### *Initial scrutiny – extract*

2.87 The purpose of the bill is to establish a Regional and Small Publishers Innovation Fund, which sets up a one-off arrangement to finance grants of up to \$50.1 million over three years. The bill provides that the Australian Communications and Media Authority (ACMA) may make a grant of financial assistance to a

26 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

27 Item 1, proposed section 205ZJ. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

constitutional corporation that publishes a newspaper, magazine or other periodical or to a content service provider. Proposed subsection 205ZJ(2) provides that the terms and conditions on which the grant of financial assistance are to be made are to be set out in a written agreement between the Commonwealth and the recipient. As such, none of the substantive requirements and criteria for eligibility are set out in statute. Instead, the explanatory memorandum provides that it is expected that the eligibility criteria will be reflected in non-statutory Grant Guidelines to be issued by ACMA and applied by ACMA in assessing grant applications.<sup>28</sup> The explanatory memorandum also states that it is intended that grants will be capped at a maximum of \$1 million per year for any media group.<sup>29</sup>

2.88 It therefore appears that neither the criteria for the award of a grant nor the purposes or conditions for which grants may be awarded are included in the bill. Instead, these matters are to be determined by non-statutory policy or included in individual agreements. The practical effect of this approach is to delegate general criteria and conditions for the award of a grant to ACMA. It is also noted that if general non-statutory rules are not developed, then the legislation confers on ACMA an extremely broad discretionary power to allocate a substantial sum of money.

2.89 The committee seeks the minister's advice as to why the criteria for the award of the grants and the standard terms and conditions to be imposed are not included in the bill or subject to any other appropriate level of parliamentary scrutiny.

### ***Minister's response***

2.90 The minister advised:

It is common practice for the details for a competitive grant program, including any criteria relating to eligibility, to be set out in the program's guidelines, as part of a call for grant applications. The Government has determined a set of eligibility criteria for grants under the Regional and Small Publishers Innovation Fund, which forms part of the Regional and Small Publishers Jobs and Innovation Package. Whilst the program guidelines are under development, these eligibility criteria have already been made public and will be incorporated into the guidelines for the grant program. In addition, the guidelines will specify a set of merit criteria against which the Australian Communications and Media Authority will assess the relative merits of applications.

It is expected that the guidelines for the Regional and Small Publishers Innovation Fund will be released in the first quarter of 2018, following a process of consultation with industry and key stakeholders.

### ***Committee comment***

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28 Explanatory memorandum, p. 7.

29 Explanatory memorandum, p. 7.

2.91 The committee thanks the minister for this response. The committee notes the minister's advice that the eligibility criteria for grants under the Regional and Small Publishers Innovation Fund have been made public, and that guidelines relating to the Fund, which will include merit criteria for assessing grant applications, will also be released in the first quarter of 2018 (before the bill would commence).

2.92 However, the committee reiterates its view that at least general criteria for the award of the grants and the standard terms and conditions to be imposed ought to be either included in the bill or subject to another appropriate form of parliamentary scrutiny, such as tabling of the guidelines and general eligibility criteria in the Parliament. The committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

**2.93 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.94 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of neither including in the bill, nor subjecting to another appropriate form of parliamentary scrutiny, the criteria for awarding grants under the Regional and Small Publishers Innovation Fund and the standard terms and conditions of such grants.**

## Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

<b>Purpose</b>	This bill seeks to amend various Acts in relation to criminal law and law enforcement to: <ul style="list-style-type: none"> <li>• amend the offence of bribery of a foreign public official;</li> <li>• introduce a new offence of failure of a body corporate to prevent foreign bribery by association;</li> <li>• make consequential amendments ensuring the continuation of the existing policy of prohibiting a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to foreign public official; and</li> <li>• implement a Commonwealth Deferred Prosecution Agreement scheme</li> </ul>
<b>Portfolio</b>	Justice
<b>Introduced</b>	Senate on 6 December 2017
<b>Bill status</b>	Before the Senate

2.95 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The Attorney-General responded to the committee's comments in a letter dated 6 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>30</sup>

### Reversal of evidential burden of proof<sup>31</sup>

#### *Initial scrutiny – extract*

2.96 Item 7 of the bill seeks to insert a new subsection 70.3(2A) into the *Criminal Code Act 1995* (Criminal Code). That new subsection would provide an additional offence-specific defence to the existing foreign bribery offence in section 70.2 of the Criminal Code (an offence which the bill also seeks to amend). In this regard, proposed subsection 70.3(2A) provides that a person does not commit an offence against section 70.2 if:

- the person's conduct occurred in relation to a foreign public official;

30 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

31 Item 7. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

- the foreign public official is a candidate to be a *particular* foreign public official (the 'substantive foreign public official'); and
- had the conduct occurred in relation to the substantive foreign public official, a written law in force in the jurisdiction of the substantive foreign public official (established by reference to the table in subsection 70.3(1)) would permit the provision of the relevant benefit to the foreign public official.

2.97 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.

2.98 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, interfere with this common law right.

2.99 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.

2.100 The committee also notes that the *Guide to Framing Commonwealth Offences* 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.<sup>32</sup>

2.101 In this case, it is not apparent that the matters in proposed subsection 70.3(2) are peculiarly within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish this matter. Further, although the explanatory memorandum addresses the effect of reversing the evidential burden of proof in this case, it does not address the question of why it is appropriate to frame the matter as an offence-specific defence rather than as an element of the offence.

2.102 As the explanatory materials do not address this issue, the committee requests the Attorney General's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the

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

burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>33</sup>

### **Attorney-General's response**

#### 2.103 The Attorney-General advised:

In response to the Committee's question at paragraph 1.48, section 70.3 of the *Criminal Code Act 1995* (Criminal Code) provides a defence to the foreign bribery offence where a written law in force in the place conduct occurs permits the provision of the benefit to the relevant foreign public official. The Bill incrementally expands the definition of foreign public officials to also cover candidates for a foreign public office. The proposed defence in subsection 70.3(2A) is necessary to extend the existing lawful authority defence to also apply to conduct involving candidates for a foreign public office, ensuring consistency across all categories of foreign public official.

This offence-specific defence for foreign bribery is consistent with the broader principle in Australian law of a defence of lawful authority, for which the defendant bears the evidential burden of adducing evidence that suggests a reasonable possibility that the lawful authority exists (sections 10.5 and 13.3 of the Criminal Code).

The defence (and the proposed extension of it to bribery of candidates) is appropriate because:

- The defendant would be in a better position to point to the evidence of the written foreign law he or she relied on when offering or providing the benefit. The defendant could readily and cheaply provide evidence of the existence of the foreign law and their reliance on it to support their case. Corporate defendants in particular are likely to have working relationships in the foreign country and to have undertaken due diligence prior to providing a benefit or making a payment.
- It would be difficult and expensive for the prosecution to prove the non-existence of a law in a foreign jurisdiction. For example, this would require the prosecution to seek evidence of any written law pursuant to a mutual assistance request, which is often time consuming and not always successful.
- The question of whether the benefit was required or permitted under a foreign country's written law is not central to the question of culpability for the offence. The essential elements of the proposed foreign bribery offence are that the defendant provided, offered or caused to be provided or offered, a benefit to another person with

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

the intention of improperly influencing a foreign public official in order to obtain an advantage.

**Committee comment**

2.104 The committee thanks the minister for this response. The committee notes the Attorney-General's advice that the proposed defence in subsection 70.3(2A) is appropriate because the defendant would be in a 'better position' to point to the evidence of the written foreign law he or she relied on when offering or providing a benefit, and could do so 'readily and cheaply'. The committee also notes the minister's advice that it would be 'difficult and expensive' for the prosecution to prove the non-existence of a law in a foreign jurisdiction. The committee finally notes the minister's advice that the question of whether the benefit was required or permitted under a foreign country's written law is not central to the question of culpability for the offence.

2.105 The committee emphasises that a defendant being in a 'better position' to point to evidence of a matter is not equivalent to the matter being peculiarly within the defendant's knowledge. Nor is a defendant being capable of 'readily and cheaply' providing evidence of a matter equivalent to the matter being significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. The committee therefore considers that the proposed defence in subsection 70.3(2A) does not appear to accord with the principles set out in the *Guide to Framing Commonwealth Offences*<sup>34</sup> and may therefore not be appropriate for inclusion in an offence specific defence.

**2.106 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.107 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of placing an evidential burden of proof on a defendant who wishes to raise the proposed new defence to the foreign bribery offence in section 70.2 of the *Criminal Code*.**

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

## Significant matters in non-statutory guidelines<sup>35</sup>

2.108 Proposed section 70.5B seeks to require the minister to publish guidance on the steps that a body corporate can take to prevent an associate from bribing a foreign public official. Proposed subsection 70.5B(2) provides that such guidance will not be a legislative instrument. The explanatory memorandum states that '[the publication of guidance] is intended to assist companies in implementing appropriate measures to prevent bribery from occurring within their organisations' but that such guidance 'would not be legislative in character'.<sup>36</sup>

2.109 Proposed section 70.5B follows immediately on from proposed section 70.5A, which provides that a body corporate would commit an offence if an associate<sup>37</sup> of that body corporate commits the offence of bribing a foreign public official,<sup>38</sup> and the associate does so for the profit or gain of the body corporate.

2.110 Proposed subsection 70.5A(5) states that the offence in proposed section 70.5A would not apply if the body corporate had in place adequate procedures designed to prevent the commission of the offence of bribing a foreign public official by any associate, and to prevent any associate engaging in conduct outside Australia that would constitute the same offence if engaged in in Australia. The bill proposes to place a legal burden of proof on the defendant, ensuring that the defendant would need to prove, on the balance of probabilities, that it had in place adequate procedures to prevent an associate from bribing a foreign public official.

2.111 The explanatory memorandum states that what constitutes 'adequate procedures' would be determined by the courts on a case by case basis and that the concept would be 'scalable, depending on the relevant circumstances including the size and nature of the body corporate'.<sup>39</sup> The explanatory memorandum also states, in the context of explaining what constitutes 'adequate procedures', that proposed section 70.5B provides that the minister must publish guidance on the steps that body corporates can take to prevent an associate from bribing foreign public officials.

2.112 It is not clear to the committee what role the guidance the minister must publish under proposed section 70.5B would have in relation to establishing the defence in proposed subsection 70.5A(5). The defence in that proposed subsection

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35 Item 8, proposed subsections 70.5A(5) and 70.5B. The committee draws Senators' attention to these provisions pursuant to principle Senate Standing Order 24(1)(a)(iv).

36 Explanatory memorandum, p. 19.

37 This is defined in item 2 of the bill to mean an officer, employee, agent or contractor of the other person, a subsidiary of the other person; controlled by the other person; or otherwise performs services for or on behalf of the other person.

38 Or engages in conduct outside Australia that, if engaged in in Australia, would constitute the same offence.

39 Explanatory memorandum, p. 18.

requires the courts to consider whether the body corporate had adequate procedures in place to prevent associates from bribing a public official. The guidance relates to steps that the body corporate can take to prevent an associate from bribing public officials. It is not clear whether a body corporate that complies with guidance published by the minister would be determined to have 'adequate procedures' in place and therefore able to establish the defence in subsection 70.5A(5), or if a body corporate could comply with such guidelines but still be found by the courts to not have had adequate procedures in place.

2.113 The committee is concerned that, because the exception to the offence does not clearly articulate what would constitute 'adequate procedures', it has been left to ministerial guidance to clarify the limits of criminal liability with respect to the offence. This concern is compounded by the fact that the guidance will not be a legislative instrument.

2.114 The committee requests the Attorney-General's advice as to:

- whether it is possible that a body corporate that complies with ministerial guidance published pursuant to proposed section 70.5B might nevertheless be convicted of an offence of failing to prevent the bribery of a foreign public official; and
- why the guidance published pursuant to proposed section 70.5B is not considered to be legislative in character and therefore not classified as a legislative instrument and subject to the usual disallowance process.

### ***Attorney-General's response***

2.115 The Attorney-General advised:

In response to the Committee's questions at paragraph 1.55, the guidance under proposed section 70.5B will be principles-based, aimed at helping corporations understand the types of steps they can take to prevent bribery of a foreign public official. The guidance will be designed to be of general application to corporations of all sizes and in all sectors. It will comprise suggested anti-bribery policies and procedures that should be read in the light of two overarching guiding principles: proportionality and effectiveness.

It is reasonable to expect companies of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their business. However, the application of steps to prevent foreign bribery will differ substantially from corporation to corporation - I do not consider it reasonable to expect small and medium-sized enterprises to put in place a compliance program of the same size that would be required of a large multi-national company. Similarly, a corporation with limited exposure to foreign bribery risk should not be expected to take mitigation measures as extensive as another corporation that has a significantly greater risk profile.

It is for this reason that I propose to provide guidance, rather than a legislated, prescriptive checklist of compliance. In this way, it will not be for Government to determine or clarify the limits of criminal liability with respect to the offence. This is appropriately a matter for courts, taking into account the circumstances of each case without the encumbrance of rigid statutory requirements.

Departure from the guidance's suggested procedures will not of itself give rise to a presumption that a corporation does not have adequate procedures in place. Indeed, not all of the policies and procedures suggested in the guidance are necessarily applicable to the circumstances of each corporation. However, companies will need to implement robust and effective steps to prevent foreign bribery to their circumstances. Companies with effective and well integrated compliance regimes would not be convicted of the failure to prevent foreign bribery offence.

The guidance will be broadly consistent with the guidance that the United Kingdom Ministry of Justice has published in relation to section 9 of the *Bribery Act 2010* (UK). This is in line with the preference Australian industry has expressed and will enable Australian companies that have already framed their anti-bribery policies on international guidelines to easily incorporate additional policies relevant to the Australian context. I will ensure that the Attorney-General's Department publicly consults on the guidance and I will review and incorporate industry and other feedback.

### **Committee comment**

2.116 The committee thanks the Attorney-General for this response. The committee notes the Attorney's advice that the guidance issued under proposed section 70.5B is intended to be principles-based and aimed at assisting corporations of all sizes and sectors to understand the types of steps they can take to prevent bribery of a foreign public official by including suggested anti-bribery policies and procedures.

2.117 The committee also notes the Attorney's advice that, because the application of steps to prevent foreign bribery will differ substantially between corporations of different types and sizes, it is proposed to provide only guidance, rather than a legislated checklist of compliance, so as to leave to the courts the determination of the limits of criminal liability for the offence, taking into account the circumstances of each case. As such, companies will need to implement 'robust and effective steps' to prevent foreign bribery, but a departure from the minister's guidance will not lead to a presumption that a company does not to have adequate procedures in place.

**2.118** The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

**2.119** In light of the detailed information provided, the committee makes no further comment on this matter.

## Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> (the Act) to:</p> <ul style="list-style-type: none"> <li>• establish public registers for key non-party political actors;</li> <li>• amend the current financial disclosure scheme in the Act by requiring non-financial particulars, such as senior staff and discretionary government benefits, to be reported;</li> <li>• prohibit donations from foreign governments and state-owned enterprises being used to finance public debate;</li> <li>• require wholly political actors to verify that donations over \$250 come from: <ul style="list-style-type: none"> <li>- an organisation incorporated in Australia, or with its head office or principal place of activity in Australia; or</li> <li>- an Australian citizen or Commonwealth elector or Australian permanent resident;</li> </ul> </li> <li>• prohibit other regulated political actors from using donations from foreign sources to fund reportable political expenditure;</li> <li>• limit public election funding to demonstrated electoral spending;</li> <li>• amend the enforcement and compliance regime for political finance regulation; and</li> <li>• enable the Electoral Commissioner to prescribe certain matters by legislative instrument</li> </ul>
<b>Portfolio</b>	Finance
<b>Introduced</b>	Senate on 7 December 2017
<b>Bill status</b>	Before the Senate

2.120 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 28 February 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>40</sup>

40 See correspondence relating to *Scrutiny Digest No. 3 of 2017* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

## Significant matters in delegated legislation<sup>41</sup>

### *Initial scrutiny – extract*

2.121 The bill provides that gifts of over \$250 to political entities and most political campaigners must be made by 'allowable donors'. The bill also provides that, where a gift is made to a third party campaigner, or a political campaigner that is a registered charity or a registered organisation, from non-allowable donors, the gift must not be made or used for political purposes. Proposed section 287AA of the bill defines 'allowable donor' in relation to individuals and corporate entities. Proposed paragraph 287AA(1)(a) provides that an individual is an allowable donor if the individual is an elector,<sup>42</sup> an Australian citizen, or an Australian resident – unless a determination is in force under proposed subsection 287AA(2) determining that Australian residents are not allowable donors. Proposed subsection 287AA(2) empowers the minister to, by legislative instrument, determine that Australian residents (who are not Australian citizens) are not allowable donors. This gives the minister a power to change the definition of an allowable donor by delegated legislation.

2.122 Noting that a primary objective of the bill is 'to ensure that only those with a meaningful connection to Australia are able to influence Australian politics and elections through political donations',<sup>43</sup> the committee considers that the question of whether Australian residents who are not also citizens are, or are not, allowable donors, is a significant policy matter that is central to electoral funding reforms proposed by the bill.

2.123 In this regard, the committee notes that the question of whether a person who makes a donation is an 'allowable donor' is a core element of a number of proposed offences and civil penalty provisions in the bill. For example, proposed section 302D seeks to make it unlawful for a person, who is an agent of a political entity, or a financial controller of a political campaigner, to receive a donation from a non-allowable donor in prescribed circumstances. Contraventions of that section are punishable by 10 years imprisonment, 600 penalty units, or both, and may also attract a civil penalty of 1000 penalty units. Proposed sections 302E to 302L seek to create similar offences and civil penalty provisions for receiving or otherwise dealing with gifts from non-allowable donors.

2.124 The committee's view is that significant matters, such as key policy aspects of an electoral reform framework, and core elements of offences and significant civil

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41 Schedule 1, item 9, proposed section 287AA. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

42 'Elector' is defined in section 4 of the *Commonwealth Electoral Act 1918* as 'any person who appears on the Roll as an elector'.

43 Second reading speech, p. 1; see also statement of compatibility, p. 7.

penalty provisions, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no justification for empowering the minister to change the definition of an allowable donor by delegated legislation, merely restating the operation of the relevant provisions.<sup>44</sup>

2.125 Additionally, where Parliament delegates its legislative power in relation to significant matters, the committee considers that it is appropriate that specific consultation obligations (beyond those in the *Legislation Act 2003*) are included in the bill and that compliance with those obligations is a condition of the validity of the relevant legislative instrument. Therefore, in relation to a determination that Australian residents are not allowable donors, if this provision remains in the bill the committee considers that it would be appropriate for consideration to be given to including specific consultation requirements on the face of the bill.

2.126 The committee's view is that significant matters, including key policy aspects of the electoral reform framework and core elements of offences, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the minister's detailed advice as to:

- why it is considered necessary and appropriate to empower the minister to determine, by delegated legislation, that Australian residents are not 'allowable donors';
- the type of consultation that it is envisaged will be undertaken prior to making such a determination; and
- whether specific consultation obligations (beyond those in the *Legislation Act 2003*) could be included in the bill (with compliance with such obligations a condition of the validity of a determination made under proposed subsection 287AA(2)).

### ***Minister's response***

2.127 The minister advised:

I consider it necessary and appropriate to establish ministerial powers to determine, by delegated legislation, who is an 'allowable donor' while guaranteeing the right to donate of those with the most significant connection to Australia. Such delegation ensures appropriate flexibility in the operation of the legislation to maintain the integrity of Australia's electoral system, and Australia's sovereignty. I further consider that the fact that the determination is disallowable provides the opportunity for appropriate parliamentary oversight of the proposed ministerial discretion.

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44 Explanatory statement, p. 12.

*Consultation*

I consider the consultation obligations as set out in the *Legislation Act 2003* are appropriate and sufficient.

**Committee comment**

2.128 The committee thanks the minister for this response. The committee notes the minister's advice that it is considered necessary and appropriate to determine whether Australian residents are 'allowable donors' by delegated legislation, as to do so ensures appropriate flexibility to maintain the integrity of Australia's electoral system and Australia's sovereignty. The committee further notes the minister's view that, as any instruments made under proposed subsection 287AA(2) would be disallowable, there is opportunity for appropriate parliamentary oversight, and that the consultation obligations in the *Legislation Act 2003* (Legislation Act) are appropriate and sufficient.

2.129 However, the committee remains concerned that proposed section 287AA would permit the minister to determine key policy aspects of the electoral reform framework, and core elements of a number of proposed offences, by legislative instrument. While noting the minister's explanation as to why such a power is necessary, the committee does not consider flexibility alone to be sufficient justification for leaving such significant policy aspects of a scheme (that is, whether the scheme will or will not apply to Australian residents who are not Australian citizens) to delegated legislation.

2.130 Additionally, the committee notes that the minister's response does not appear to address the type of consultation that it is envisaged will be undertaken prior to making a determination under proposed subsection 287AA(2).

2.131 The committee reiterates its general view that where Parliament delegates its legislative power in relation to significant matters it is appropriate that specific consultation obligations (beyond those in section 17 of the Legislation Act) are included in the bill and that compliance with those obligations is a condition of the validity of relevant legislative instruments. In this regard, the committee notes that section 17 of the Legislation Act does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that the rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In addition, the Legislation Act provides that consultation may not be undertaken if a rule-maker considers consultation to be unnecessary or inappropriate, and provides that the fact that consultation does not occur does not affect the validity or enforceability of an instrument.<sup>45</sup>

2.132 Given the significance of the matters that proposed section 287AA would allow the minister to determine by legislative instrument, the committee considers

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45 See sections 18 and 19 of the *Legislation Act 2003*.

that it would be appropriate to include specific consultation requirements in the bill, and to provide that compliance with those obligations is a condition of the validity of an instrument made under proposed subsection 287AA(2).

**2.133 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of:**

- **allowing the minister to determine, by legislative instrument, whether Australian residents who are not citizens are 'allowable donors' for the purposes of the bill; and**
- **not including any specific consultation obligations in relation to determinations of this nature.**

**2.134 The committee also draws this matter to the attention of the Senate Standing committee on Regulations and Ordinances for information.**

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**Presumption of innocence: entry in Register constitutes prima facie evidence<sup>46</sup>**

***Initial scrutiny – extract***

2.135 Proposed Division 1A seeks to establish a framework for the registration of key participants in electoral campaigns. Under this framework, persons who satisfy prescribed conditions would be required to register with the Electoral Commissioner (Commissioner) as a political campaigner, third party campaigner or associated entity.<sup>47</sup> The Commissioner would also be required to establish and maintain a Register of Political Campaigners, a Register of Third Party Campaigners, and a Register of Associated Entities, each of which would be made publicly available.<sup>48</sup>

2.136 Proposed section 287R provides that an entry in any of the registers is prima facie evidence of the information contained in the entry. This means that, where an entry is recorded in one of the registers, it would be assumed that there is sufficient evidence to establish particular facts (such as whether a person is a political campaigner or third party campaigner). While a person may attempt to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The explanatory memorandum states that proposed section 287R is 'similar to other provisions in the Electoral Act, such as current subsection 391(2)'.<sup>49</sup> The committee

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46 Schedule 1, item 11, proposed section 287R. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

47 See Schedule 1, item 11, proposed section 287F; Schedule 1, item 11, proposed section 287G; Schedule 1, item 11, proposed section 287H.

48 See Schedule 1, item 11, proposed section 287N; See Schedule 1, item 11, proposed section 287Q

49 Explanatory memorandum, p. 25.

notes that subsection 391(2) of the *Commonwealth Electoral Act 1918* (Electoral Act) provides that a record of particulars contained in a claim for enrolment or transfer of enrolment is admissible in evidence in any proceeding and is prima facie evidence of the matters it contains.

2.137 The committee is concerned that proposed section 287R would allow, in effect, a reversal of the burden of proof with respect to matters that may be central to a person's culpability under a number of proposed offences in the bill. For example, the committee notes that the majority of the offences and civil penalty provisions in proposed Division 3A (detailed further below) apply to persons who receive or otherwise deal with gifts from non-allowable donors on behalf of political campaigners and third-party campaigners. An entry in the register would purport to establish, prima facie, that a gift recipient is a political campaigner, third party campaigner or associated entity, with the defendant required to adduce evidence on the balance of probabilities to disprove that matter.

2.138 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 requiring a defendant to raise evidence to disprove one or more elements of an offence interfere with this common law right.

2.139 In this instance, the explanatory memorandum provides no explanation for the effective reversal of the burden of proof brought about by proposed section 287R, beyond noting that the proposed subsection is similar to other provisions in the Electoral Act and 'assists with efficient administration'.<sup>50</sup> The committee does not consider that administrative efficiency, or consistency with existing provisions, alone justifies making entry in the register prima facie evidence of the matters contained within it.

2.140 The committee also notes that proposed section 287R is akin to provisions that enable the issue of certificates (evidentiary certificates) that are admissible in court as prima facie evidence of the information they contain. In this regard, the committee draws attention to the *Guide to Framing Commonwealth Offences*, which emphasises that limits should be placed on the use of evidentiary certificates. The Guide states:

Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.<sup>51</sup>

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50 Explanatory memorandum, p. 25.

51 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 54.

2.141 The Guide further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.<sup>52</sup>

2.142 A key piece of information recorded in the registers is likely to be whether a person is a political campaigner, third party campaigner or associated entity. Given that this information is central to a number of proposed offences in the bill, the committee considers it unlikely that information in the registers would be sufficiently removed from the facts at issue in a proceeding related to one of these offences. Further, it is not apparent to the committee that the matters to which the information in the registers relates would be difficult to prove under the normal evidentiary rules. For example, it appears to the committee that whether a person or entity is a political campaigner, third party campaigner or associated entity could be established by the prosecution through reasonable enquiries, without relying on a provision that makes entries in the registers prima facie evidence of the information they contain.

2.143 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to effectively reverse the evidential burden of proof by providing that an entry in one of the registers is prima facie evidence of the information contained in the entry.

### **Minister's response**

2.144 The minister advised:

This provision is consistent with similar existing provisions in the *Commonwealth Electoral Act 1918*, such as subsection 391(2), on records of claim for enrolment. I consider that anyone who has an entry in a register is best placed to address issues on their particular entry. This is particularly the case given obligations on registrants under section 287P of the Bill to notify the Electoral Commissioner within 28 days of the information relating to their entry on a register ceasing to be correct or complete. The consistent use of the provision in the *Commonwealth Electoral Act 1918* ensures administrative efficiency for the Australian Electoral Commission.

### **Committee comment**

2.145 The committee thanks the minister for this response. The committee notes the minister's advice that proposed section 287R is consistent with existing provisions in the *Commonwealth Electoral Act 1918* (Electoral Act). The committee also notes the minister's advice that anyone who has an entry in the register is best placed to address issues on their particular entry, and that the consistent use of the

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52 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 55.

provision (that is, proposed section 287R) in the Electoral Act ensures administrative efficiency for the Australian Electoral Commission.

2.146 However, it does not appear that the information provided by the minister goes beyond the information already provided in the explanatory memorandum concerning proposed section 287R. The committee therefore remains concerned that, by making an entry in the register prima facie evidence of the information it contains, proposed section 287R would allow an effective reversal of the evidential burden of proof with respect to matters that may be central to a person's culpability under a number of proposed offences and civil penalty provisions.

2.147 The committee also reiterates its views that administrative efficiency, or consistency with existing provisions, do not alone justify provisions that reverse, or effectively reverse, the evidential burden of proof.

**2.148 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing, in proposed section 287R, that an entry in the registers to be established under proposed Division 1A constitutes prima facie evidence of the information contained in that entry, thereby effectively reversing the burden of proof in relation to those matters.**

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## **Significant penalties<sup>53</sup>**

### ***Initial scrutiny – extract***

2.149 Subdivisions B and C of proposed Division 3A (proposed sections 302D to 302L) seek to create a series of offences and civil penalty provisions relating to receiving and otherwise dealing with donations from non-allowable donors. The bill proposes that the following forms of conduct would be punishable by 10 years' imprisonment, 600 penalty units, or both, or would attract a civil penalty of 1000 penalty units (\$210,000):

- receiving a gift of over \$250 from a non-allowable donor on behalf of a political entity or a political campaigner (unless the recipient is a registered charity or organisation).<sup>54</sup>
- receiving a gift of over \$250 from a non-allowable donor on behalf of a third-party campaigner, or on behalf of a political campaigner which is a registered charity or organisation, in specified circumstances.<sup>55</sup>

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53 Schedule 1, item 33, proposed sections 302D, 302E 302F, 302G, 302H, 302J, 302K and 320L. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 23(1)(a)(i).

54 See Schedule 1, item 33, proposed section 302D.

- where the recipient is a registered charity or organisation, allowing a gift from a non-allowable donor to be used for domestic political purposes.<sup>56</sup>
- receiving a gift on behalf of a political entity or political campaigner from a foreign bank account, or by transfer from a person in a foreign country (unless the recipient is a registered charity or organisation).<sup>57</sup>
- receiving a gift of over \$250 on behalf of a political entity or political campaigner without verifying, before the end of six weeks after the gift is made, that the donor is an allowable donor (unless the recipient is a registered charity or organisation).<sup>58</sup>

2.150 Additionally, the bill proposes that the following forms of conduct would be punishable by 5 years' imprisonment, 300 penalty units, or both, or would attract a civil penalty of 500 penalty units (\$105,000):

- soliciting or receiving a gift from a non-allowable donor, intending that all or part of the gift will be transferred to a political entity, political campaigner, or to another person for one or more political purposes (unless the recipient is a registered charity or organisation).<sup>59</sup>
- forming a body corporate solely or for the predominant purpose of avoiding the restrictions on foreign donations in proposed Division 3A.<sup>60</sup>

2.151 The committee notes that the offences in the bill apply to specific persons with a connection to the relevant entity, such as financial controllers of political campaigners and agents of political entities. The committee also acknowledges that a number of exceptions to the offences apply, such as where a person takes action ('acceptable action'<sup>61</sup>) to mitigate any potential damage to the integrity of the political process caused by the relevant gift or donation. However, in the view of the committee the penalties proposed by the bill are significant, ranging from five to ten years imprisonment. The committee also notes that the relevant offences capture a broad range of conduct, and may apply to a variety of persons with a connection to the Australian electoral and political processes.

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55 See Schedule 1, item 33, proposed section 302E.

56 See Schedule 1, item 33, proposed section 302F.

57 See Schedule 1, item 33, proposed section 302K.

58 See Schedule 1, item 33, proposed section 302L.

59 See Schedule 1, item 33, proposed sections 302G and 302H.

60 See Schedule 1, item 33, proposed section 302J.

61 Under proposed section 302B, 'acceptable action' includes transferring an amount equal to the value of the relevant gift to the Commonwealth, or returning the relevant gift or an amount equal to that gift to the donor.

2.152 The committee's expectation is that a detailed justification for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in other Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. This should include a consideration of...other comparable offences in Commonwealth legislation'.<sup>62</sup>

2.153 In this instance, the committee notes that the explanatory memorandum does not provide any specific justification for the proposed imposition of significant penalties, merely stating that the object of the offences and civil penalty provisions in proposed Division 3A is to 'secure and promote the actual and perceived integrity of the Australian election process'.<sup>63</sup> The committee further notes that the explanatory memorandum does not provide any information regarding penalties imposed under similar offences in other Commonwealth legislation.

2.154 It is not apparent to the committee that the penalties in proposed sections 302D to 302L of the bill are appropriate by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.

2.155 The committee therefore seeks the minister's detailed advice as to the justification for the significant custodial penalties proposed by these provisions. In particular, the committee seeks the minister's advice as to specific examples of applicable penalties for comparable Commonwealth offence provisions.

### ***Minister's response***

2.156 The minister advised:

The penalties in proposed sections 302D to 302L of the bill are consistent with the serious nature of the offences and the potential effect that such offences have on the integrity of Australia's electoral system, and Australia's sovereignty. The provisions provide the option of custodial penalties alongside, or in addition to, financial penalties. The proposed penalties are comparable to fraud and bribery offences in chapter 7 of the Commonwealth Criminal Code. I consider that such penalties are appropriate to ensure the integrity of Australia's electoral system by restricting foreign influence on Australian political actors including campaigners.

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62 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 39.

63 Explanatory memorandum, p. 37.

**Committee comment**

2.157 The committee thanks the minister for this response. The committee notes the minister's advice that the penalties in proposed section 302D to 302L of the bill are consistent with the serious nature of the offences and the potential effect that such offences have on the integrity of Australia's electoral system and Australian sovereignty. The committee also notes the minister's advice that the proposed penalties are comparable to those imposed in relation to fraud and bribery offences in Chapter 7 of the Commonwealth *Criminal Code Act 1995* (Criminal Code).

2.158 However, it is not apparent to the committee that the penalties imposed in relation to the offences in proposed sections 302D to 302L of the bill are consistent with those imposed for comparable offences in the Criminal Code—including the fraud and bribery offences mentioned by the minister—or for comparable offences in other Commonwealth legislation. It therefore remains unclear to the committee that the magnitude of the penalties in proposed section 302D to 302L is appropriate.

2.159 In this regard, the committee would have appreciated the minister's more detailed advice in relation to this matter, including specific examples of provisions imposing similar penalties for comparable offences under Commonwealth law.

**2.160 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of the penalties imposed in relation to the offences in proposed sections 302D to 302L.**

## Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Enhancing Online Safety Act 2015</i> to: <ul style="list-style-type: none"> <li>• prohibit the non-consensual posting of, or threatening to post, an intimate image on a social media service or relevant electronic service including images shared by email, text or multimedia messages, or a designated internet service;</li> <li>• establish a complaints and objections system to be administered by the eSafety Commissioner;</li> <li>• introduce a civil penalty regime to be administered by the eSafety Commissioner</li> </ul>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	Senate on 6 December 2017
<b>Bill status</b>	Before the House of Representatives

2.161 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 9 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>64</sup>

### Reversal of evidential burden of proof<sup>65</sup>

#### *Initial scrutiny – extract*

2.162 Proposed subsection 44B(1) of the bill creates a prohibition on a person of posting, or threatening to post, an intimate image<sup>66</sup> of another person. A civil penalty of 500 penalty units may be imposed for contravening that provision. Proposed subsections 44B(2), (3) and (4) each provide an exception to the prohibition, providing that subsection 44B(1) does not apply if:

64 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

65 Schedule 1, item 26, proposed section 44B. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

66 'Intimate image' is defined by proposed section 9B, and includes any still or moving visual image which depicts a person's private parts, depicts a person engaged in a private activity, or depicts a person without attire of religious or cultural significance (in certain circumstances).

- the intimate image is posted with the consent of the person that it depicts;
- the intimate image is covered by proposed subsection 9B(4) because it depicts, or appears to depict, a person without particular attire of religious or cultural significance; and the person posting the image did not know that the person depicted consistently wears that attire in public; or
- the post of the intimate image is, or would be, an exempt post. An exempt post is broadly defined in proposed section 44M as including a number of matters, including if the post is necessary for the enforcement of a law, for the purposes of court or tribunal proceedings or an ordinary reasonable person would consider the post acceptable on a number of grounds.

2.163 Subsection 96 of the *Regulatory Powers (Standard Provisions) Act 2014* provides that a person who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating a civil penalty provision bears an evidential burden in relation to that matter. This mirrors the provisions in subsection 13.3(3) of the *Criminal Code Act 1995* relating to criminal offences.

2.164 The committee notes that the explanatory materials do not provide any justification for the reversal of the evidential burden of proof, merely stating the effect of the relevant provisions.

2.165 The committee also notes that the reversal of the burden of proof in proposed subsections 44B(2), (3) and (4) relates to a civil penalty, rather than to a criminal offence. However, the committee recognises that, in certain cases, there may be a blurring of distinctions between criminal and civil penalties, with civil penalties applied in circumstances that are akin to criminal offences. The committee considers that reversals of the burden of proof in such cases merit careful scrutiny,<sup>67</sup> as there could be a risk that reversing the burden of proof in such cases may unduly trespass on personal rights and liberties. This is particularly the case where more significant penalties are imposed. In this case, the committee notes that proposed subsection 44B(1) seeks to impose a penalty of what currently amounts to \$105,000 on natural persons.<sup>68</sup>

2.166 As the explanatory materials do not address this issue, the committee requests the minister's advice as to the appropriateness of reversing the evidential burden of proof in this instance.

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67 See also Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129), December 2015, p. 284.

68 See section 4AA of the *Crimes Act 1914* which defines a 'penalty unit' as \$210.

## **Minister's response**

### 2.167 The minister advised:

I note the Committee's view that the explanatory materials do not provide any justification for the reversal of the evidential burden of proof, merely stating the effect of the relevant provisions. Under the Bill, in any proceedings for a civil penalty, if intending to rely on any of the three exceptions to the prohibition the onus is on the alleged perpetrator to provide evidence that the exception applies. The three exceptions to the prohibition are: where consent to share an intimate image was provided by the person depicted; the post of the intimate image is an exempt post; or the perpetrator was not aware that the person depicted in the image consistently wears attire of religious or cultural significance in public.

Specifically, the Bill states that consent must be express, informed and voluntary. I note the Committee's comment that in cases where there is a reversal of a burden of proof this should merit careful scrutiny, as there could be a risk that this might unduly trespass on personal rights and liberties. I consider the reversal of the onus of proof in these circumstances is appropriate, notwithstanding the possibility of the imposition of a significant civil penalty on an individual.

The civil penalty provisions under the Bill are enforceable under the *Regulatory Powers (Standard Provision) Act 2014* (the RPSP Act), which provides that in proceedings if a person intends to rely on any exception, exemption, excuse, qualification or justification provided in the civil penalty provision, then the person bears an evidential burden in relation to that matter. Accordingly, this is the general approach adopted for civil penalty provisions enforceable under the RPSP Act, and the current Bill does not depart from this approach.

Placing the evidential burden on a person relying on an exception to the prohibition on the non-consensual sharing of intimate images is appropriate as the exceptions are generally matters which are peculiarly within the person's knowledge, for example, in relation to consent, and whether the person knew that the person depicted in the image ordinarily wore particular attire for a religious or cultural reason when in public. In the case of the latter, the person sharing the image would be best placed to provide evidence that they were not aware that the person depicted in the image ordinarily wore attire of religious or cultural significance.

With regards to an exempt post, this is often determined by the purpose of the post, such as if it is for genuine medical or scientific purposes, or the post is for the purposes of proceedings in a court or tribunal. Again, the person sharing the image is best placed to provide evidence as to why the image was shared, and whether this would amount to an exempt post.

In addition to the reasons set out above, the intent of the evidential burden of proof resting with the perpetrator is to minimise the impact on victims of the non-consensual sharing of intimate images. Victims are

often traumatised and to require the burden to rest with the Commissioner that consent was not provided to the perpetrator by the victim could result in re-victimisation. Thus, such an arrangement meets this objective.

### ***Committee comment***

2.168 The committee thanks the minister for this response. The committee notes the minister's view that the reversal of the onus of proof in proposed subsections 44B(2), (3) and (4) is appropriate, notwithstanding the possibility of the imposition of a significant civil penalty on an individual.

2.169 The committee also notes the minister's advice that placing the evidential burden of proof on a person relying on an exception in one of those subsections is appropriate as the exceptions are generally matters which are peculiarly within the person's knowledge, and the person would therefore be best placed to provide relevant evidence. The committee further notes the examples provided by the minister as to when a person might seek to rely on an exemption.

2.170 Finally, the committee notes the minister's advice that the intent of placing the evidential burden on the perpetrator is to minimise the impact on victims of the non-consensual sharing of intimate images, as well as advice that requiring the Commissioner to establish that consent was not provided to the perpetrator by the victim could result in re-victimisation.

**2.171 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to and understanding of the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.172 In light of the detailed information provided by the minister, the committee makes no further comment on this matter.**

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## **Broad delegation of administrative powers<sup>69</sup>**

### ***Initial scrutiny – extract***

2.173 Proposed sections 44B, 44G and 44K of the bill seek to impose civil penalties for engaging in particular conduct. Proposed section 46A seeks to make each of those provisions subject to an infringement notice under Part 5 of the Regulatory Powers Act. Proposed subsection 46A(2) would allow the eSafety Commissioner to

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69 Schedule 1, item 30, proposed subsection 46A(2). The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

delegate the authority to issue infringement notices to any member of the staff of the ACMA – which can be any APS level employee.<sup>70</sup>

2.174 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's preference is that legislation sets a limit either on the scope of the powers that may be delegated or on the categories of people to whom those powers might be delegated. The committee prefers 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.

2.175 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the legitimacy of an infringement notice scheme depends on the existence of a properly managed process for the issuing of notices and that a common approach is to require that a person issuing the notice possess specific attributes, qualifications or qualities. A provision that effectively allows any APS employee to issue a notice is likely to be inappropriate.<sup>71</sup>

2.176 In this instance, the explanatory memorandum provides no explanation for the broad delegation of the power to issue infringement notices, merely restating the terms of the relevant provision. Further, there is nothing in the bill that would limit the delegation of the power to issue an infringement notice to persons with appropriate expertise, qualifications or attributes.

2.177 The committee requests the minister's detailed justification for the broad delegation of power to issue infringement notices in proposed section 46A of the bill. The committee considers it may be appropriate to amend the bill to require that persons authorised to issue infringement notices be confined to officers that hold special attributes, qualifications or qualities, and seeks the minister's advice in relation to this.

### ***Minister's response***

2.178 The minister advised:

I note the Committee's concern in relation to the delegation of administrative powers to a relatively large class of persons. Currently, under section 46A, the Commissioner can authorise, in writing, any member of staff of the Australian Communications and Media Authority to issue infringement notices.

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70 See section 54 of the *Australian Communications and Media Authority Act 2005*.

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

I note that simply because a broad authorisation power is conferred on the Commissioner, this does not necessarily mean that the Commissioner would exercise the power in such a way. In practice, it is expected that the Commissioner would only authorise staff with appropriate attributes, qualifications, qualities and relevant experience. The eSafety Office has advised that it is considering empowering around three staff to be able to do this.

They are, the manager of the image-based abuse portal team (who is a permanent Executive Level 2), the Senior Investigations Officers in the team (who are permanent Executive Level 1) or a Senior Executive Service (SES) Band 1 (who currently holds the position of Executive Manager at the eSafety Office). From a resourcing perspective, it would be impractical and limiting to both have only one member of staff able to perform this function or only staff at the SES level. Furthermore, the reason the delegation refers to staff of the Australian Communications and Media Authority (ACMA) is due to the current legislative framework whereby under the *Enhancing Online Safety Act 2015*, staff of the eSafety Office are technically employed by the ACMA.

I note that the Committee's preference is that the legislation set a limit to the scope of the powers, to be confined to those that hold special attributes, qualifications or qualities. I am of the view that the eSafety Office has reflected these considerations in its proposed list of officers who may issue an infringement notice. Additionally, the eSafety Office has advised that the procedures around the issuing of an infringement notice will be approved in writing by the Commissioner.

### **Committee comment**

2.179 The committee thanks the minister for this response. The committee notes the minister's advice that, in practice, the Commissioner would only authorise staff with appropriate attributes, qualifications, qualities and relevant experience. The committee also notes the minister's advice that, from a resourcing perspective, it would be impractical and limiting to have only one member of staff issue infringement notices, or to limit persons authorised to perform this function to staff at the SES level.

2.180 The committee further notes that the eSafety Office has advised that it is considering empowering around three staff to issue infringement notices, and the minister's views that, in doing so, the eSafety Office has reflected on the committee's preferences with regard to delegations of administrative power. Finally, the committee notes that the eSafety Office has advised that procedures around the issuing of an infringement notice will be approved in writing by the Commissioner.

2.181 The committee reiterates its preference that delegations of administrative powers be confined to the holders of nominated offices or SES-level employees or, alternatively, that a limit is set on the scope and type of powers that might be delegated. While the committee notes the minister's advice as to how it is intended

the Commissioner's power of delegation will be exercised, and as to the assurances that have been provided by the eSafety Office, the committee remains concerned that there is nothing on the face of the bill that would ensure that the power of delegation would be exercised in the way set out in the minister's response.

**2.182 The committee considers that it would be appropriate for the bill to be amended to require the Commissioner to be satisfied that persons authorised to issue infringement notices hold appropriate qualifications, attributes or expertise.**

**2.183 The committee otherwise draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of permitting the Commissioner to delegate the power to issue infringement notices to officers at any APS level.**

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## Exclusion of merits review<sup>72</sup>

### *Initial scrutiny – extract*

2.184 Item 39 of the bill seeks to amend section 88 of the *Enhancing Online Safety Act 2015*, to expressly provide that decisions by the eSafety Commissioner to *give* a removal notice under proposed section 44D, 44E or 44F are reviewable by the Administrative Appeals Tribunal (AAT). However, item 39 does not expressly provide for review of decisions by the eSafety Commissioner to *refuse to give* a removal notice, and it is unclear to the committee whether decisions of this type are reviewable by the AAT.

2.185 In this instance, the explanatory memorandum does not clarify whether decisions by the eSafety Commissioner are reviewable in the AAT, merely restating the terms of the relevant provision. However, in relation to merits review more generally, the explanatory memorandum states:

In relation to administrative decisions, it is good policy to provide the opportunity for independent review on the merits in relation to decisions that affect the rights and interests of individuals...<sup>73</sup>

2.186 The committee notes that victims of image-based abuse (that is, the sharing of intimate images without consent) often experience high levels of psychological distress, consistent with a diagnosis of moderate to severe depression and/or anxiety disorder,<sup>74</sup> and often the primary concern of victims is the rapid removal of the

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72 Schedule 1, item 39. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

73 Explanatory memorandum p. 42.

74 Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse* (Summary Report), May 2017, p. 5.

offending images. These matters are recognised in the explanatory memorandum.<sup>75</sup> A decision to refuse to give a removal notice may result in an offending image remaining available to viewers, particularly if the victim cannot secure the agreement of the relevant service provider or content host to remove the image.

2.187 Consequently, it appears to the committee that a decision by the eSafety Commissioner to refuse to give a removal notice could affect the rights and interests of individuals, and it may be appropriate to subject such a decision to merits review.

2.188 The committee requests the minister's advice as to whether a decision by the eSafety Commissioner to refuse to give a removal notice would be subject to merits review in the AAT, and if not, why the decision has been excluded from merits review.

### ***Minister's response***

2.189 The minister advised:

I note the Committee's concern that a decision by the Commissioner to refuse to give a removal notice is not reviewable by the Administrative Appeals Tribunal (AAT).

Under the Bill a person can make a complaint, or give an objection notice, to the Commissioner in relation to an intimate image (sections 19A and 19B respectively). On receipt of a complaint or objection notice the Commissioner has a variety of options to affect removal of an intimate image. The issuing of a removal notice is one option, while other options include informally seeking removal, accepting an enforceable undertaking, or seeking an injunction from a court.

While a decision of the Commissioner to refuse to issue a removal notice would not be reviewable by the AAT, if a removal notice was not issued and the image was not removed, this would not prevent a person from making another complaint to the Commissioner. For example, if the person were able to provide more information to the Commissioner to demonstrate that it was an intimate image shared without consent.

Sections 44D, 44E and 44F sets out the conditions under which the Commissioner can issue a removal notice to an end-user (a perpetrator), hosting service providers, and to providers of a social media service, a relevant electronic service or a designated internet service. These sections also provide that if the Commissioner decides not to issue a removal notice he/she is required to notify the person who lodged the complaint or objection notice. It is expected that the Commissioner would also include reasons why the notice was not issued.

In order for the eSafety Office to affect rapid removal of an image, the complaint or objection notice must contain sufficient information. Lack of

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75 Explanatory memorandum p. 2.

detail including for example, how and by whom the image was shared without consent, might impede this work and result in a decision not to issue a removal notice.

### **Committee comment**

2.190 The committee thanks the minister for this response. The committee notes the minister's advice regarding the operation of the complaints framework to be established by the bill, as well as the minister's advice that removal notices are one of a number of available methods to effect removal of an intimate image.

2.191 The committee also notes the minister's advice that a while a decision to refuse to give a removal notice is *not* reviewable, such a decision would not prevent a person from making further complaints to the Commissioner. Finally, the committee notes the minister's advice that, if the minister decides not to issue a removal notice, he or she is required to notify the person who lodged the relevant complaint or objection notice, and that it is expected that the minister would also provide reasons as to why the removal notice was not issued.

2.192 However, the minister's advice does not appear to address why a decision not to give a removal notice has been excluded from merits review. In this regard, the committee emphasises that internal review mechanisms, or the ability to provide further information to a decision-maker, are not generally considered to provide a substitute for review by an independent tribunal.<sup>76</sup> Moreover, the committee does not consider the ability to make additional complaints to the Commissioner to be sufficient justification for excluding merits review.

2.193 As outlined in the committee's initial comments, a decision to refuse to give a removal notice in relation to an intimate image may result in that image remaining available to viewers. Noting the significant psychological harms experienced by victims of image-based abuse, the committee considers that decision to refuse to give a removal notice has could affect the rights and interests of individuals, and it would therefore be appropriate to subject such a decision to merits review. In this regard, the committee notes the views of the Administrative Review Council that administrative decisions that will, or are likely to, affect the interests of a person should be subject to merits review.<sup>77</sup>

2.194 The committee is also concerned that, while it may be expected that the Commissioner would provide reasons for the refusal to give a removal notice, there is nothing on the face of the bill that would require the Commissioner to provide reasons to an affected person.

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76 See Attorney General's Department, *Administrative Law Policy Guide*, 2011, p. 13.

77 Attorney-General's Department — Administrative Review Council, *What decisions should be subject to merit review?*, paragraph 2.1, <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttoemeritreview1999.aspx>.

**2.195** The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to and understanding of the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

**2.196** The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of not subjecting decisions by the eSafety Commissioner to refuse to give a removal notice to independent merits review.

## Export Control Bill 2017

<b>Purpose</b>	This bill seeks to implement a new legislative framework for agricultural exports from Australian Territory
<b>Portfolio</b>	Agriculture and Water Resources
<b>Introduced</b>	Senate on 7 December 2017
<b>Bill status</b>	Before the Senate

2.197 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 26 February 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>78</sup>

### Delegation of legislative powers<sup>79</sup>

#### *Initial scrutiny – extract*

2.198 Clause 24 provides that the minister may, by legislative instrument, determine that the export of specified goods from Australian territory, or from a part of Australian territory, is prohibited absolutely for a specified period of up to six months. The minister may also determine that the export of specified goods to a specified place is prohibited for a specified period of up to six months. Under clause 25, the minister may vary a temporary prohibition determination issued under clause 24 in order to extend the specified period for a further six months.

2.199 The committee notes that a temporary prohibition determination issued under clause 24 is a legislative instrument and would therefore be subject to parliamentary scrutiny through the usual disallowance process. However, clause 25 does not state that a variation of a temporary prohibition determination would also be a legislative instrument. The explanatory memorandum does not clarify whether such variations are to be considered legislative instruments and whether they will therefore be subject to the same level of parliamentary scrutiny.<sup>80</sup>

2.200 The committee requests the minister's advice as to whether a variation of a temporary prohibition determination issued under clause 25 will be a legislative

78 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.apf.gov.au/senate\\_scrutiny\\_digest](http://www.apf.gov.au/senate_scrutiny_digest)

79 Clause 25. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

80 Explanatory memorandum, pp. 54-55.

instrument and, if not, why it is appropriate to exclude such a variation from the parliamentary scrutiny afforded to legislative instruments.

### ***Minister's response***

2.201 The minister advised:

I consider that a determination made under clause 24 and a variation to a determination under clause 25 would fall within the definition of a legislative instrument, based on the relevant provisions in the *Legislation Act 2003*. As a legislative instrument, the determination will be subject to parliamentary scrutiny through the usual disallowance process.

Subsection 5(1) of this Act provides that a legislative instrument is an instrument in writing of a legislative character. Subsection 5(3) states that, among other things, an instrument has legislative character if it determines the law or alters the content of the law, rather than applying the law in a particular case; and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right. In addition, subsection 8(4) defines legislative instruments to include an instrument if any provision of the instrument is made under a power delegated by the Parliament. An instrument is also a legislative instrument if it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

### ***Committee comment***

2.202 The committee thanks the minister for this response. The committee notes the minister's advice that a variation to a determination under clause 25 would be legislative in character and therefore fall within the definition of a legislative instrument set out in the *Legislation Act 2003*. The committee further notes the advice that a variation of a temporary prohibition determination issued under clause 25 would therefore be subject to the parliamentary scrutiny normally afforded to legislative instruments.

**2.203 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.204 In light of the information provided, the committee makes no further comment on this matter.**

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**Broad discretionary power**<sup>81</sup>

2.205 Part 2 of proposed Chapter 2 seeks to establish a framework for the secretary to grant exemptions from provisions of the bill in relation to particular goods. Within that framework, clause 53 provides that the occupier of an establishment where export operations in relation to relevant goods<sup>82</sup> are carried out, or a person who wishes to export relevant goods, may apply to the secretary for an exemption from one or more provisions of the bill in relation to the goods. On receipt of an application under clause 53, the secretary would be required either to grant or refuse to grant the exemption. The secretary would also be empowered to grant exemptions subject to conditions, and to vary those conditions where the secretary considers it necessary to do so.

2.206 The committee is concerned that Part 2 of proposed Chapter 2 appears to confer on the secretary a broad administrative power to exempt persons (applicants) from the application of the law as it applies to particular classes of goods. The committee considers this power to be broadly akin to a Henry VIII clause, which enables delegated legislation to alter or override the operation of primary legislation. The committee has significant concerns with Henry VIII-type clauses, as such clauses have the potential to impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.

2.207 In this instance, the committee notes that Part 2 of proposed Chapter 2 would not enable delegated legislation to alter the operation of primary legislation, but rather would enable the secretary to make an administrative decision overriding the operation of primary legislation with respect to specific persons and types of goods. However, the committee remains concerned about the breadth of such powers, and expects a sound justification in the explanatory memorandum for including such a power. In this instance, the explanatory memorandum provides no such justification, merely stating the operation and effect of the relevant provisions.

2.208 The committee also notes that the bill proposes to allow the rules to prescribe the circumstances in which goods are 'relevant goods'<sup>83</sup> (and therefore to prescribe the types of goods in relation to which an exemption may be granted) and to prescribe key elements of the exemptions process – including the matters to which the secretary must have regard in deciding whether to grant an exemption or

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81 Clauses 53 to 55. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

82 Paragraphs 52(1)(a) to (e) provide that Part 2 of Chapter 2 applies to prescribed goods ('relevant goods') that are to be exported as a commercial sample, for experimental purposes, in exceptional circumstances, in special commercial circumstances and in any other circumstances prescribed by the rules. Subclause 52(2) provides that the rules may prescribe the meaning of the terms in paragraphs 52(1)(a) to (d).

83 See clause 52.

to impose or vary conditions.<sup>84</sup> The committee is therefore concerned that the secretary's broad discretionary power as described above may be expanded even further through the making of delegated legislation. The committee's longstanding view is that significant matters, such as core elements of the secretary's decision-making process, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.209 The explanatory memorandum states that allowing the rules to prescribe the circumstances in which goods are 'relevant goods', and to prescribe key elements of the exemptions framework, is necessary to provide flexibility and to reduce administrative burden.<sup>85</sup> In relation to prescribing the circumstances in which an exemption may be granted, the explanatory memorandum further states:

These circumstances may arise for a range of matters relating to the prescribed goods, an importing country requirement or a requirement under the Bill that cannot be complied with. The ability to prescribe these circumstances will be necessary for the purposes of achieving one or more requirements of the Bill and reflects the likelihood that the circumstances prescribed will change from time to time and will need to commence at short notice.<sup>86</sup>

2.210 Similar explanations are provided with respect to enabling the rules to prescribe matters to which the secretary must have regard when deciding whether to grant an exemption<sup>87</sup> or to impose conditions.<sup>88</sup>

2.211 The committee appreciates that circumstances relevant to the exemptions framework, and to the administration of the export control regime more generally, may change from time to time. However, the committee does not generally consider administrative flexibility to be sufficient justification for including significant matters in delegated legislation rather than in primary legislation.

2.212 The committee also notes that the secretary's decision on an application for exemption is not subject to any form of merits review.<sup>89</sup>

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

- why it is proposed to confer on the secretary a broad discretionary power to exempt persons proposing to export relevant goods from provisions of the bill;

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84 See subclauses 54(3) and 55(2).

85 Explanatory memorandum, pp. 102-107.

86 Explanatory memorandum, p. 102.

87 Explanatory memorandum, p. 104.

88 Explanatory memorandum, pp. 104-105.

89 See clause 381 (which does not list an exemption decision as a 'reviewable decision').

- why it is considered necessary and appropriate to leave core elements of the exemptions framework, particularly the matters to which the secretary must have regard before granting an exemption, to delegated legislation;
- the appropriateness of amending the bill to provide more specificity as to the circumstances in which a person is eligible to apply for an exemption or to set out the relevant considerations the secretary must take into account in deciding whether to grant an exemption; and
- why an exemption decision is not subject to any form of merits review.

### ***Minister's response***

#### 2.214 The minister advised:

Proposed Part 2 of Chapter 2 of the Bill seeks to establish a framework for the Secretary to grant exemptions from provisions of the Bill in relation to particular goods in certain specified circumstances. An exemption may be granted if the goods are a commercial sample, if the goods are for experimental purposes, where there are exceptional circumstances, where there are special commercial circumstances, or where the importing country does not require the export controls to apply to the goods. The Bill does not provide for exemptions for kinds of goods in situations where these circumstances do not exist.

An exemption may be granted following an individual application rather than in relation to all goods of a particular kind or all goods exported to a particular importing country. The purpose of this is to enable a reduced level of regulatory oversight in circumstances where the risk posed by exporting the goods to the importing country is minimal and the importing country has accepted this risk.

There is a broad range of matters that the Secretary may need to take into account when deciding to grant an exemption. These matters may be detailed and specific to a particular circumstance, importing country or kind of goods, and are not appropriate to be included in the Bill. In addition, these circumstances may change at short notice in accordance with importing country requirements. For this reason, it is not practical to include these matters in the Bill.

The Administrative Review Council's publication '*What decisions should be subject to merit review?*' (1999) indicates that decisions for which there is no appropriate remedy may be suitable to be excluded from merits review. A decision to grant an exemption would be made on the basis of an individual application. In the majority of cases, decisions must be made quickly, as many of the goods subject to regulation under the Bill are perishable. In many cases it is likely that the goods to which the review relates would no longer be suitable for export. As such, there is no remedy available. In addition, a decision to grant an exemption is about determining the circumstances in which it is acceptable to exclude a consignment of goods from the requirements of the legislation. Such

decisions may have implications beyond the interests of an individual exporter, including adversely impacting trading partners' confidence in the Australian Government's regulatory oversight of exported goods. This in turn may affect the interests of the export industry or a segment of that industry.

### ***Committee comment***

2.215 The committee thanks the minister for this response. The committee notes the minister's advice that the secretary would only be able to grant exemptions from the provisions of the bill in relation to particular goods where the goods are a commercial sample; for experimental purposes; where there are exceptional circumstances; or where the importing country does not require the export controls to apply to the goods.

2.216 The committee further notes the minister's advice that an exemption may be granted following an individual application, rather than in relation to all goods of a particular kind or all goods exported to a particular importing country, and that this is intended to enable the reduction of regulatory oversight where the risks posed by exporting particular goods are minimal and have been accepted by the importing country.

2.217 The committee also notes the minister's advice that it is not practical to include in the bill the matters the secretary must consider when deciding to grant or not grant an exemption as they may be detailed; specific to a particular circumstance, importing country or kind of goods; and may change at short notice in accordance with importing country requirements.

2.218 The committee also notes the minister's advice that, in the majority of cases, exemption decisions must be made quickly as many goods regulated under the bill will be perishable. In cases where the goods are no longer suitable for export, the minister states that there would be no remedy available and therefore it is appropriate to exclude exemption decisions from merits review. The minister further states that a decision to grant an exemption may affect interests beyond those of an individual exporter, including adversely impacting trading partners' confidence in the regulatory oversight of exported goods, which may then affect the interests of the relevant export industry.

2.219 However, the committee remains concerned about the breadth of the discretionary power to exempt persons proposing to export relevant goods from provisions of the bill. As noted in the committee's original comments, the bill would allow the rules to prescribe 'other circumstances' in which exemptions may be granted by the secretary, meaning the circumstances in which the secretary could grant an exemption may not be limited to those set out in paragraph 2.19. The minister's response does not address the committee's concern in relation to the potential expansion of the secretary's discretionary power through the making of delegated legislation. Further, while it may not be appropriate or possible to include in the bill the full range of matters the secretary must take into account when

deciding to grant an exemption in each case, it is unclear why it is not possible to provide at least some high-level guidance in the bill as to relevant considerations.

2.220 Finally, it is not clear to the committee that it is appropriate to completely exclude merits review of exemption decisions. See the committee's consideration regarding the exclusion of merits review of such decisions at paragraphs 2.330 to 2.337 below.

**2.221 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.222 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring on the secretary a broad discretionary power to exempt persons proposing to export relevant goods from provisions of the bill.**

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### **Broad delegation of administrative powers: to non-Commonwealth officers or bodies<sup>90</sup>**

2.223 The bill provides that government certificates may be issued for export goods which relate to matters that other countries require certification for or are otherwise requirements that must be complied with before goods are exported. As set out in the explanatory memorandum, government certificates will 'constitute evidence that goods that are to be, or have been, exported, have been assessed as being compliant with the requirements of the Bill, and meet relevant importing country requirements.'<sup>91</sup> Subclause 63(1) provides that the issuing body for a government certificate in relation to a kind of goods that are to be, or have been, exported is a person or body prescribed by the rules, or if no person or body has been prescribed, the secretary. Under subclause 63(2), the rules may provide that one or more of the following is an issuing body for such government certificates:

- the secretary,
- a person or body covered by an approved arrangement that provides for the person or body to issue government certificates in relation to goods of that kind;
- a specified person or body.

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90 Clause 63. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

91 Explanatory memorandum, p. 2. See also definition of 'government certificate' under clause 12.

2.224 The explanatory memorandum states that providing the secretary with the power to prescribe the issuing body will 'provide the Secretary with the flexibility to determine the appropriate issuing body for a particular kind of goods'.<sup>92</sup> The committee notes that there are no limits in the bill as to the type of person or body who may be appointed as an issuing body for government certificates, meaning that such persons or bodies may include private contractors.

2.225 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. Where broad delegations are provided for, including delegations beyond the Australian Public Service (APS), the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

2.226 In this case, the explanatory memorandum does not explain why it is necessary to give the secretary the broad discretion to prescribe 'a specified person or body'. Neither the bill nor the explanatory memorandum contains any guidance as to what persons or bodies it would be appropriate to specify as an issuing body. The explanatory memorandum also does not address the question of why it is appropriate to allow decisions with respect to the issuing of government certificates to be made by persons or bodies outside the Australian Public Service, nor what accountability mechanisms will be put in place with respect to such persons or bodies.

2.227 The committee requests the minister's advice as to:

- why it is appropriate to allow decisions with respect to the issuing of government certificates to be made by any person or body as specified in the rules; and
- what accountability and review mechanisms will apply in relation to decisions made by non-Commonwealth officers.

### ***Minister's response***

2.228 The minister advised:

Clause 12 of the Bill provides that an 'issuing body' for a government certificate in relation to a kind of goods means a person or body that may issue a government certificate in relation to goods of that kind under clause 63. Clause 63 of the Bill provides that the issuing body for a kind of goods is the person or body specified in the rules. If there is no issuing body specified for a kind of goods in the rules, the issuing body is exclusively the Secretary.

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92 Explanatory memorandum, p. 111.

In accordance with paragraphs 63(2)(b) and (c) of the Bill, an issuing body may be a person or body covered by an approved arrangement; or a specified person or body. Such third party issuing bodies are necessary in circumstances where a body or person has the specialisation, knowledge and expertise to certify a kind of goods. For example, bodies that have specialised expertise in organics certification would be authorised to issue certificates in relation to organic goods.

The authorisation for a person or body covered by an approved arrangement, or a specified person or body, to issue government certificates will be subject to safeguards that will be established by the Bill. First, the rules that specify an issuing body will be subject to parliamentary oversight, and therefore disallowance. Second, issuing bodies will be subject to accountability and review mechanisms administered by the Secretary. An issuing body who is covered by an approved arrangement will be subject to the checks and measures set out in Chapter 5 of the Bill (Approved arrangements). This includes the power to vary, suspend or revoke an approved arrangement in whole or in part. For example, if the functions of the issuing body will no longer ensure compliance with requirements of the Act in relation to export operations the approved arrangement may be suspended. These provisions in Chapter 5 also include the requirement to comply with any specified obligations and conditions to which the approved arrangement is subject.

This approach follows a similar model currently in place under the *Export Control Act 1982*. For example, the *Export Control (Organic Produce Certification) Orders* allows certain bodies to certify organic produce on behalf of the Government, subject to the establishment and maintenance of a documented system that the Secretary may audit to ensure certificates are issued in appropriate circumstances. It is intended that such documented systems will be managed under the Bill through approved arrangements and subject to similar requirements.

In circumstances where an issuing body is a non-Commonwealth officer that is not under an approved arrangement, the Secretary would be able to conduct audits of that issuing body in accordance with clause 267 of the Bill. Clause 267 provides that the Secretary may require an audit to be conducted of the performance of functions and the exercise of power under this Act by any other person (other than a Commonwealth authorised officer or a State or Territory authorised officer) who performs functions or exercises powers under the Bill (see subparagraph 267(1)(i)). This will include issuing bodies. The Secretary is also able to revoke any certificate issued by any issuing body, and may amend the rules to remove a third party issuing body.

In addition, the rules may prescribe that an issuing body, whether under an approved arrangement or not, may be required to satisfy the fit and proper person test before being able to issue government certificates (see clauses 372 and 373).

**Committee comment**

2.229 The committee thanks the minister for this response. The committee notes the minister's advice that it is necessary to allow third-party bodies to issue government certificates where such bodies possess the specialisation, knowledge and expertise to certify certain types of goods (for example, bodies with specialised knowledge in organics certification).

2.230 The committee further notes the minister's advice that a number of safeguards will apply in relation to persons or bodies who are authorised to issue government certificates. For example, issuing bodies will be subject to accountability and review mechanisms administered by the secretary. For instance, Chapter 5 of the bill includes a requirement to comply with any specified obligations and conditions attaching to an approved arrangement and gives the secretary powers to vary, suspend and revoke such arrangements. The committee also notes the minister's advice that, where an issuing body is neither a Commonwealth officer nor under an approved arrangement, the secretary would be able to conduct audits in accordance with clause 267 of the bill.

2.231 The committee finally notes the minister's advice that the secretary would also be able to revoke any certificate issued by any issuing body and may amend the rules to remove third-party issuing bodies.

**2.232 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.233 In light of the information provided, the committee makes no further comment on this matter.**

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**Significant matters in delegated legislation<sup>93</sup>**

2.234 Clause 258 seeks to make it an offence for a person to engage in conduct that contravenes a rule made with respect to official marks, marks resembling official marks and official marking devices.<sup>94</sup> The offence carries a maximum penalty of imprisonment for five years or 300 penalty units, or both.

2.235 The committee notes that this provision effectively allows the rules to specify the details of what will constitute an offence under clause 258. The committee's view is that significant matters, such as the details of conduct that will

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93 Clause 258. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

94 Clauses 255, 256 and 257 allow rules to make provisions for and in relation to these matters.

constitute an offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.236 In this instance, the explanatory memorandum states that conduct that contravenes the requirements set out in the rules may undermine the integrity of the regulatory framework provided for by the bill, impact the confidence of trading partners and adversely impact market access.<sup>95</sup> However, the explanatory memorandum does not provide any justification for allowing all of the details of what will constitute an offence to be set out in the rules.

2.237 The committee therefore requests the minister's advice as to why it is appropriate to provide that all of the details as to what conduct will constitute an offence under clause 258 (which will be subject to a penalty of up to five years imprisonment) is to be set out in the rules.

### ***Minister's response***

2.238 The minister advised:

Clause 258 of the Bill proposes to make it an offence for a person to engage in conduct that contravenes a rule made under Division 2 of Part 3 of Chapter 8 of the Bill in relation to official marks, marks resembling official marks and official marking devices. These rules address such matters as who may possess or manufacture an official mark or an official marking device, and the persons who may apply an official mark or a resemblance of an official mark. The rules are likely to relate to a particular commodity rather than to all prescribed goods covered by the Bill.

Paragraph 2.3.4 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers provides that it is appropriate to have the conduct that will constitute an offence set out in a legislative instrument in the following circumstances:

- the relevant content involves a level of detail that is not appropriate for the Act, and
- prescription by legislative instrument is necessary because of the changing nature of the subject matter.

This guideline is applicable to clause 258 for the following reasons. First, the law regarding official marks, marks resembling official marks and official marking devices is highly detailed and technical and will relate to commodity specific requirements. For example, the rules may prescribe detailed methods for the application of an official mark which is specific to a particular kind of goods and tolerances for dimensions of official marks. This operational level of detail is not appropriate to be set out in the primary legislation.

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95 Explanatory memorandum, p. 290.

Second, the legal requirements for official marks, marks resembling official marks and official marking devices change relatively frequently. For example, pictorial representations of official marks for a particular kind of good may be required (see, for example, Part 13 of the *Export Control (Prescribed Goods - General) Order 2005*). These images may need to change quickly in accordance with importing country requirements or advances in manufacturing and application processes. To enable a response to these changes it is not appropriate to prescribe conduct that relates to the proper oversight and management of official marks, marks resembling official marks and official marking devices in primary legislation.

In addition, the rules are legislative instruments and will be subject to parliamentary oversight, including disallowance.

### **Committee comment**

2.239 The committee thanks the minister for this response. The committee notes the minister's advice that the law regarding official marks, marks resembling official marks and official marking devices is highly detailed and technical and will relate to commodity specific requirements and is therefore not suitable for inclusion in primary legislation, and that the legal requirements change relatively frequently.

2.240 The committee emphasises that, from a scrutiny perspective, it is desirable for the content of an offence to be clear from the provision itself so that the scope and effect of the offence is clear and so that affected persons may readily ascertain their obligations. Noting these scrutiny considerations, the committee remains concerned that *all* of the details as to what conduct will constitute an offence under clause 258 are to be set out in the rules, particularly as the offence will be subject to a penalty of up to five years imprisonment.

**2.241 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.242 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that all of the details as to what conduct will constitute an offence subject to up to five years imprisonment are to be set out in the rules.**

**2.243 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

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## **Broad delegation of administrative powers: absence of training, qualification or skill requirements<sup>96</sup>**

2.244 A number of provisions in the bill seek to allow the secretary to approve or prescribe certain persons to carry out functions or powers under the bill. However, in doing so the bill does not limit the type of persons who may be appointed and does not require that such persons delegated with such powers need possess any specific training, qualification or skill requirements.

2.245 In particular, clauses 273 and 281 provide that the secretary may, in writing, approve a person, or each person in a specified class of persons, to conduct audits or to carry out assessments of goods, and the rules may make provision for matters relating to the approval of such persons. However, the bill does not provide that the secretary may only appoint auditors and assessors that possess relevant skills, training or experience, nor does the bill require that such matters be set out in the rules.

2.246 The explanatory memorandum states that it may be necessary for the rules to 'address specific training, qualification and skill requirements that may be taken into account when approving a person to be an auditor.'<sup>97</sup> However, the committee notes that it is not a statutory requirement that the rules make provision for any specific matters with respect to the approval of auditors or assessors, including training, qualification and skill requirements. The committee further notes that, in the absence of the rules specifying such matters, the secretary is granted a very broad power that may be exercised without reference to any clear statutory criteria.

2.247 A similar situation exists with respect to the appointment of 'analysts' under clause 413. This clause seeks to allow the secretary to appoint a person to be an analyst for the purposes of the bill. The role of the analyst would include the taking, testing and analysis of samples as set out in clauses 410 and 412, as well as providing a written certificate as set out in clause 413. The bill provides no limitation as to who may be appointed as an analyst, nor any guidance on the qualifications or attributes that an analyst must possess. Further, the bill does not provide that such matters may be prescribed in the rules. The explanatory memorandum provides no clarification of these matters.<sup>98</sup> Again, this provision appears to grant a very broad power to the secretary without any guidance as to how it should be exercised. This matter is of additional concern to the committee given the role of analysts in the preparation of evidentiary certificates, as discussed below at paragraph 2.345 to 2.351. The committee further notes that as there is no limitation in the bill on who

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96 Clauses 273, 281 and 413. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

97 Explanatory memorandum, p. 304, see also pp. 308-309 with respect to the approval of assessors under clause 281.

98 Explanatory memorandum, pp. 404-405.

may be appointed as an auditor, assessor or analyst, such persons may be private contractors and not bound by the same professional code of conduct or accountability measures as members of the APS are.

2.248 The committee seeks the minister's detailed advice as to:

- why the bill does not require that the secretary only appoint auditors, assessors or analysts that possess relevant skills, training or experience;
- at a minimum, why there is no obligation for the rules to set out the requirements that must be met for approval of an auditor, assessor or analyst; and
- what accountability and review mechanisms will apply in relation to decisions made by non-Commonwealth officers.

### ***Minister's response***

2.249 The minister advised:

The effectiveness of, and confidence in, the export control regime depends on the capacity and capability of persons performing functions and exercising powers under the Bill. Therefore, the Bill will enable the rules to make provision in relation to the approval of auditors and assessors and the assessment and competency of applicants. Relevant skills, training or experience will be taken into account before a person is approved to be an auditor, assessor or analyst under the Bill.

I note the Committee's comments in relation to the types of persons who may be appointed as auditors, assessors or analysts. The Bill will enable the rules to make provision for a fit and proper person test (under clause 372) to apply for the purposes of any provision under the Bill or rules. This will ensure that certain persons in the supply chain are trustworthy and demonstrate the required integrity necessary to uphold Australia's trading reputation. All Australian Public Service (APS) employees in the Department of Agriculture and Water Resources (Department) are subject to the APS Code of Conduct as well as other key performance indicators.

In relation to oversight of third party auditors, assessors and analysts, and to ensure an effective export control regime, the rules will set out the powers of the Secretary to be able to suspend or revoke the approval of these people. As legislative instruments, the rules will be subject to parliamentary oversight and disallowance. In addition I will be able to give directions to the Secretary about the rules which; for example, may require the Secretary to take certain things into account when making rules (see clause 289).

### ***Committee comment***

2.250 The committee thanks the minister for this response. The committee notes the minister's advice that the bill enables the rules to make provision in relation to the approval of auditors and assessors and the assessment and competency of

applicants, and that relevant skills, training or experience will be taken into account before a person is approved to be an auditor, assessor or analyst.

2.251 The committee also notes the minister's advice that clause 372 of the bill enables the rules to make provision for a fit and proper person test to apply to any provision of the bill or rules and that all APS employees in the department are subject to the APS Code of Conduct as well as other key performance indicators.

2.252 Finally, the committee notes the minister's advice that the rules will set out the powers of the secretary to suspend or revoke the approval of third-party auditors, assessors and analysts, and that as the rules will be legislative instruments they will be subject to parliamentary oversight and disallowance.

2.253 The committee remains concerned that the bill does not itself contain any requirement that persons appointed as auditors, assessors and analysts possess relevant skills, training or experience. Although the rules *may* make provision in relation to the approval of auditors and assessors and the assessment of the competency of applicants, the bill contains no positive requirement that the rules address these matters. The committee also reiterates that third-party auditors, assessors and analysts may be private contractors and therefore not be bound by the professional code of conduct or accountability measures that apply to APS members.

2.254 The committee notes the minister's advice that the bill makes provision for a fit and proper person test to be applied for the purposes of any provision under the bill or rules. However, clause 372, which sets out what the secretary must have regard to in determining if a person is a fit and proper person, focuses on whether the person has been convicted of certain offences or has had court orders made against them. Its purpose is to establish that persons involved in the export of goods are 'trustworthy and demonstrate the required integrity necessary to uphold Australia's trading reputation'.<sup>99</sup> It would not go to determining whether persons appointed as auditors, assessors and analysts possess the relevant skills, training or experience.

**2.255 The committee considers that it would be appropriate for the bill to be amended so as to require that the secretary must not appoint a person as an auditor, assessor or analyst unless he or she is satisfied the person possesses relevant skills, training or experience.**

**2.256 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

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99 Explanatory memorandum, p. 377.

**2.257 The committee otherwise 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 appoint persons as auditors, assessors and analysts with no legislative requirement that such persons possess relevant skills, training or experience.**

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**Broad sub-delegation of administrative powers: to any APS level employee<sup>100</sup>**

2.258 Proposed subclause 288(1) provides that the secretary may, in writing, delegate any of his or her functions or powers (subject to three exceptions) to a Senior Executive Service (SES) employee, or an acting SES employee, in the department.<sup>101</sup> Proposed subclause 288(2) provides that, if the secretary delegates a function or power to an SES employee or an acting SES employee, that employee may, in writing, sub-delegate the function or power to an authorised officer or to an APS employee within the department. Proposed subclause 288(3) then lists a number of functions and powers that may *not* be sub-delegated.

2.259 The committee has consistently drawn attention to legislation that allows for the delegation (or sub-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's preference is that legislation sets a limit either on the scope of the powers that may be delegated or on the categories of people to whom delegation is permitted. The committee prefers that delegates (and sub-delegates) be confined to the holders of nominated offices or to members of the SES. 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. In this instance, the explanatory memorandum states:

In an operational context, many of the powers that are delegated to SES staff may need to be completed by staff at a lower classification level as a matter of administrative necessity. This arises from the volume and timeliness of decision making and availability of SES officers who have broad responsibilities. For example, the Secretary must decide to either register an establishment or refuse to register an establishment in clause 112 of the Bill; however, in an operational context, officers below SES level require the ability to register an establishment.

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100 Clause 288. The committee draws Senators' attention to this provision pursuant Senate Standing Order 24(1)(a)(ii).

101 Proposed paragraph 288(1)(b) sets out three exemptions to this power of delegation, providing that the secretary may not delegate the power to arrange for the use of computer programs to make certain decisions, the power to enter into particular arrangements with a State or Territory, and the power to make rules.

When a power is subdelegable (see subclause 288(3) for powers that will not be able to be subdelegated) there will be no limitation in the Bill on which APS employees may receive the subdelegation in order for there to be the greatest degree of flexibility. However, subclause 288(2) is not intended to allow every power to be subdelegated to every individual in every class listed; functions which may be subdelegated to each particular class of persons will be determined administratively.<sup>102</sup>

2.260 The committee notes the explanation provided in the explanatory memorandum for the broad sub-delegation of administrative powers proposed by the bill. However, the committee is concerned that there is no guidance on the face of the bill as to the skills, qualifications or experience that would be required of an employee or officer to undertake sub-delegated functions, nor any limitation on the level to which sub-delegation is permitted (currently, sub-delegation would be permitted to *any* level APS employee). In this regard, the committee notes that it has generally not accepted administrative flexibility as sufficient justification for allowing a broad delegation of administrative power to officials at any level.

2.261 Further, while the committee welcomes the limitations on sub-delegation set out in proposed subclause 288(3), the committee notes that the explanatory memorandum does not specify the functions and powers that *may* be sub-delegated under subclause 288(2) (as opposed to those that may not). It is therefore unclear to the committee exactly which powers are capable of sub-delegation, and so it is difficult to assess the appropriateness of delegating specific powers and functions to employees and officers at any APS level.

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

- each of the powers and functions under the bill that may be sub-delegated, the justification for each sub-delegation and examples of the persons to whom it is envisaged each sub-delegation would be made; and
- the appropriateness of amending the bill to require that persons to whom powers are sub-delegated be confined to officers or employees that hold special attributes, qualifications or expertise.

### ***Minister's response***

2.263 The minister advised:

Subclause 288(1) specifies powers under the Bill that must not be delegated and subclause 288(3) specifies powers that must not be subdelegated. Any other powers of the Secretary under the Bill that are been delegated to an SES officer may be subdelegated to an authorised officer or an APS employee of my Department. Subdelegable powers have been identified based on the following policy considerations. These

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102 Explanatory memorandum, pp. 314-315.

decisions do not have the capacity to affect national interests or Australia's trading relationship with other countries.

As stated in the Explanatory Memorandum, administrative necessity may require these decisions to be made by staff at lower classification levels due to the high volume of decisions, or time-sensitivity of the decisions.

The effectiveness of, and confidence in, the export control regime depends on the capacity and capability of persons performing functions and exercising powers under the Bill. Therefore, my Department will ensure that only those persons with appropriate training, qualifications and expertise will be delegated (or subdelegated) powers under the Bill. The decisions that are able to be subdelegated will not have serious implications for Australia's export industry as a whole or a particular export industry.

All APS employees in my Department with delegated powers are subject to the APS Code of Conduct as well as other key performance indicators. Third party authorised officers may be suspended or commit an offence for failing to comply with the conditions of their authorisation. I believe that these oversight mechanisms provide sufficient safeguards for the exercise of powers under the Bill, including those with subdelegations.

The person or persons to whom a power is subdelegated will depend on the specific power and which area of my Department is responsible for regulating that export industry for that aspect of the Bill. For example, the power to approve an approved arrangement may be subdelegated to directors (APS Executive Level 2) in the relevant program areas for industries that use approved arrangements (such as live animal export, meat and plants). The power to cause forfeited goods to be sold, destroyed or otherwise disposed of may be subdelegated to directors in Department based in regional areas where goods may be forfeited to the Commonwealth. The power to approve the payment of compensation may be subdelegated to an APS employee of my Department, such as a Director (APS Executive Level 2), in the Finance and Business Support Division which deals with compensation payment.

It would not be appropriate to amend the Bill to limit subdelegation to officers or employees who hold special attributes, qualifications or expertise. The attributes, qualifications or expertise that are needed or desirable to exercise a subdelegated power will vary for each subdelegable power. These requirements will continue to be dealt with administratively, which will allow the delegate to consider the detailed attributes, qualifications or expertise required for a subdelegate to exercise a specific power.

The following powers under the Bill may be subdelegated are listed at Attachment A.

#### **List of powers that are subdelegable under the Export Control Bill 2017**

##### **In relation to accredited properties:**

- power to approve (clause 79), renew (clause 84), vary at the request of a manager (clause 87), vary on the Secretary's own initiative (clause 90), suspend at the request of a manager (clause 92), suspend on the Secretary's own initiative in relation to one or more kinds of export operations, prescribed goods and places (clause 94), suspension on the Secretary's own initiative in relation to all kinds of export operations and all kinds of prescribed goods (clause 95), vary the period of suspension (clause 97), revoke a suspension (clause 98), revoke at the request of a manager (clause 101), revoke on the Secretary's own initiative (clause 102) an accredited property

**In relation to registered establishments:**

- power to approve (clause 112), renew (clause 117), vary at the request of an occupier ( clause 120), vary on the Secretary's own initiative (clause 123), suspend at the request of an occupier (clause 125), suspend on the Secretary's own initiative in relation to one or more kinds of export operations and one or more kinds of prescribed goods (clause 127), suspend on the Secretary's own initiative in relation to all kinds of export operations and all kinds of prescribed goods (clause 128), vary the period of suspension (clause 130), revoke a suspension (clause 131), revoke at the request of an occupier (clause 137), revoke on the Secretary's own initiative (clause 138) a registered establishment.

**In relation to approved arrangements:**

- power to approve (clause 151), renew (clause 156), vary at the request of a holder (clause 161), vary on the Secretary's own initiative (clause 165), suspend at the request of a holder (clause 169), suspend on the Secretary's own initiative (clause 171), vary the period of a suspension (clause 174), revoke a suspension (clause 175), revoke at the request of a holder (clause 178), revoke on the Secretary's own initiative (clause 179) an approved arrangement.

**In relation to export licences:**

- power to grant (clause 191), renew (clause 196), vary at the request of a holder (clause 199), vary on the Secretary's own initiative (clause 201), suspend at the request of a holder (clause 203), suspend on the Secretary's own initiative (clause 205), vary the period of a suspension (clause 208), revoke a suspension (clause 209), revoke at the request of the holder (clause 211), revoke on the Secretary's own initiative (clause 212) an export licence.

**In relation to export permits:**

- power to issue (clause 225), vary at the request of a holder (clause 229), vary on the Secretary's own initiative (clause 229), suspend (clause 231) or revoke an export permit (clause 233)

- For the purposes of making a decision in relation to an application for an export permit, the Secretary may:  
request further information or documents relating to the application, require an audit of export operations, require an assessment of goods, request a written statement from the applicant, take or analyse samples of the goods or from equipment or other things relating to the application (or arrange another person to do so) or anything else prescribed by the rules (clause 241).

#### **Other subdelegable powers**

- to grant an exemption, request further information or documents relating to application for exemption (clause 54), vary the conditions of exemption (clause 58), revoke an exemption (clause 59)
- to issue an identity card (clause 206(1))
- require an assessment of goods to be carried out if an export permit for a kind of prescribed goods is in force (clause 234)
- give written approval to alter or interfere with a trade description (clause 250)
- to require an audit to be conducted (clauses 266, 267)
- approve a person to conduct audits (clause 273) or to be an approved assessor (clause 281)
- to approve a person or each person in a specified class of persons, to carry out assessments of goods (clause 281)
- to arrange for the use, under the Secretary's control, of computer programs for making decisions (clause 286)
- to determine, in writing, training and qualification requirements for authorised officers (clause 291)
- approve manner of application to be a third party authorised officer and to authorise a person to be a third party authorised officer (clause 291(3))
- to authorise a person to be an authorised officer (clause 291) or vary, suspend or revoke authorisation (clauses 295, 296, 297)
- to request notification of certain events by suspended third party authorised officer (clause 299)
- to give approval, in writing, for the occupier of a registered establishment to provide goods or services to an authorised officer (clause 308(2))
- to approve a program of export operations ( clause 311(2))
- direct an authorised officer to carry out certain export operations in approved export program (clause 313)

- direct an authorised officer to monitor or review export operations in approved export programs (clause 314)
- powers as chief executive for the purpose of Part 3 of the Regulatory Powers Act (investigation powers) (clause 329(2)(e))
- authorised applicant for civil penalties, an infringement officer and relevant chief executive for the purpose of Part 5 of the Regulatory Powers Act (infringement notices) (clause 359(2))
- authorised person for Part 6 of the RPA (enforceable undertakings) (clause 362(2))
- authorised person for Part 7 of the RPA (enforceable undertakings) (clause 364(2))
- to determine whether a person is a fit and proper person (clause 372)
- approve the manner for making application and forms (clause 377)
- review reviewable decisions personally or cause the reviewable decision to be reviewed by an internal reviewer (clause 383)
- affirm or vary a reviewable decision or set aside the reviewable decision and make a decision as he or she thinks appropriate (clause 383)
- refuse to carry out activities where a person is liable to pay a charge that is due and payable (clause 398)
- to authorise a person to use protected information for a secondary permissible purpose or disclose to a specified person, or to a specified class of persons, protected information for a secondary permissible purpose that is specified in the authorisation (clause 390)
- to remit or refund the whole or part of a cost recovery charge that is payable, or that has been paid, to the Commonwealth if the Secretary is satisfied there are circumstances that justify doing so (clause 405)
- appoint an analyst (clause 413)
- cause forfeited goods to be sold, destroyed or otherwise disposed of (clause 416) or goods seized in certain circumstances (clause 418)
- approving payment of compensation (clause 419)
- report to Parliament about export of livestock (clause 424).

### ***Committee comment***

2.264 The committee thanks the minister for this response. The committee notes the minister's advice that subdelegable powers under the bill have been identified on the basis that they do not have the capacity to affect national interests or Australia's trading relationships with other countries, and that 'administrative necessity' may require that these decisions be made by staff at lower classification levels due to the high volume or time-sensitivity of decisions involved. The committee also notes the

minister's advice that the person or persons to whom it is intended that powers will be subdelegated will depend on the nature of the power and which area of the department is responsible for regulating the relevant export industry.

2.265 The committee further notes the minister's advice that it is intended that the department will ensure that only persons with appropriate training, qualifications and expertise will be delegated or subdelegated powers under the bill. The committee also notes the minister's advice that it would not be appropriate to amend the bill to limit subdelegations to officers or employees that hold special attributes, qualifications and expertise as these will vary for each subdelegable power, and that these requirements will continue to be dealt with administratively, allowing the delegate to consider the detailed attributes, qualifications or expertise required for a subdelegate to exercise a specific power.

2.266 The committee notes that although it is intended that the department will ensure that only persons with appropriate training, qualifications or expertise will be delegated or subdelegated powers under the bill, there is no legislative requirement that would require this.

2.267 With respect to the minister's view that it would not be appropriate to amend the bill to limit subdelegations to officers with special attributes, qualifications or expertise because such requirements will vary with each subdelegable power, the committee notes that a general requirement that a delegate must not subdelegate a power to a person unless he or she is satisfied the person possesses appropriate skills, qualifications or experience would allow such requirement to vary with each power subdelegated.

**2.268 The committee considers it would be appropriate for the bill to be amended so as to require that a delegate must not subdelegate a power to a person unless he or she is satisfied that person possesses appropriate skills, qualifications or experience.**

**2.269 The committee requests that the key information provided by the minister, including the list of powers capable of subdelegation under the bill, be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.270 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the subdelegation of powers to any APS level employee or third party authorised officer, without requiring that such persons possess particular attributes, qualifications or expertise.**

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## Significant matters in non-statutory determinations<sup>103</sup>

2.271 Clause 291 provides for the authorisation of persons to be authorised officers. Subclause 291(7) requires the secretary to determine, in writing, training and qualification requirements for authorised officers, and subclause 291(6) prevents the secretary from authorising a person to be an authorised officer unless these training and qualification requirements are met. Similarly, subclause 324(2) provides that the secretary must also determine, in writing, training and qualification requirements for authorised officers specifically in relation to the performance of functions or duties and the exercise of powers under Chapter 10 of the Regulatory Powers Act. However, subclauses 291(8) and 324(3) provide that neither determination is a legislative instrument.

**2.272** The explanatory memorandum states that subclauses 291(8) and 324(3) make statements as to the law and, as such, the determinations are not legislative instruments.<sup>104</sup> However, the committee notes that determinations made under subclauses 291(7) and 324(2) do appear to alter the content of the law, in that a person cannot be authorised as an authorised officer unless they satisfy the requirements set out in the relevant determination. This in turn imposes a legal obligation on the secretary to make the determinations. It is therefore not clear to the committee why the determinations are considered not to be legislative instruments and therefore not subject to disallowance.

2.273 The committee requests the minister's more detailed advice as to why it is considered that determinations made under subclauses 291(7) and 324(2) are not legislative instruments (and therefore not subject to disallowance).

### ***Minister's response***

2.274 The minister advised:

The determinations made by the Secretary under subclauses 291(7) and 324(2) set out the training and qualifications necessary for authorised officers. The determinations relate to administrative Departmental policy that will facilitate the requirement for authorised officers to have the training and qualifications necessary to perform the functions and exercise the powers set out in their instrument of authorisation. The determinations are analogous to employment documents that set out the prerequisites for a person seeking employment in a particular position or job.

The determinations relate to individual persons or classes of persons and do not address the appointment of persons to public offices or committees, which may be appropriate to be available to the public and

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103 Subclauses 291(8) and 324(2). The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

104 Explanatory memorandum, pp. 318, 343.

subject to parliamentary oversight. For these reasons, I believe that the instruments should not be treated as legislative instruments that are subject to disallowance.

### **Committee comment**

2.275 The committee thanks the minister for this response. The committee notes the minister's advice that determinations made by the secretary which would set out training and qualification requirements for authorised officers would be analogous to employment documents, and that because the determinations relate to individual persons or classes of persons and do not address appointments of persons to public offices or committees they should not be treated as legislative instruments, nor be subject to disallowance.

2.276 The committee reiterates that determinations setting out training and qualification requirements for authorised officers appear to alter the content of the law, in that a person cannot be authorised as an authorised officer unless they satisfy the requirements set out in the relevant determination. As such, they appear to meet the criteria set out under subsection 8(4) of the *Legislation Act 2003*, which states that an instrument made under a power delegated by the Parliament is a legislative instrument if it 'determines the law or alters the content of the law' and 'has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.' The committee therefore considers that determinations made under subclauses 291(7) and 324(2) are likely to be legislative in character and so should be subject to the usual disallowance procedures.

**2.277 The committee considers it would be appropriate for the bill to be amended so as to remove subclauses 291(8) and 324(3), which respectively specify that determinations made under subclauses 291(7) and 324(2) are not legislative instruments.**

**2.278 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of declaring that determinations specifying requisite training and qualifications for authorised officers are not legislative instruments.**

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### **Reversal of evidential burden of proof<sup>105</sup>**

2.279 Subclause 307(1) seeks to make it an offence for a person who has been issued with an identity card to fail to return the card with 14 days of ceasing to be an

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105 Clauses 307 and 308. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

authorised officer, an approved auditor or any other person who performs functions or duties or exercises powers under the Act and is prescribed by the rules. Subclause 307(2) provides an exception (offence specific defence) to this offence, stating it does not apply to an authorised officer whose authorisation has been suspended, or if the identity card was lost or destroyed. The offence is subject to strict liability and carries a maximum penalty of one penalty unit.

2.280 In addition, subclause 308(1) seeks to make it an offence for the occupier of a registered establishment to provide goods or services to an authorised officer. Subsections (2) and (3) provide exceptions (offence-specific defences) to this offence, stating that the offence does not apply if the secretary has approved, in writing, the provision of the goods and services to the authorised officer, or in relation to goods or services that are provided to a third party authorised officer under a contract of employment or a contract for services. A parallel offence and exceptions are set out under subclauses (4) to (6) addressing authorised officers receiving goods and services from occupiers of registered establishments. These offences carry a maximum penalty of imprisonment for 12 months imprisonment or 60 penalty units, or both.

2.281 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.

2.282 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.

2.283 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.

2.284 With respect to clause 308, the statement of compatibility states that reversing the evidential burden of proof is reasonable because 'the defendant will have the information or knowledge available to them, which would form evidence to support the application of the exception', and that 'requiring the prosecution to provide evidence in all cases that the Secretary had authorised the provision of a good or service, or that it was provided pursuant to a contract of employment or contract for services would also be prohibitively costly.'<sup>106</sup> With respect to clause 307, the statement of compatibility provides the similar justifications, but also states

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106 Explanatory memorandum, p. 438.

that the matters set out in the exception would be peculiarly within the knowledge of the defendant.<sup>107</sup>

2.285 However, the committee notes that the *Guide to Framing Commonwealth Offences*<sup>108</sup> 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.<sup>109</sup>

2.286 It is not apparent to the committee that the matters set out in subclauses 308(2) and (5)—as to whether the secretary has approved, in writing, the provision of the goods and services or they are provided under a contract of employment or contract for services—is *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish. Similarly, it is also not apparent that the matter set out in paragraph 307(2)(a)—whether or not the defendant is an authorised person whose authorisation has been suspended—is *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish. Rather, the matters appear to be matter more appropriate to be included as elements of the offence.

2.287 The committee requests the minister's detailed justification as to the appropriateness of including the matters specified in paragraph 307(2)(a) and subclauses 308(2) and (5) as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offences, and seeks the minister's advice in relation to this.

### **Minister's response**

2.288 The minister advised:

Subclause 307(1) of the Bill provides that it is an offence for a person who has been issued with an identity card to fail to return the card within 14 days after ceasing to be an authorised officer, approved auditor or any other person who performs functions or duties or exercises powers under the Act and is prescribed by the rules. Paragraph 307(2)(a) provides an exception to this offence if the authorised officer's authorisation is suspended.

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107 Explanatory memorandum, p. 437.

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

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

Subclause 296(5) of the Bill provides that, if a person's authorisation as an authorised officer is suspended, the person is taken not to be an authorised officer during the period of suspension. The intent of including paragraph 307(2)(a) was to clarify that an authorised officer who has been suspended does not commit an offence if they fail to return their identity card. This recognises that, in some instances, a suspension of a person's authorisation will be revoked and the person will continue to be an authorised officer.

My Department will be able to establish whether a person's authorisation as an authorised officer was suspended, and therefore whether he or she was required to return their identity card. This accords with subsection 13.3(4) of the Criminal Code, which provides that the defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court. In practice, my Department would not institute proceedings in circumstances where the authorisation was suspended. The exception is enlivened when the authorisation is suspended and not whether the defendant can establish they had been given or received a notice of suspension.

Subclause 308(1) provides that the occupier of a registered establishment must not provide goods to an authorised officer. Subclause 308(2) provides that this prohibition does not apply if the Secretary has given approval in writing for the occupier to provide the goods and services to the authorised officer. In addition, subclause 308(4), provides that an authorised officer must not receive goods or services from the occupier of a registered establishment. Subclause 308(5) provides that this prohibition does not apply if the Secretary has approved receipt of the goods by the authorised officer.

Whether the occupier of the registered establishment was given a written notice of approval is peculiarly within the knowledge of the occupier as the occupier will have received the notice and have access to it within the records of the registered establishment. Similarly, the authorised officer will have personal knowledge of whether he or she was given a written notice of approval to receive the goods and services from the occupier of a registered establishment and the authorised officer will have access to that document within their records. It would be significantly more difficult and costly for the prosecution to prove that written approval had not been given to the occupier, or that written approval had not been given to the authorised officer.

### ***Committee comment***

2.289 The committee thanks the minister for this response. The committee notes the minister's advice that the exception set out under paragraph 307(2)(a) was included in the bill to clarify that an authorised officer who has been suspended does not commit an offence if they fail to return their identity card because, in some cases, an authorised officer's suspension will be revoked and they will therefore

continue to be an authorised officer. The committee further notes the minister's advice that the department will be able to establish whether a person's authorisation has been suspended and that, in practice, the department would not institute proceedings where an authorisation had been suspended.

2.290 In relation to the exception set out under subclauses 308(2), the committee notes the minister's advice that whether the occupier has been given a written notice of approval will be peculiarly within the knowledge of the occupier as the occupier 'will have received the notice and have access to it within the records of the registered establishment'. In relation to the exception set out under subclause 308(5), the committee notes the minister's advice that the authorised officer will have 'personal knowledge' of whether they were given a written notice of approval and would have access to the document. Finally, the committee notes the minister's advice that it would be significantly more difficult and costly for the prosecution to prove that written approval had not been given to either the occupier or the authorised officer.

2.291 The committee reiterates that the *Guide to Framing Commonwealth Offences* 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.<sup>110</sup>

2.292 With respect to the exception set out under paragraph 307(2)(a), the minister's advice states that the department 'will be able to establish whether a person's authorisation as an authorised officer was suspended'. This matter is therefore clearly not peculiarly within the knowledge of the defendant, nor does it appear to be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

2.293 With respect to the exception set out under subclause 308(2), it remains unclear how the matter of whether the secretary has approved, in writing, the provision of goods and services to the authorised officer could be a matter peculiarly within the defendant's knowledge, as the department would also have knowledge of whether such written approval has been given.

2.294 With respect to the exception set out under subclause 308(5), the committee emphasises that the fact that an authorised officer would have 'personal knowledge' of whether the secretary has approved, in writing, the provision of goods and services, does not amount to the matter being *peculiarly* within the knowledge of the authorised officer. Finally, it remains unclear to the committee why it would be

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

significantly more difficult and costly for the prosecution to prove that written approval had not been given to either the occupier or the authorised officer, as the department will have access to records of such written approvals.

**2.295 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.296 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in these instances.**

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### **Broad delegation of administrative powers: to 'persons assisting'<sup>111</sup>**

2.297 Clauses 326 and 329 seek to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions of the bill. Subclauses 326(4) and 329(3) provide that an authorised person may be assisted 'by other persons' in exercising certain powers or performing certain functions or duties.

2.298 In addition, clause 366 sets out that authorised officers may be assisted by 'other persons' in performing functions or duties under proposed Parts 4 to 6, if that assistance is necessary and reasonable. These Parts provide authorised officers with the power to enter adjacent premises, enter and exercise powers on premises without a warrant or consent, and exercise powers in emergency situations.<sup>112</sup> Subclause 366(2) seeks to allow a person assisting to enter premises and exercise the powers available to authorised officers in these circumstances, in accordance with any direction given by the authorised officer.

2.299 As noted in the discussion below at paragraphs 2.306 to 2.312, the bill also seeks to allow persons assisting authorised officers to use such force against things as is necessary and reasonable in the circumstances when entering premises and executing warrants.<sup>113</sup> The explanatory memorandum acknowledges in each case that these coercive powers may be exercised by persons assisting an authorised officer.<sup>114</sup> However, it does not explain why it is necessary to extend the use of such powers to persons assisting authorised officers, nor does it provide any explanation

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111 Clauses 326, 329 and 366. The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

112 These powers are set out in Parts 4, 5 and 6 of Chapter 10.

113 See clauses 327, 330 and 349.

114 Explanatory memorandum, pp. 348, 352, 361–2.

as to what expertise or training, if any, such persons assisting will be required to possess.<sup>115</sup> The committee notes that, by contrast, the bill would require the secretary to determine, in writing, specific training and qualification requirements with respect to authorised officers who exercise compliance and enforcement powers under Chapter 10 of the bill or under the Regulatory Powers Act.<sup>116</sup>

2.300 The committee therefore requests the minister's advice as to why it is necessary to confer coercive powers on 'persons assisting' an authorised officer and the appropriateness of amending the bill to require that any person assisting an authorised person have specified skills, training or experience (including in the use of force).

### ***Minister's response***

2.301 The minister advised:

The Bill proposes to allow an authorised person to be assisted by other persons in exercising certain powers or performing certain functions or duties under the Regulatory Powers Act. In addition, an authorised officer may be assisted by other persons in relation to entry to adjacent premises, entry to premises without a warrant or consent, and the exercise of powers in emergency situations. The person assisting may enter premises and exercise the powers available to authorised officers in these circumstances, in accordance with any direction from an authorised officer. A person assisting an authorised officer may also use such force against things as is necessary and reasonable when entering premises and executing warrants.

It is necessary to confer coercive powers on a person assisting an authorised person or authorised officer for the following reasons:

- no other authorised person or authorised officer may be available to assist;
- the premises that are subject to monitoring or investigation may be large;
- there may be a large number of documents or material that needs to be reviewed;
- there may be a large number of things that need to be searched, or inspected, examined or sampled;
- the person assisting may be more familiar with the premises, or have particular skills or knowledge that would enable the authorised person or authorised officer to effectively exercise their powers and perform their functions or duties;

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115 Explanatory memorandum, pp. 350, 373

116 See clause 324.

- things may be heavy or difficult to move without assistance.

It would not be appropriate to amend the Bill to specify the expertise or training that persons assisting are required to possess. Allowing a person assisting to exercise coercive powers will support the authorised officer in the exercise of their powers to monitor and investigate compliance with the Bill. Persons assisting will need to have different expertise and training, which will vary depending on the circumstances, such as the purpose of the entry to premises (such as for monitoring or investigation purposes), the nature of the premises or things, and the anticipated needs of the authorised officer in exercising their powers under the Bill. For example, a person assisting may need to be a specialist in operating electronic equipment, a person with scientific knowledge of the goods that are the subject of the exercise of powers, a person with knowledge of the business operations of the premises, or a person who is trained to review financial records. The expertise or training required will be determined based on administrative policy, which will ensure flexibility to different circumstances.

An administrative approach to determining expertise and training requirements for persons assisting is consistent with both the *Export Control Act 1982* and the compliance and enforcement powers provided for in the *Biosecurity Act 2015* (see sections 482(8) 485(8), 505, 515).

### **Committee comment**

The committee thanks the minister for this response. The committee notes the minister's advice as to why it is necessary to confer coercive powers on a person assisting an authorised officer. The committee also notes the minister's advice that it would not be appropriate to amend the bill to specify the expertise or training that persons assisting will be required to possess because persons assisting will be required to possess different expertise and training depending on the circumstances, including the purpose of entering premises, the nature of the premises or things and the needs of the authorised officer.

2.302 The committee also notes the minister's advice that the expertise or training required of persons assisting will be determined based on administrative policy in order to allow flexibility for different circumstances.

2.303 However, the committee remains concerned that coercive powers can be conferred under the bill on 'any person' to assist an authorised person, regardless of whether the person assisting possesses skills, training or experience appropriate to the exercise of coercive powers in the circumstances.

**2.304 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.305 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring coercive powers on any persons assisting authorised officers.**

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### **Use of force<sup>117</sup>**

2.306 Clauses 327 and 330 seek to modify the operation of the monitoring and investigatory provisions in Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*, as those provisions will apply to the monitoring of compliance with the bill and investigation of offences and penalty provisions under the bill. Subclauses 327(6) and 330(6) provide that, when executing a monitoring or investigation warrant, an authorised person or a person assisting an authorised person may use such force against things as is necessary and reasonable in the circumstances.

2.307 In addition, clause 340 seeks to allow an authorised officer to use such force against things as is necessary and reasonable in the circumstances when executing an adjacent premises warrant, and clause 349 seeks to allow an authorised officer or a person assisting an authorised officer to use force against things when entering premises in order to conduct offence related searches and seizures.

2.308 Finally, paragraph 354(4)(c) seeks to allow an authorised officer to use such force against things as is necessary and reasonable in the circumstances when exercising powers given under subclauses 354(2) and (3) to stop, detain and search a conveyance<sup>118</sup> to secure evidential material.

2.309 The committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion in a bill of any use of force power for the execution of warrants should only be allowed where a need for such powers can be identified. It states that a use of force power should be accompanied by an explanation and justification in the explanatory memorandum and a discussion of proposed accompanying safeguards that the agency intends to implement.<sup>119</sup>

2.310 In relation to clauses 327 and 330, the explanatory memorandum explains that, in the absence of these provisions, the use of force by an authorised officer or a person assisting an authorised officer 'may amount to illegally damaging someone's

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117 Subclauses 327(6) and 330(6), clauses 340 and 349, and paragraph 354(4)(c). The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

118 That is, an aircraft, vessel, vehicle or any other prescribed means of transport. See definition of 'conveyance' under clause 12.

119 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p.80.

property.<sup>120</sup> The explanatory memorandum further states that what is necessary and reasonable will depend on the circumstances in each case and that 'the use of force may be required to achieve the object of monitoring or investigating compliance with the Bill, but this needs to be balanced against the right of the occupier of the premises not to have their property destroyed unless the force is necessary and reasonable in the circumstances.'<sup>121</sup> The explanatory memorandum provides similar explanations in relation to clauses 340 and 349, and paragraph 354(4)(c).<sup>122</sup>

2.311 However, in relation to each of these provisions, the explanatory memorandum does not contain an explanation of the circumstances in which it is envisaged it will be necessary to use force against things in order to monitor and investigate compliance with the bill, the need to extend the power to use force against things to a person assisting an authorised person nor a discussion of any safeguards the agency intends to implement with respect to the use of force against things. Nor does the explanatory memorandum explain whether authorised persons will be required to have specified skills, training or experience relevant to the use of force.<sup>123</sup>

2.312 The committee therefore seeks the minister's detailed advice as to:

- the circumstances in which it is envisaged it may be necessary to allow the use of force against things during the execution of monitoring, investigation, and adjacent premises warrants, when entering premises to conduct offence related searches and seizures, and when stopping, detaining and searching a conveyance;
- the appropriateness of amending the bill to, at a minimum, require that authorised officers and persons assisting have appropriate skills, training or experience in the exercise of use of force powers;
- what safeguards, if any, will be implemented to ensure these powers are used appropriately; and
- why it is necessary to allow persons assisting an authorised person to use force against things.

### ***Minister's response***

2.313 The minister advised:

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120 Explanatory memorandum, p. 352.

121 Explanatory memorandum, p. 352.

122 Explanatory memorandum, pp. 357, 361–2, 364–5.

123 The committee notes its discussion at paragraphs 1.29 to 1.32 above regarding the lack of any legislative requirement as to the skills, training or experience of persons assisting authorised officers.

Whether the use of force is appropriate will depend on what is necessary and reasonable in the particular circumstances. For example, it may be necessary and reasonable to move a thing in order to access another thing on the premises when conducting a search. It may be necessary and reasonable to open a thing (such as a box or container) or remove packaging on goods in order to conduct a search or to inspect, examine or sample a thing. It may also be reasonable and necessary to use force to gain entry to premises under a warrant if the occupier has refused access and there are urgent and serious circumstances which justify immediate entry (such as where evidential material will be destroyed).

The effectiveness of, and confidence in, the export control regime depends on the capacity and capability of persons performing functions and exercising powers under the Bill. Therefore, the Bill will enable the rules to make provision in relation to the training requirements for authorised officers who exercise coercive powers. Relevant skills, training or experience will be taken into account before a person is authorised under the Bill.

Subclause 324(1) provides that third party authorised officers will not be able to exercise coercive powers, including use of force, under the Bill. For all other authorised officers, subclause 324(2) of the Bill provides that the Secretary must determine, in writing, training and qualification requirements for authorised officers in relation to the performance of functions or duties and the exercise of powers under Chapter 10 of the Bill (compliance and enforcement) or the Regulatory Powers Act. As the use of force relates to the performance of functions or duties and the exercise of powers under Chapter 10 of the Bill, the power to determine training and qualification requirements may include determining training or qualification requirements on the exercise of use of force powers.

In addition to training and qualification requirements for the use of force, my Department will ensure that use of force powers are used appropriately through other safeguards such as administrative policies and instructional material for persons assisting. As requirements for particular skills, training and qualifications, in relation to the exercise of coercive powers including the use of force, evolve and change over time, I do not believe that it is appropriate for these to be listed in the Bill.

It is necessary to allow a person assisting an authorised person or authorised officer to use force against things for the following reasons:

- no other authorised person or authorised officer may be available to assist;
- there may be a large number of things on the premises that need to be searched;
- things may be heavy or difficult to move without assistance.

Allowing a person assisting to use force as is reasonable and necessary in the circumstances will support the authorised person or authorised officer

in the exercise of their powers to monitor and investigate compliance with the Bill. In addition, all APS employees in my Department are subject to the APS Code of Conduct as well as other key performance indicators in performing these, as well as any other, functions or exercising powers under the Bill.

***Committee comment***

2.314 The committee thanks the minister for this response. The committee notes the minister's advice that whether the use of force is appropriate will depend on what is necessary and reasonable in particular circumstances, and that it may be appropriate to use force to move or open a thing, or remove packaging, when conducting a search or inspecting, examining or sampling a thing. It may also be appropriate to use force to gain entry to premises where access has been denied and there are urgent and serious circumstances which justify immediate entry.

2.315 The committee further notes the minister's advice that the bill will enable the rules to make provision in relation to the training requirements for authorised officers who exercise coercive powers and that relevant skills, training or experience will be taken into account before a person is authorised under the bill. The committee also notes the minister's advice that third-party authorised officers will not be able to exercise coercive powers under the bill, and that the secretary will be required to determine, in writing, the training and qualification requirements for authorised officers exercising compliance and enforcement powers under chapter 10 of the bill, and that this determination may include specific requirements with respect to the use of force. The committee also notes the minister's advice that allowing persons assisting authorised officers to use force will support authorised persons or authorised officers in the exercise of their powers to monitor and investigate compliance with the bill.

2.316 The committee also notes the minister's advice that the department will ensure that use-of-force powers are subjected to other safeguards, including administrative policies and instructional material for persons assisting, and that it is not appropriate to list particular skills, training and qualification requirements in the bill as these change over time.

2.317 However, the committee notes that there is no legislative requirement to ensure that only those with appropriate skills, training or experience in the use of force will be authorised. The committee notes that while rules may be made in relation to the training requirements for authorised officers who use coercive powers, and the secretary's determination under subclause 324(2) may include determining training or qualifications on the exercise of use of force powers, there is no requirement that such matters be specified in the rules or the secretary's determination.

**2.318 The committee considers it would be appropriate for the bill to be amended so as to require that the secretary must determine training or qualification requirements on the exercise of use of force powers.**

**2.319** The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

**2.320** The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing authorised officers and 'persons assisting' to use force against things in the absence of a requirement that they possess appropriate skills, training or experience in the exercise of the use of force power.

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### Exclusion of merits review<sup>124</sup>

2.321 Subclause 381(1) provides that certain decisions made under the bill will be reviewable decisions and includes details of the 'relevant person' for each decision—that is, the person who is able to seek merits review of each decision. A 'reviewable decision' is one whereby a person can seek internal review or apply to the Administrative Appeals Tribunal.<sup>125</sup> The bill lists 75 reviewable decisions, and subclause 381(2) provides that the rules may specify further decisions as reviewable decisions.

2.322 The explanatory memorandum states that the 'ability to seek a review of these decisions is consistent with the Government's policy that an administrative decision that is likely to affect the interests of an individual should be reviewable on its merits unless to do so would be inappropriate, or there are factors justifying the exclusion of merits review.'<sup>126</sup>

2.323 The committee notes, however, that there are several decisions that are not included in the list of reviewable decisions. For example, as discussed above at paragraphs 2.205 to 2.213, clause 54 provides that the secretary must make a decision to either grant or refuse an application for an exemption made under clause 53. This decision is not included in the list of reviewable decisions under subclause 381(1) and the explanatory memorandum provides no explanation as to the reasons why allowing merits review is not appropriate in this case.<sup>127</sup>

2.324 In addition, clause 67 provides that, on receipt of an application made under section 65 for a government certificate in relation to a kind of goods, an issuing body

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124 Clause 381. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

125 See clauses 383 and 385.

126 Explanatory memorandum, p. 387.

127 Explanatory memorandum, p. 104.

must decide whether to grant or refuse the certificate. In this case, the explanatory memorandum acknowledges that this decision will not be reviewable and states by way of justification:

Decisions regarding government certificates represent one of the final decisions to enable goods to be imported into the importing country once all other requirements and conditions have been met. Such decisions are essentially about maintaining international confidence in Australia's agricultural exports in the interests of a whole export industry, or part of that industry, and ensuring that agricultural exports achieve a consistent standard. Further, government certificates are high-volume decisions and often made in relation to perishable items. Given the specific timeframes that an exporter may be operating under, providing for the review of a decision made under clause 67 would not be practical.<sup>128</sup>

2.325 It is not clear to the committee why allowing review of such a decision would diminish confidence in, or undermine the consistency of, Australia's agricultural exports. It is also unclear why high-volume decisions are not capable of being reviewed, or why more limited exceptions cannot be made in the case of perishable items.

2.326 Further, clause 132 provides that the secretary may give the occupier of a registered establishment a written direction to cease carrying out one of more kinds of export operations in relation to particular prescribed goods or a kind of prescribed goods if the secretary reasonably suspects one or more of a range of grounds exists. Again, the explanatory memorandum provides no explanation as to the reasons why allowing merits review is not appropriate in this case.<sup>129</sup>

2.327 In light of these examples of decisions that have been excluded from subclause 381(1) without strong justification, the committee considers that it cannot properly assess subclause 381(1) in the absence of comprehensive information about what decisions under the bill have been excluded from review and the reasons justifying exclusion in each case.

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

- what decisions under the bill have been excluded from merits review and are not included in subclause 381(1) and the reasons for this exclusion in each case;
- why it is appropriate that decisions made under clauses 54 and 132 are excluded from merits review; and
- why it is not appropriate to allow merits review of decisions made under clause 67, subject to exemptions with regard to perishable items.

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128 Explanatory memorandum, p. 115.

129 Explanatory memorandum, pp. 174-175.

**Minister's response**

## 2.329 The minister advised:

The objective of merits review is to ensure administrative decisions are made according to law and the best decisions that could have been made on the basis of the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision and improving the quality and consistency of primary decision-making.

Subclause 381(1) of the Bill sets out decisions that are reviewable decisions under the Bill. Attachment B provides a list of decisions that are not reviewable based on the following reasons:

- Where the decision is in favour of the person affected by the decision. For example, a decision by the Secretary that specified conditions that are prescribed by the rules are not conditions for the accreditation of the property.
- Where the decision is procedural as opposed to substantive. For example, a decision not to allow a longer period in which to make an application for renewal of an accreditation.
- Where the decision is procedural (such as a notice of a proposed decision) and there are urgent or serious circumstances which justify reducing procedural fairness obligations. For example, a decision not to provide the manager of an accredited property with an opportunity to provide submissions on a proposed variation to the accreditation where the grounds for the variation are serious or urgent. In urgent or serious circumstances, the Secretary requires the ability to act quickly in order to protect the integrity of the export control regime. The substantive decision is a reviewable decision, which allows the person affected by the decision to seek review of the decision at that point. For example, the decision to vary the accreditation is a reviewable decision.
- Where the decision is mandatory and the decision-maker does not have discretion whether or not to make the decision. For example, the Secretary must suspend an accreditation of a property upon request by the manager of the property.
- Where the decision is made upon request of the person affected by the decision. It is assumed that the person affected by the decision in these situations would not wish to have the decision reviewed because it is at their request.
- Where the decision sets objective criteria that will apply to a specified group of people under the Bill, such as authorised officers. For example, the decision to determine training requirements for a person to be an authorised officer.
- Where the decision is not made by the Secretary (or a delegate or subdelegate of the Secretary). For example, a decision by an

authorised officer or the Minister. The merits review regime is intended to apply to the Secretary only. Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* remains available for a person affected by a decision made by a person other than the Secretary to seek review of the decision.

- Where internal review would unnecessarily add to the administrative burden in administering the Bill, or be contrary to the purpose of the provision. For example, a decision not to carry out activities where a person has not paid the cost-recovery charge that is due and payable.
- Where the decision is integral to maintaining the integrity of the export control regime. For example, the power to require an audit. It is important that these decisions can be made on a timely basis to support the exercise of powers and the performance of functions under the Bill.

There are also policies that relate to specific regulatory tools, powers or functions in the Bill. For example, some decisions in relation to export permits are not reviewable decisions. Export permits are high-volume decisions which are made about perishable goods. As such, it is important that the decision is not delayed or prolonged due to internal review. Furthermore, decisions in relation to export permits have the potential to harm Australia's trading relationships with other countries. An export permit is the final regulatory tool that the Secretary can use to permit, or prevent, the export before the goods are permitted to depart Australia. As such, it is a matter of national interest that decisions about export permits are not subject to internal review.

Decisions in relation to the authorisation of a person as an authorised officer ( other than a third party authorised officer) are generally not reviewable under the Bill. Decisions relating to a person who is a third party authorised officer are reviewable. However, a decision relating to an officer or employee of the Commonwealth or of a State or Territory who is an authorised officer is generally not reviewable under the Bill. These decisions are not reviewable on the basis that these persons are appointed as an authorised officer as part of their employment duties in the Commonwealth or State or Territory government. These persons do not have a personal interest in their authorisation and so do not require the ability to seek review of a decision relating to their authorisation. Similarly, decisions in relation to the delegation of a function or power should not be subject to internal review because it does not affect the interests of a member of the public.

Clause 54 provides that on receiving an application for an exemption under clause 53 of the Bill, the Secretary must decide to grant or refuse to grant the exemption. A decision made under this clause is not a reviewable decision as decisions regarding exemptions are essentially about maintaining international confidence in Australia's food and agricultural exports in the interests of a whole export industry. The Bill does not

prevent a person from making a new application for an exemption in relation to the same relevant goods.

Clause 132 enables the Secretary to give the occupier of a registered establishment a written direction to cease carrying out one or more kinds of export operations in relation to particular prescribed goods, or a kind of prescribed goods, covered by the registration, if the Secretary reasonably suspects one of the circumstances provided for in subclause 132(1). The circumstances in which the Secretary can direct the occupier of a registered establishment to cease export operations are limited and reflect conduct that could compromise the integrity of the Australian export control regime. An example of the circumstances in which a written direction may be issued would be where a condition of the registration has been contravened or it is likely that a condition has been contravened. Another example is where the occupier has not complied or is likely not to comply with a requirement of the Bill. In these circumstances, I believe that, given the urgent requirement to give such a direction, it is appropriate that it is not subject to merits review, as this could compromise market access and importing countries' reliance on a robust regulatory framework.

Clause 67 provides that an issuing body, on receiving an application for a government certificate, must decide to issue the certificate or refuse to issue the certificate. The circumstances for refusing to issue a certificate may arise for a range of technical and administrative reasons. Subclause 67(2) enables the issuing body to make a written request that the applicant give the issuing body further specified information or documents for the purposes of making a decision in relation to the application. The Bill does not prevent a person from making a new application for a certificate in relation to the same relevant goods.

Subclause 67(5) provides that if the issuing body decides not to grant a government certificate, the issuing body must notify the applicant in writing. This ensures that an applicant is aware of the outcome of their application. As the Committee notes, a decision made under clause 67 is not a reviewable decision. This is because decisions regarding government certificates represent one of the final decisions to enable goods to be imported into the importing country once all other requirements and conditions have been met. Such decisions are essentially about maintaining international confidence in Australia's agricultural exports in the interests of a whole export industry, or part of that industry, and ensuring that agricultural exports achieve a consistent standard. Further, government certificates are high-volume decisions and often made in relation to perishable items. Given the specific timeframes that an exporter may be operating under, providing for the review of a decision made under clause 67 would not be practical.

**Attachment B****List of decisions that are not reviewable under the Export Control Bill 2017**

The following decisions are not reviewable decisions under the Bill (based on the policy rationale provided in the response to the request at 1.154):

**Exemptions**

- To approve the manner and form in which an application for an exemption must be made (paragraphs 53(3)(a) and (b))
- To not allow an application to be made within a different period (subparagraph 53(3)(f)(ii));
- To not grant an exemption or to grant an exemption subject to conditions (subsection 54(1));
- To vary the conditions of an exemption (subclause 58(1));
- To revoke an exemption (subclause 59(1));

**Government certificate**

- To approve the manner in which an application for a government certificate must be made, including by approving a form (paragraphs 65(2)(a) and (b));
- To issue, or refuse to issue, a government certificate (subclause 67(1));
- To request an applicant to give the issuing body further specific information or documents relevant to an application (clause 67(2));
- To do certain things for the purpose of making a decision in relation to an application for a government certificate, including requesting further information, requiring an audit of export operations, requesting consent to enter premises, etc (clause 68);
- To revoke a government certificate if satisfied of certain matters (subclause 75(1));

**Accredited properties**

- To decide which conditions prescribed by the rules are not to apply to the accreditation of the property (subclause 80(1));
- To allow a longer period in which to make an application for renewal of an accreditation (paragraph 83(4)(b));
- To decide which conditions prescribed by the rules are not to apply to the accreditation of a property that has been renewed (paragraph 85(b));
- To vary the accreditation so that it remains in force indefinitely (subparagraph 90(1)(d)(ii));

- To not request the manager of the accredited property to provide a submission before a proposed decision to vary the accreditation where the grounds for the proposed variation are serious and urgent (subclause 90(5));
- To suspend the accreditation of a property on request by the manager of the property (subclause 92(5));
- To not request the manager of the accredited property to provide a submission before a proposed decision to suspend the accreditation where the grounds for the proposed suspension are serious and urgent (subclause 94( 4));
- If the Secretary suspends the accreditation of a property, to refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the relevant Commonwealth liability has been paid (subclause 95(3));
- To reduce the period of suspension of an accredited property (clause 97(2));
- To revoke the suspension of the accreditation of a property (clause 98);
- To revoke the accreditation of a property upon request by the manager of the property (subclause 101(3));
- to not request the manager of the accredited property to provide a submission before a proposed decision to revoke the accreditation where the grounds for revocation are serious and urgent (clause 102(4));
- If the Secretary revokes the accreditation of a property, to refuse to carry out, or direct a person not to carry out, specified activities in relation to the debtor until the relevant Commonwealth liability has been paid (clause 103(2));

#### **Registered establishments**

- To decide that certain conditions prescribed by the rules are not to apply to the registration of an establishment (paragraph 113(1)(b));
- To allow a longer period in which to make an application to renew the registration of an establishment (paragraph 116(4)(b));
- To decide which conditions prescribed by the rules are not to apply to the registration of an establishment that has been renewed (paragraph 118(b));
- To vary the registration so that it remains in force indefinitely (subparagraph 123(1)(d)(ii));
- To not request the occupier of the registered establishment to provide a submission before a proposed decision to vary the

accreditation where the grounds for the proposed variation are serious and urgent (subclause 123(5));

- To suspend the registration of an establishment on request by the occupier of the registered establishment (subclause 125(5));
- To not request the occupier of the registered establishment to provide a submission before a proposed decision to suspend the registration where the grounds for the proposed suspension are serious and urgent (subclause 127(4));
- If the Secretary suspends the registration of an establishment, to refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the relevant Commonwealth liability has been paid (subclause 128(3));
- To reduce the period of suspension of the registration of an establishment (clause 130(2));
- To revoke the suspension of the registration of an establishment (clause 131);
- To revoke a direction given to the occupier of a registered establishment if the reasons for the direction no longer exist (subclause 134(1));
- To revoke the registration of an establishment upon request by the occupier of the registered establishment (subclause 137(3));
- to not request the occupier of the registered establishment to provide a submission before a proposed decision to revoke the registration where the grounds for revocation are serious and urgent (clause 138(4));
- If the Secretary revokes the registration of an establishment, to refuse to carry out, or direct a person not to carry out, specified activities in relation to the debtor until the relevant Commonwealth liability has been paid (clause 139(2));
- the Secretary may direct the occupier of the registered establishment to take specified action (subclause 142(2));

#### **Approved arrangements**

- To decide which conditions prescribed by the rules are not to apply to an approved arrangement (paragraph 152(1)(b));
- To allow a longer period in which to make an application for renewal of an approved arrangement (paragraph 155(4)(b));
- To decide which conditions prescribed by the rules are not to apply to an approved arrangement that has been renewed (paragraph 157(1)(b));

- To vary the export licence so that it remains in force indefinitely (subparagraph 165(1)(d)(i));
- To not request the holder of the approved arrangement to provide a submission before a proposed decision to vary the approved arrangement where the grounds for the proposed variation are serious and urgent (subclause 165(5));
- To suspend the approved arrangement on request by the holder of the approved arrangement (subclause 169(5));
- To not request the holder of an approved arrangement to provide a submission before a proposed decision to suspend the approved arrangement where the grounds for the proposed suspension are serious and urgent (subclause 172(4));
- If the Secretary suspends an approved arrangement, to refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the relevant Commonwealth liability has been paid (subclause 174(3));
- To reduce the period of suspension of an approved arrangement (subclause 174(2));
- To revoke the suspension of an export licence ( clause 175);
- To revoke an approved arrangement upon request by the holder of the approved arrangement (subclause 178(3));
- to not request the holder of an approved arrangement to provide a submission before a proposed decision to revoke the approved arrangement where the grounds for revocation are serious and urgent (clause 179(4));
- If the Secretary revokes an approved arrangement, to refuse to carry out, or direct a person not to carry out, specified activities in relation to the debtor until the relevant Commonwealth liability has been paid (clause 180(2));
- To give written directions to the holder of an approved arrangement to take specified action (subclause 183(2));

#### **Export licences**

- To decide which conditions prescribed by the rules are not to apply to an export licence (paragraph 192(1)(b));
- To allow a longer period in which to make an application for renewal of an export licence (paragraph 195(4)(b));
- To decide which conditions prescribed by the rules are not to apply to an export licence that has been renewed (paragraph 197(1)(b));
- To vary the export licence so that it remains in force indefinitely (subparagraph 201(1)(d)(i));

- To not request the holder of the export licence to provide a submission before a proposed decision to vary the licence where the grounds for the proposed variation are serious and urgent (subclause 201(5));
- To suspend the export licence on request by the holder of the licence (subclause 203(5));
- To not request the holder of an export licence to provide a submission before a proposed decision to suspend the licence where the grounds for the proposed suspension are serious and urgent (subclause 205(4));
- If the Secretary suspends an export licence, to refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the relevant Commonwealth liability has been paid (subclause 206(3));
- To reduce the period of suspension of an export licence (subclause 208(2));
- To revoke the suspension of an export licence (clause 209);
- To revoke an export licence upon request by the holder of the export licence (subclause 211(3));
- to not request the holder of an export licence to provide a submission before a proposed decision to revoke the licence where the grounds for revocation are serious and urgent (clause 212(4));
- If the Secretary revokes an export licence, to refuse to carry out, or direct a person not to carry out, specified activities in relation to the debtor until the relevant Commonwealth liability has been paid (clause 213(2));
- To give written directions to the holder of an export licence to do or refrain from doing certain things (subclause 216(2));

#### **Export permits**

- to issue, or refuse to issue, an export permit for a kind of prescribed goods (subclause 225(1));
- To vary, or refuse, to vary, an export permit or conditions of an export permit (subclause 229(1));
- To suspend an export permit if the Secretary reasonably believes that circumstances prescribed by the rules exist (subclause 231(1));
- To revoke the suspension of an export permit (subclause 231 (3));
- To revoke an export permit if the Secretary reasonably believes certain matters exist (subclause 233(1));
- To require an assessment of goods to be carried out if the Secretary reasonably believes certain matters exist (subclause 234(2));

- To approve the manner in which an application for an export permit, or to vary an export permit, must be made, including approving a form for making the application (paragraphs 239(1)(a), (b));
- To accept information or documents previously given as satisfying requirements to give information or documents for an application (subclause 239(2));
- To do certain things for the purpose of making a decision in relation to an application to which Part 5 applies, including requesting further information, requiring an audit of export operations, requesting consent to enter certain premises, etc (clause 241 );

#### **Notices of intention to export**

- To approve the manner in which a notice of intention is given and the form of a notice of intention (paragraphs 243(1)(a) and (b));

#### **Trade description**

- To give written approval for a person other than an authorised officer to alter or interfere with a trade description applied to prescribed goods (paragraph 250(1)(c));

#### **Tariff rate quota systems**

- To give written directions to be complied with by a particular person or body relating to tariff rate quotas for the export of goods (subclause 264(3));

#### **Audits**

- To require an audit to be conducted in relation to certain export operations (subclause 266(1));
- To require an audit to be conducted in relation to the performance of functions and the exercise of powers under the Act by certain persons, or compliance by those persons with the conditions applying to the performance or exercise of those functions and powers (subclause 267(1));
- To approve, in writing, a person, or each person in a class of persons, to be an auditor for the purposes of the Act (subclause 273(1));

#### **Approved assessors**

- To approve, in writing, a person, or each person in a class of persons, to be an assessor for the purposes of the Act (subclause 281(1));

#### **Powers of the Secretary**

- To require, by notice in writing, a person to give the Secretary any information, or produce any documents, referred to in the notice that relate to any prescribed goods that have been, or are intended to be, exported (subclause 285(1));

- To arrange for the use, under the Secretary's control, of computer programs for making certain decisions under the Act (subclause 286(1));
- To delegate any or all functions or powers to an SES employee, or acting SES employee, in the Department (subclause 288(1));
- To give directions to a delegate relating to the performance of functions or the exercise of powers by the delegate (subclause 288(5));

#### **Authorised officers**

- To authorise, or refuse to authorise, a person who is an officer or employee of a Commonwealth body, or an officer or employee of a State or Territory body, to be an authorised officer (subclause 291(1));
- To approve a manner for a person to apply to be a third party authorised officer (subclause 291(3));
- To determine, in writing, training and qualification requirements for authorised officers (subclause 291(7));
- To enter into an arrangement with a State or Territory body for their officers or employees to be authorised as authorised officers (subclause 294(1));
- To vary the functions and powers that a person ( other than a third party authorised officer) may exercise as an authorised officer or the period of effect of the authorisation (paragraph 295(1)(a));
- To vary the conditions to which the authorisation of a person (other than a third party authorised officer) is subject (paragraph 295(1)(b));
- To vary the period of effect of the authorisation of a person (other than a third party authorised officer) (paragraph 295(1)(c));
- To specify a period of effect of the authorisation of a person (other than a third party authorised officer) (paragraph 295(1)(d));
- To suspend the authorisation of a person ((other than a third party authorised officer) as an authorised officer (subclause 296(1));
- To vary the period of suspension of an authorisation of a person ((other than a third party authorised officer) as an authorised officer (subclause 296(4));
- To revoke a suspension of a person's authorisation as an authorised officer (subclause 296(6));
- To revoke the authorisation of a person (other than a third party authorised officer) as an authorised officer (subclause 297(1));
- To request, in writing, a third party authorised officer whose authorisation has been suspended to notify the Secretary within 14 days of any notifiable event that has occurred, or that no

notifiable event has occurred, since the person's authorisation was suspended (subclause 299(2));

- To give a direction to an authorised officer about the performance of their functions or the exercise of their powers (subclause 301(2));
- [Commonwealth authorised officer] to give a direction to a third party authorised officer, or a class of third party authorised officers, about the performance of their functions or the exercise of their powers (subclause 301(3));
- [A State or Territory authorised officer, or a third party officer] to charge a fee in relation to things done in the performance of their functions or the performance of their powers under the Act (subclause 303(1));
- Authorised officer] to give a direction to a person (or an agent of that person) to provide reasonable assistance to the authorised officer in performing a function or exercising a power under the Act in relation to goods (subclause 304(1));
- [Authorised officer] to give a direction to the manager of an accredited property, the occupier of a registered establishment, the holder of an approved arrangement, or the holder of an export licence, to take specified action within a specified period to deal with the ground on the basis of which the direction is given (subclause 305(1));
- [Authorised officer] to give a direction to a person who gave a notice of intention to export a consignment of, the holder of an export permit for, or the applicant for an export permit for, a kind of prescribed goods, to take specified action within a specified period to deal with the ground on the basis of which the direction is given (subclause 305(1));
- To issue an identity card (subclause 306(1));
- To approve the form for an identity card (subclause 306(2));

#### **Approved export programs**

- To approve, in writing, a program of export operations to be carried out by an accredited veterinarian or authorised officer (subclause 311(2));
- To direct an authorised officer to carry out some or all of the export operations in an approved export program (subclause 313(1));
- To direct an authorised officer to monitor or review, in or outside Australian territory, the carrying out of export operations by accredited veterinarians and by persons who export eligible live animals or eligible animal reproductive material (subclause 314(1));

**Compliance and enforcement**

- To determine, in writing, training and qualification requirements for authorised officers in relation to the performance of functions or duties and the exercise of powers under this Chapter or the Regulatory Powers Act (subclause 324(2));

**Reviewable decisions**

- To allow a longer period to make an application for a review of a reviewable decision (subparagraph 383(2)(c)(ii));
- To review the reviewable decision personally or cause the reviewable decision to be reviewed by another person (subclause 383(3));
- To affirm, vary or set aside the reviewable decision, and, if the decision is set aside, make such other decision as he or she thinks appropriate (subclause 383(4));
- To require further information from a person who has applied for review (subclause 384(1));
- To refuse to consider an application until further information is given (subclause 384(2));

**Confidentiality of information**

- To authorise, in writing, a person to use protected information or to disclose protected information, for a secondary permissible purpose as specified in the authorisation (subclause 390(1));
- To authorise, in writing, a person to use certain other protected information (including sensitive information) or to disclose that protected information, for a secondary permissible purpose as specified in the authorisation (subclause 391(2));

**Cost recovery**

- Power of the Minister to give a written direction to ensure cost-recovery charges are notionally payable by the Commonwealth (subclause 402(1));
- To remit or refund the whole or part of a cost-recovery charge, either on his or her own initiative, or on written application by a person (clause 405(1));
- To refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the cost-recovery charge has been paid (clause 406);

**Miscellaneous**

- To cause goods that have been forfeited by order of the court to be sold, destroyed or otherwise disposed of (subclause 416(3));
- To cause goods that have been seized by an authorised officer under Chapter 10 of the Regulatory Powers Act and are not able to be

stored in a way that preserve them, to be destroyed or otherwise disposed of (clause 418);

- To approve the payment of a reasonable amount of compensation in respect of goods that are damaged or destroyed under the Act (subclause 419(1));
- To approve a form for claims for compensation (subclause 420(4)(a)).

### ***Committee comment***

2.330 The committee thanks the minister for this response. The committee notes the minister's detailed advice as to the specific decisions taken under the bill that will not be subject to merits review and the general criteria used to identify these decisions. The committee also notes the minister's advice that the bill does not subject decisions in relation to export permits to merits review because they are high-volume decisions made about perishable goods and it is therefore 'important that the decision is not delayed or prolonged due to internal review'. Further, the committee notes the minister's advice that export permit decisions may potentially harm Australia's trading relationships with other countries and it is 'a matter of national interest that decisions about export permits are not subject to internal review'.

2.331 The committee also notes the minister's advice that decisions in relation to the authorisation of a person as an authorised officer (with the exception of third-party authorised officers) are generally not reviewable under the bill on the grounds that these appointments occur as part of a person's employment duties in Commonwealth, state or territory governments and that these employees therefore do not have a personal interest in their authorisation. The committee further notes the minister's advice that decisions relating to the delegation of a function or power should also not be subject to internal review because they do not 'affect the interests of a member of the public'.

2.332 With respect to clause 54, the committee notes the minister's advice that decisions to grant or refuse applications for exemptions should not be reviewable because they are 'essentially about maintaining international confidence in Australia's food and agricultural exports in the interests of the whole export industry'. With respect to decisions made under clause 132, the committee notes the minister's advice that the secretary may decide to direct the occupier of a registered establishment to cease export operations only in certain specified circumstances that could 'compromise the integrity of the Australian export control regime', and that it is appropriate to exclude merits review of such decisions given their urgency and the need to avoid compromising market access and importing countries' reliance on 'a robust regulatory framework'.

2.333 The committee finally notes the minister's advice that decisions made under clause 67 to issue, or refuse to issue, a government certificate are appropriately excluded from merits review as they are 'one of the final decisions to enable goods

to be imported into the importing country' and are 'essentially about maintaining international confidence in Australia's agricultural exports', and these are high-volume decisions often made in relation to perishable items, which makes the provision of merits review impractical.

2.334 The committee remains concerned about the adequacy of several of the justifications provided for excluding merits review of decisions made under the bill. With respect to decisions to grant or not grant exemptions under clause 54, it is not clear to the committee why allowing merits review would affect international confidence in Australia's food and agricultural exports. In relation to clause 132, given that a person would be required to comply with a direction to cease carrying out one or more kinds of export operations while the review process was underway, it is not clear why subjecting decisions taken under this clause to merits review would compromise the integrity of the export control regime.

2.335 Finally, in relation to decisions to grant or not grant government certificates under clause 67, it is not clear that as these decisions will be high volume and that they will often relate to perishable items, that this justifies the complete exclusion of merits review. It appears that these decisions will sometimes relate to non-perishable items and that there would be no barrier to conducting reviews in these cases. It is also not clear why the fact that the timeframes of exporters may sometimes make review of a decision impractical justifies the exclusion of merits review in all cases. The question of whether an exporter's timetable leaves sufficient time to seek review of a decision would appear to be one for the exporter in each case.

**2.336 The committee requests that the key information provided by the minister, including the list of decisions not subject to merits review under the bill, be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.337 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of excluding numerous decisions made under the bill from merits review.**

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### **Limitation on merits review**<sup>130</sup>

2.338 Subclause 385(1) provides that applications may be made to the Administrative Appeals Tribunal for review of a reviewable decision made by the secretary personally, or a decision of the secretary or an internal reviewer under section 383 that relates to a reviewable decision. Subsection (2) specifies that such

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130 Clause 385. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

applications may only be made by, or on behalf of, the relevant person for the decision. Subsection 381(1) sets out who is a relevant person for each reviewable decision. Subsection 381(3) states that this limitation of review rights to those designated as relevant persons has effect despite subsection 27(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act), which would otherwise allow an application for review to be made by any person whose 'interests are affected by the decision.'

2.339 The explanatory memorandum acknowledges that this provision would have the effect of narrowing subsection 27(1) of the AAT Act but states that 'it would be burdensome to allow any member of the public who is affected by the decision to also apply for a review of the decision.'<sup>131</sup> However, the explanatory memorandum does not explain why the application of the normal rules set out in the AAT Act with respect to who can ask for a decision to be reviewed would be burdensome, nor does it explain why this purported burden outweighs the need to allow persons who have been adversely affected by a government decision to seek merits review of that decision.

2.340 The committee seeks the minister's detailed advice as to:

- why it is considered it would be burdensome to allow any person whose interests are affected by a reviewable decision made under the bill to seek merits review of that decision; and
- why any such burden outweighs the need to allow persons who have been adversely affected by a government decision to seek merits review of that decision.

### ***Minister's response***

2.341 The minister advised:

The Bill provides internal review mechanisms as well as applications to the Administrative Appeal Tribunal (AAT). Reviewable decisions are specified in clause 381 of the Bill. Subclause 385(2) of the Bill specifies that such applications may only be made by, or on behalf of, the 'relevant person' for the decision review. This has the effect of narrowing section 27(1) of the *Administrative Appeals Tribunal Act 1975*, which would otherwise allow an application for review to be made by any person whose 'interests are affected by a decision'.

It is appropriate to limit persons who can seek review to relevant persons, as there is a prohibitively large number of people who could potentially claim that their interests were affected by a reviewable decision. This is primarily due to the extensive supply chain and number of people potentially involved in, or affected by, the export of a single consignment

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131 Explanatory memorandum, p. 389.

of goods; from primary producer through to purchaser. For example, a decision to refuse to revoke the registration of an establishment may affect a person who can no longer transport the goods produced by that establishment, or, in turn, purchase those goods for export. It would be burdensome to allow any member of the public who is affected by the decision (because, for example, they can no longer purchase goods) to apply for review of the decision.

This burden outweighs the need to allow any person whose interests have been affected by a decision to apply for review. By restricting applications to relevant persons in relation to reviewable decisions, the Bill aims to prevent the review process from becoming inefficient, and the regulatory processes under the Bill from becoming ineffective through delays resulting from review applications.

### ***Committee comment***

2.342 The committee thanks the minister for this response. The committee notes the minister's advice that it is considered appropriate to allow only relevant persons to seek review because the number of people who could potentially claim that their interests were affected by a reviewable decision would otherwise be prohibitively large due to the extensive supply chain and the number of people potentially involved in, or affected by, the export of goods. The committee also notes the minister's advice that the need to prevent the review process from becoming inefficient, and the regulatory system becoming ineffective through delays resulting from review applications, outweighs the need to allow any person whose interests have been affected by a decision to seek review.

**2.343 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to and understanding of the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.344 In light of the information provided, the committee makes no further comment on this matter.**

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### **Presumption of innocence: certificate constitutes prima facie evidence<sup>132</sup>**

2.345 Clause 413 seeks to allow the secretary to appoint a person to be an analyst for the purposes of the bill. Clause 414 seeks to provide that if a person is alleged to have contravened the Act in relation to goods or any other thing, an analyst may give a written certificate stating a number of matters relating to the goods or any other

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132 Clause 415. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

thing. Subclause 415(1) provides that such a certificate is admissible in any proceedings in relation to a contravention of the Act as prima facie evidence of the matters in the certificate and the correctness of the result of the analysis to which the certificate relates (so long as a copy of the certificate and notice of intention to present it as evidence has been provided to the defendant at least 14 days before it is admitted into evidence).

2.346 The explanatory memorandum explains that the effect of such a certificate will be that 'the information contained in the certificate will be able to be used as evidence against the defendant without the requirement to prove each piece of information contained in the certificate'.<sup>133</sup> The statement of compatibility explains that the objective of clause 415 is to 'ensure that all the appropriate evidence is before the court. The certificate will provide information on the state of the goods and the relevant background on how the goods were tested and samples taken.'<sup>134</sup> The statement of compatibility further explains that the information provided in the certificate will not be enough to prove the culpability of the defendant beyond reasonable doubt and that allowing such a certificate 'is reasonable to free up the court's time to consider the more pressing issues related to the offence.'<sup>135</sup>

2.347 The statement of compatibility explains that the rights of the defendant are protected by a number of safeguards, including that: the certificate is to establish prima facie evidence rather than conclusive evidence; subclause 415(2) provides that the defendant must be given a copy of the certificate at least 14 days prior to its admission as evidence; and subclause 415(3) will allow the defendant to call the analyst as a witness and cross-examine them on the certificate.<sup>136</sup>

2.348 The committee notes that providing that an analyst's certificate is prima facie evidence of the matters contained within it would ensure that the court could take these matters to be established facts in any offence proceedings. While a person may attempt to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. In effect, these provisions allow for a reversal of the burden of proof with respect to a range of matters. In this regard, the committee draws attention to the *Guide to Framing Commonwealth Offences*, which emphasises that limits should be placed on the use of evidentiary certificates. The Guide states:

Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.

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133 Explanatory memorandum, p. 405.

134 Explanatory memorandum, p. 435.

135 Explanatory memorandum, p. 435.

136 Explanatory memorandum, p. 435.

2.349 The Guide further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.<sup>137</sup>

2.350 In this case, the matters that can be specified in a certificate include when and from whom the goods or other thing was received, what labels or other means of identifying the goods or other thing accompanied the goods or other thing when it was received, and what covering the goods or other thing was in when it was received.<sup>138</sup> Given the bill includes provisions making it an offence to export prohibited goods (with much of the detail to be set out in the rules as to which goods are prohibited or prescribed), it is not clear whether issues relating to from whom the goods were received, what labels accompanied the goods etc, relate only to formal or technical matters that would not be in dispute, or that they are matters that would be difficult to prove under the normal evidential rules.

2.351 The committee therefore seeks the minister's detailed advice as to whether each of the matters that may be specified in an analyst's certificate will be formal or technical matters of fact that are not likely to be in dispute and would be difficult to prove under the normal evidential rules. The committee's understanding of the provision would be enhanced if a separate justification were provided in respect of each of the matters set out in paragraphs 414(1)(a) to (h).

### **Minister's response**

2.352 The minister advised:

Clause 414 facilitates the provision of expert and non-expert *prima facie* evidence in relation to allegation of contraventions of the Act. An analyst appointed for the purposes of the Act is able to present evidence about goods or any other thing by means of a written certificate prepared by the analyst and dealing with any one or more of the things mentioned in paragraphs 414(l)(a)-(h). Each paragraph relates to a circumstance that may be relevant to the receipt, identification, retention, and testing or analysis of the goods or other thing by the analyst. In relation to any particular goods or thing received by an analyst, some of the matters listed in subclause 414(1) will be relevant while others may not.

Paragraphs 414(1)(a)-(d) relate to the receipt of the goods or other thing by the analyst. They provide for the analyst to include in the certificate information about who delivered the goods and what their nature and condition was on delivery.

Paragraphs 414(1)(e)-(g) relate to the process of testing or analysis carried out by the analyst on the goods or other thing. They provide for the

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137 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 55.

138 See paragraphs 414(1)(a) to (c).

analyst to include in the certificate information about when the testing was carried out, what kind of testing or analysis was done and the results of the testing or analysis.

Paragraph 414(h) relates to how the goods or other thing were dealt with after the testing or analysis was completed. It provides for the analyst to include in the certificate information about whether any part of the goods or other thing remained following the testing process and, if so, to whom the analyst gave it and any action taken to keep the remaining goods secured.

A certificate prepared under clause 414 is in the nature of a report by an expert analyst on a testing or analysis procedure and as a result contains a record of formal and technical matters. The intention of the provision is to provide a mechanism for an analyst to make a formal report on tests or analysis and to have it admitted in evidence. The certificate will include formal matters such as information about the condition of the goods, the time of testing and the disposition of any remainder.

It is appropriate that these matters are dealt with in the certificate as they are generally non-controversial. While clause 415 provides that a certificate given under clause 414 is *prima facie* evidence of the matters in the certificate and the correctness of the results of the analysis, it also provides for the opinion of the analyst on technical matters relating to the results of the testing or analysis to be tested through cross examination and rebutted by the defendant.

### **Committee comment**

2.353 The committee thanks the minister for this response. The committee notes the minister's advice regarding the intent and operation of clause 414, as well as the matters to which paragraphs 414(a) to (h) relate. The committee further notes the minister's advice that clause 414 is in the nature of a report by an expert analyst on a testing or analysis procedure and as a result contains a record of formal and technical matters, and that it is appropriate that these matters are dealt with in the certificate as they are generally non-controversial. Finally, the committee notes the minister's advice that clause 415 provides for the opinion of the analyst who issued a certificate under clause 414 to be tested through cross-examination and rebutted by the defendant.

**2.354 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to and understanding of the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

2.355 In light of the detailed information provided, the committee makes no further comment on this matter.

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**Broad delegation of administrative powers**<sup>139</sup>

2.356 Clause 428(1) provides that, where a person (the first person) is empowered or required to do a thing, the first person is taken to have done the thing if the first person causes another person to do the thing on behalf of the first person. Subclause 428(2) provides that, if a person is empowered or required to cause or direct a thing to be done, the person is taken to have caused or directed the thing to be done if the person does the thing himself or herself.

2.357 The explanatory memorandum explains that:

Clause 428 will not be a delegation power and does not shift the responsibility to the person who actually performs the function. For example, the Secretary may cause another person to issue identity cards under clause 306 of the Bill. Clause 428 ensures that it is clear who is responsible and accountable for using powers under the Bill.

2.358 It appears to the committee that subclause 428 is intended to clarify that, where a person is authorised under the bill to exercise a function or power, they are taken to have validly exercised that function of power if they act through a third party as a matter of practical or administrative necessity. However, the authority to make decisions rests with the person who is, under the bill, the repository of the relevant function or power. That person also remains accountable for how the power or function is exercised. In this regard, the example in the explanatory memorandum of issuing identity cards is an apt one. Where a person is empowered to issue identity cards as part of a regulatory regime, it would be unreasonable to suggest that cards have not been validly issued only because the physical acts of manufacturing and distributing those cards were undertaken by a third party.

2.359 However, the committee notes that subclause 428 is broadly drafted, and the committee considers it could foreseeably be read as conferring an express power on decision-makers to authorise agents to act on their behalf – including permitting those agents to exercise decision-making powers and functions. In this regard, the committee notes that the courts have been reluctant to allow persons authorised under legislation to exercise functions and powers to act through agents, particularly where an express power of delegation is available, and have tended only to permit such persons to act through agents where to do so is a matter of administrative necessity.

2.360 In this instance, it is not apparent to the committee that exercising the functions and powers in the bill through agents is a matter of administrative necessity. In particular, the committee notes that the majority of functions and powers in the bill may already be delegated to SES officers, with certain functions

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139 Clause 428. The committee draws Senators' attention to this provision pursuant Senate Standing Order 24(1)(a)(ii).

and powers also sub-delegable to more junior employees and officials<sup>140</sup> (see discussion at paragraphs 2.259 to 2.271 above).

2.361 The committee is concerned that if proposed clause 428 is read as enabling decision-makers to exercise powers and functions through agents, the bill does not set any limits on the powers and functions that may be exercised in this way, any restrictions on the persons who may act as agents, or any requirements that agents be 'authorised' by the person for whom they act (or otherwise). The committee notes that the explanatory memorandum does not provide any guidance in this regard, nor any explanation of why it is necessary for persons authorised to exercise powers and functions to act through others, particularly given that the bill also includes express powers of delegation.

2.362 The committee considers that clause 428, as currently drafted, may create uncertainty as to the exercise of powers and functions under the bill through third parties (agents) who are neither the repositories of such powers and functions nor their delegates. The committee therefore seeks the minister's advice as to:

- whether proposed clause 428 is intended to allow persons authorised to exercise functions and powers to act through agents; and
- if so, the circumstances in which it is envisaged powers and functions under the bill would be exercised through agents, including examples of the agents (or types of agents) through which those functions and powers might be exercised.

### ***Minister's response***

2.363 The minister advised:

Clause 428 provides that, if a person has the power or is required under the Bill to do a thing, that person will be taken to have done the thing if they cause another person to do that thing on their behalf. It also provides that if a person has the power or is required under the Bill to cause or direct a thing to be done, that person is taken to have caused or directed the thing to be done if the person does the thing himself or herself. It is not a delegable power and does not shift the responsibility to the person who actually performs the function.

This provision is intended to facilitate the exercise of functions or powers under the Bill, where necessary and appropriate. For example, where an authorised person may not have the skills or expertise required to complete a particular task, it may be necessary to engage a suitably qualified person to assist. As the Committee notes, the Explanatory Memorandum uses the example of ensuring that identity cards are valid when the manufacture and distribution was undertaken by a third party.

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140 See clause 288.

Another example may be where a door in a registered establishment is required to be opened by an authorised officer and the authorised officer needs to a locksmith to open it.

Clause 428 is drafted in similar terms as section 639 of the *Biosecurity Act 2015* and ensures it is clear who is responsible and accountable for using powers under the Bill.

### **Committee comment**

2.364 The committee thanks the minister for this response. The committee notes the minister's advice that clause 428 is intended to facilitate the exercise of functions or powers under the bill where necessary and appropriate — for example where an authorised person does not have the skills or expertise to complete a particular task and it is necessary to engage a suitably qualified person to assist.

2.365 The committee notes the minister's advice that arrangements of this kind occur frequently as a matter of administrative and practical necessity, and do not shift responsibility or accountability for the relevant task from the authorised person to the person actually performing the relevant function.

2.366 However, the committee remains concerned that clause 428 is broadly drafted, and could therefore foreseeably be read as conferring a power on decision-makers to authorise agents to act on their behalf — including permitting agents to exercise decision-making functions. Neither the explanatory memorandum nor the minister's response explicitly addresses the question whether clause 428 could permit authorised persons to act through agents, although the minister's response suggests that this is not the intention of the clause.

**2.367 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to and understanding of the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.368 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of authorised persons potentially acting through agents.**

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### **Immunity from civil liability<sup>141</sup>**

2.369 Subclause 430(1) seeks to provide the Commonwealth and protected persons<sup>142</sup> with an immunity from any civil proceedings in relation to anything done, or omitted to be done, in good faith by a protected person:

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141 Clause 430. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

- in the performance or purported performance or exercise of a function, duty or power, conferred by the Act; or
- in relation to anything done, or omitted to be done, by a person in providing assistance, information or a document to a protected person as a result of a request, direction or other requirement made by the protected person.

2.370 Subclause (2) seeks to extend the immunity from civil proceedings to persons assisting protected persons.

2.371 This clause would therefore remove any common law right to bring an action to enforce legal rights, unless 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.

2.372 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. The explanatory memorandum states this immunity is necessary as it will allow persons who are required to perform functions or exercise powers under the bill to do so without being obstructed by the possibility of a 'continuous stream of repeated challenges to the performance of those functions or the exercise of those powers.'<sup>143</sup> The explanatory memorandum also states that 'the provision would provide immunity from civil liability for conduct that may otherwise constitute a tort (for example, damage to property)' and concludes that 'persons should be able to perform functions and exercise powers under the bill without fear of being sued when they act in good faith.'<sup>144</sup>

2.373 The committee notes the justification for granting immunity with respect to protected persons who act in accordance, or in purported accordance, with their functions or duties or in exercising their powers. However, the committee notes that the justification given with respect to protected persons—that they should be able to carry out functions under the bill in good faith without fear of being sued—does not explain why it is necessary to extend the immunity to the Commonwealth itself.

2.374 The committee requests the minister's advice as to why it is considered appropriate to provide the Commonwealth with civil immunity, such that affected persons would have their right to bring an action against the Commonwealth to enforce their legal rights limited to situations where a lack of good faith is shown.

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142 Clause 430(4) states that a protected person means a person who is or was the minister, the secretary, an authorised officer, or an officer or employee of the department.

143 Explanatory memorandum, p. 416.

144 Explanatory memorandum, p. 416.

**Minister's response**

2.375 The minister advised:

Clause 430 will provide that persons performing functions or exercising powers under the Bill will have protection from civil proceedings. Immunity from civil liability where good faith is shown is necessary to maintain the integrity of the regulatory framework. Protection from civil proceedings does not extend to criminal offences, for example theft or intentional destruction of documents or property.

I believe it is appropriate that protected persons, as defined in subclause 430(4) of the Bill, and the Commonwealth as a whole, when acting in good faith under the Bill, should be protected from civil proceedings. This is designed to ensure that the exercise of powers and the performance of functions under the Bill by the Commonwealth and appropriately qualified and trained persons are not unduly impeded so as to compromise the sound operation of the export control regime.

**Committee comment**

2.376 The committee thanks the minister for this response. The committee notes the minister's advice that providing persons with immunity from civil liability where good faith is shown is necessary to maintain the integrity of the regulatory framework, as well as the advice that clause 430 would provide immunity from civil proceedings only, and does not extend to criminal offences.

2.377 The committee further notes that the minister believes it is appropriate that protected persons, and the Commonwealth as a whole, are protected from civil proceedings and conferring immunity is designed to ensure that the exercise of powers and functions under the bill is not unduly impeded so as to compromise the sound operation of the export control regime.

2.378 As noted in the committee's initial comments, the conferral of an immunity from civil liability on protected persons appears to be adequately justified. However, it is not apparent to the committee that the sound operation of the export control regime would be compromised if this immunity from civil liability were not also extended to the Commonwealth. The minister's response does not appear to address the question of why it is necessary to confer immunity from civil liability on the Commonwealth, in addition to conferring immunity on protected persons.

**2.379 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to and understanding of the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.380 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of conferring an immunity from civil liability on the Commonwealth.**

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### **Consultation prior to making delegated legislation<sup>145</sup>**

2.381 The committee notes that the bill is structured so as to leave much of the detail regarding the regulation of the export of goods from Australia to be specified in the rules. The committee's view is that significant matters, such as the circumstances in which goods may or may not be exported, should generally be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.382 The explanatory memorandum states that the bill sets out the 'overarching legislative framework for the Government to regulate the export of goods from Australian territory', while enabling the secretary to make rules by legislative instrument that 'set out the detailed requirements for the export of goods.'<sup>146</sup> The secretary's power to make rules is set out in clause 432, which provides that the secretary may make rules prescribing matters 'required or permitted by this Act to be prescribed by the rules' or 'necessary or convenient to be prescribed for carrying out or giving effect to this Act.'<sup>147</sup>

2.383 The explanatory memorandum provides the following justification for delegating much of the detail to the secretary to prescribe matters in the rules:

It is appropriate that the Secretary is given the power to set the requirements for the export of goods in the rules. The combination of their technical nature, the need to rapidly respond to changes in importing country requirements, and the need to deal with a wide range of commodities mean that the Secretary is in the best position to set the requirements for the export of goods from Australia.

It would not be possible or practical to set out the detailed requirements to export goods in the Bill. The Bill sets out the requirements of the regulatory scheme in as much detail as is reasonable in the circumstances, given the breadth of goods that may be regulated and the range of reasons for their regulation. It sets boundaries on the Secretary's power to prescribe the requirements for exporting goods in the rules, while still allowing for flexibility.<sup>148</sup>

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145 Clause 432. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

146 Explanatory memorandum, p. 7.

147 Explanatory memorandum, p. 7.

148 Explanatory memorandum, p. 8.

2.384 The explanatory memorandum further states that the secretary's rule-making power will be subject to a number of oversight mechanisms. First, as the rules will be legislative instruments, they will be tabled in Parliament and be subject to the usual disallowance process, as required by the *Legislation Act 2003*. Second, clause 289 empowers the minister to direct the secretary in relation to the exercise of the rule-making power. Finally, the secretary 'will need to comply with the ordinary processes of government in making rules', including obtaining appropriate authority for policy changes, preparing regulation impact statements where required, and 'conducting appropriate and reasonable consultation with industry and other stakeholders.'<sup>149</sup>

2.385 However, 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 that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that no such additional consultation requirements prior to making the rules are currently set out in the bill.

2.386 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*.<sup>150</sup> 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.<sup>151</sup>

2.387 Given that much of the detail regarding the requirements for the export of goods from Australia is to be set out in the rules, the committee requests the minister's advice as to:

- the type of consultation that it is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the

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149 Explanatory memorandum, p. 8.

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

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

legislation (with compliance with such obligations a condition of the validity of the legislative instrument); and

- why it is appropriate for these significant matters to be included in rules rather than regulations.

### ***Minister's response***

2.388 The minister advised:

This Bill is the result of a comprehensive review of the legislation currently regulating goods exported from Australian territory. The review was triggered by legislative instruments within the existing export regulation framework being due to sunset (cease to be law) on 1 April 2020 in accordance with the requirements of the *Legislation Act 2003*. As part of the review, my Department undertook comprehensive consultation with a broad range of stakeholders, including industry and producer representatives and State and Territory counterparts. As part of that review process, my Department committed to continuing engagement with stakeholders throughout the development of the rules, including any future changes in response to changing conditions.

Rules made under the Bill will be prepared in consultation with stakeholders in affected sectors consistent with my Department's current program of wide ranging consultations. It would be inconsistent with the objective of putting in place a flexible and responsive regulatory framework for specific consultation obligations to be included in the Bill.

In reviewing the existing legislative framework it was agreed by most consultation participants that greater flexibility would benefit farmers and exporters by allowing government and industry to be more responsive to ongoing changes in technology. Importantly, greater flexibility in the legislative framework will allow regulatory tools to respond more rapidly to the changing requirements of trading partners.

In the context of complex and rapidly changing export markets, it is clear that the benefits of including detailed regulatory requirements in rules rather than regulations outweigh any concerns. It has also been common practise over a number of years for Acts to provide for the making of instruments rather than regulations. Under the *Legislation Act 2003* all disallowable legislative instruments are subject to parliamentary scrutiny.

While the Bill allows the Secretary of my Department to make rules about a range of important details, there will continue to be sufficient parliamentary oversight of export regulation. The rules will be legislative instruments subject to parliamentary scrutiny, disallowance and sunseting in accordance with the *Legislation Act 2003*. In addition, the Bill provides the Minister with strong oversight of export regulation through the power to direct the Secretary's rule-making power.

**Committee comment**

2.389 The committee thanks the minister for this response. The committee notes the minister's advice that rules made under the bill will be prepared in consultation with stakeholders in affected sectors, but that including specific consultation obligations in the bill would be inconsistent with the proposed 'flexible and responsive' regulatory framework. The committee also notes the minister's advice that the proposed approach will allow regulatory tools to respond more quickly to the changing requirements of trading partners.

2.390 The committee further notes the minister's advice that the benefits of placing detailed regulatory requirements in rules rather than regulations outweighs any concerns, and that the rules in this case will be subject to parliamentary scrutiny, disallowance and sunseting in accordance with the *Legislation Act 2003*.

2.391 However, the committee considers that the minister's response does not adequately address why it is not appropriate to include specific consultation obligation in the bill, in addition to those set out in section 17 of the *Legislation Act 2003*. The committee notes that section 17 of the *Legislation Act 2003* does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule maker be satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule-maker does not think that consultation is appropriate, there is no requirement that consultation be undertaken.

**2.392 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of leaving significant elements of the export control regime to be included in rules, without including any specific consultation requirements.**

**2.393 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for Information.**

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**Incorporation of external material into the law<sup>152</sup>**

2.394 Subclause 432(3) provides that, despite section 14(2) of the *Legislation Act 2003*, the rules may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification, any of the documents set out in paragraphs (a) to (g), as in force or existing from time to time.

2.395 The explanatory memorandum contains a general statement that the rule making powers provided to the secretary under clause 432 are necessary to 'accommodate the range of export operations, functions and powers to which the

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152 Subclause 432(3). The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

bill relates' and to allow the flexibility to quickly prescribe matters if required.<sup>153</sup> However, it does not specifically explain why it is necessary to allow the incorporation of the specified documents as in force or existing from time to time.

2.396 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
- 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).

2.397 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.

2.398 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.<sup>154</sup> 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.

2.399 Notes 1 to 4 included at the end of subclause 432(3) provide web addresses where the documents referred to in paragraphs (a), (b), (e) and (f) can be viewed. Paragraph (d) refers to the Australian New Zealand Food Standards Code, which comprises legislative instruments which can be viewed on the Federal Register of Legislation. However, no information is provided, either as notes in the bill or in the explanatory memorandum, as to whether the documents described in paragraphs (c) and (g) will be freely available and, if so, where they can be viewed.

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153 Explanatory memorandum, p. 418.

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

2.400 The committee requests the minister's advice as to whether the documents described in paragraphs 432(3)(c) and (g) will be made freely available to all persons interested in the law and why it is necessary to apply the documents listed under subsection 432(3) as in force or existing from time to time, rather than when the instrument is first made.

***Minister's response***

2.401 The minister advised:

It is intended that whenever documents described in paragraphs 432(3)(c) and (g) are applied, adopted or incorporated by the rules, these documents will be publicly available either on my Department's website or through a link on that website to where the documents may be found on the website of the relevant authority or body.

The purpose of the provisions in subclause 432(3) is to ensure rules can be made to apply various standards to Australian exports. Were the documents listed under subclause 432(3) to be applied as in force when the instrument is first made, the effect would be that the rules and the standards they apply would be out of date as soon as the responsible authority or body made changes.

Our key trading partners place a great deal of importance on robust legislation to support export certification. Considerable work has been done in an ongoing process of international harmonisation of standards for export of a wide range of agricultural and food products. While the rules could in theory be amended each time one of the documents referred to in subclause 432(3) is updated, there would in practice always be a delay. This could mean Australia is unable to deal with a breach of an overseas country requirement arising from non-compliance with a recent amendment to one of the documents. The cost of this gap in our regulatory controls could be very high in terms of a loss of confidence amongst our trading partners in our export control regime.

***Committee comment***

2.402 The committee thanks the minister for this response. The committee notes the minister's advice that, if the documents listed under subclause 432(3) were required to be incorporated as in force at a particular time (for example, when an instrument is first made), the rules and the standards that they apply would soon be out of date. The committee further notes the minister's advice that this could frustrate the effective operation of Australia's export controls regime, including generating gaps in applicable regulatory controls.

2.403 The committee also notes the minister's advice that it is intended, whenever documents described in paragraphs 432(3)(c) and (g) are incorporated by the rules, that these documents will be publicly available on a website.

**2.404** The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to and understanding of the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

**2.405** In light of the information provided, the committee makes no further comment on this matter.

## Family Law Amendment (Parenting Management Hearings) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Family Law Act 1975</i> to establish a new forum for resolving less complex family law disputes
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	Senate on 6 December 2017
<b>Bill status</b>	Before the Senate

2.406 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The Attorney-General responded to the committee's comments in a letter dated 6 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the Attorney-General's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>155</sup>

### No-invalidity clauses<sup>156</sup>

#### *Initial scrutiny – extract*

2.407 Proposed section 11LG seeks to require parties to a parenting management hearing to inform the Parenting Management Hearings Panel (the Panel) of particular matters relating to family violence orders, child care arrangements under child welfare laws, notices, investigations and reports. The proposed section also enables persons who are not parties to a hearing to inform the Panel of those matters. The explanatory memorandum states that proposed section 11LG is necessary to ensure that the Panel 'is aware of such orders, care arrangements, notifications and investigations' to ensure that it appropriately dismisses matters under new sections 11NA and 11NB, which require the panel to dismiss an application in relation to a child if the child is under the care of a person under a child welfare law, and that 'it does not inadvertently make an order inconsistent with a family violence order'.<sup>157</sup>

2.408 However, proposed subsection 11LG(8) provides that a failure to inform the Panel of a matter covered by section 11LG does not affect the validity of any determination made by the Panel.

155 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

156 Schedule 1, item 22, proposed subsections 11LG(8), 11PB(8) and 11PC(7) The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

157 Explanatory memorandum, p. 53.

2.409 In addition, proposed section 11PB provides that the Panel must give reasons for a parenting determination, either orally or in writing, and enables parties to a parenting management hearing to request a statement of reasons from the Panel. Proposed section 11PC requires the Panel (by request or otherwise) to explain the consequences of a parenting determination to affected parties. The explanatory memorandum states that these provisions are to ensure all parties understand why the Panel has made a determination, and the consequences that flow from the determination.<sup>158</sup> However, proposed subsections 11PB(8) and 11PC(7) provide that a failure to comply with the requirements of proposed sections 11PB and 11PC does not affect the validity of a parenting determination.

2.410 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. Consequently, some of judicial review's standard remedies will not be available. The committee therefore expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum.

2.411 In relation to proposed subsections 11LG(8), 11PB(8) and 11PC(7), the explanatory memorandum states that the inclusion of no-invalidity clauses are appropriate to 'prevent technical defects after the Panel has already considered the matter.'<sup>159</sup> However, it is not apparent to the committee that a failure to comply with proposed section 11LG or 11PB or 11PC can aptly be described as merely technical in nature. For example, a failure to notify the Panel of a matter contemplated by proposed section 11LG could lead to substantial inconsistency between a parenting determination and other protection orders (e.g. a family violence order), and could impact on the quality of parenting determinations more generally.

2.412 Further (in relation to proposed subsections 11PB(8) and 11PC(7)), enforceable obligations to provide reasons for and to explain the consequences of a particular decision (in this case, a decision to make a parenting determination) promotes good administrative practice, guards against arbitrariness, and increases public confidence in the exercise of administrative power. There is a strong argument that a failure to provide reasons for, or the consequences of, making or a parenting determination could compromise a person's right to a fair hearing. Given the

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158 Explanatory memorandum, p. 73.

159 Explanatory memorandum, pp. 53, 73-74.

importance of Panel determinations to interested parties and affected children, it is unclear to the committee why a determination should be accepted as valid where the Panel has failed to provide reasons for making it, or failed to explain the consequences of the determination for affected parties.

2.413 The committee seeks the Attorney-General's detailed justification for including no-invalidity clauses in proposed subsections 11LG(8), 11PB(8) and 11PC(7) of the bill, which mean that a failure to inform the Panel of relevant matters, or a failure by the Panel to provide reasons for, or explain the consequences of, making a parenting determination, will not invalidate a parenting determination.

### ***Attorney-General's response***

2.414 The Attorney-General advised:

#### *Obligation to inform the Panel of certain matters*

Section 11LG of the PMH Bill requires parties to a PMH to inform the Panel of particular matters relating to family violence orders, care arrangements for a child under child welfare laws, and notifications to and investigations by state or territory agencies. The provision is intended to encourage parties to make full and frank disclosures to the Panel about these issues, as these matters will be relevant to the Panel in making a determination in the best interests of the child. Subsection 11LG(8) provides that failure to inform the Panel of one of these matters does not affect the validity of a determination made by the Panel.

Section 11LG of the PMH Bill is modelled on the following provisions in the *Family Law Act 1975*:

- Section 60CF-informing court of relevant family violence orders
- Section 60CH-informing court of care arrangements under child welfare laws, and
- Section 60CI-informing court of notifications to, and investigations by, prescribed State or Territory agencies).

Each of these sections in the Family Law Act provides that 'failure to inform the court of the matter does not affect the validity of any order made by the court'.

I consider the inclusion of the no-invalidity clause in subsection 11LG(8) is justified.

The no-invalidity clause is necessary to ensure that a party's non-compliance with the obligation cannot of itself be used to invalidate a determination. This is particularly important in the context of parenting disputes, where it may be tactically advantageous for one party not to inform the Panel (or a court) about the existence of a prior order, notification or arrangement in relation to the child. For example, the Panel may be notified about a family violence order by Party A; Party B does not notify the Panel about this family violence order; the Panel may then make

a determination giving appropriate consideration to the existence of the family violence order. Without subsection 11LG(8), it would be open to Party B to rely on his or her own non-compliance with section 11LG to argue that the determination is invalid, notwithstanding the Panel had been informed about the family violence order by Party A.

Under the PMH Bill, the Panel would have broad information gathering powers and would be able to gather information in range of ways. Paragraph 11LD(1)(c), section 11M and section 11MK of the PMH Bill would ensure that the Panel is able to obtain all relevant information prior to making a parenting determination in relation to a child.

The no-invalidity clause in subsection 11LG(8) does not restrict the availability of judicial review of a Panel determination in relation to the Panel's obligation to consider all relevant considerations when making a determination. Rather, the restriction only applies to prevent the availability of judicial review on the grounds of jurisdictional error solely in relation to non-compliance with the requirement to inform the Panel of certain matters.

The legislative framework in the Bill clearly provides that when deciding whether to make a particular parenting determination the Panel must regard the best interest of the child as the paramount consideration (section 11P). Section 11JB sets out the matters the Panel must consider in determining the child's best interests. A primary consideration is 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'. Additional considerations, to the extent that they are relevant to a particular application, include: 'any family violence involving the child or a member of the child's family,' and 'if a family violence order applies, or has applied, to the child or a member of the child's family- any relevant inferences that can be drawn from that order.'

Additionally, section 11PA expressly requires the Panel to consider family violence when making a parenting determination. Should the Panel make a determination that is inconsistent with an existing state and territory order, the existing state and territory order would prevail (due to the operation of section 11PH). State and territory courts will have the power to adjust a parenting determination to ensure consistency with a subsequent family violence order (section 68R).

This legislative framework ensures that the Panel is able to undertake its own investigations to obtain information relevant to a particular application, and is not solely reliant on parties complying with their obligations under section 11LG. The Panel is required to consider family violence and prioritise the safety of the child in making any parenting determination.

For the above reasons, I consider that inclusion of the no-invalidity clause in subsection 11LG(8), is justified and that the section appropriately places an obligation on parties to disclose relevant information, whilst ensuring

that non-compliance with the requirement is not used tactically to invalidate otherwise sound determinations.

*Duties of the Panel when making determinations*

Section 11PC of the Bill sets out the duties of the Panel when making determinations, including that the Panel must set out particulars of the obligations created by a determination and consequences arising from a breach of a determination. If a party is not represented by a legal practitioner, the Panel must explain to each person about the availability of programs, and location and recovery orders.

Subsection 11PC(8) provides that a failure by the Panel to comply with a requirement to set out and explain certain matters in, or in connection with, the making of a determination does not affect the validity of the determination. This provision is modelled on, and equivalent to, section 65DA of the Family Law Act which provides, in the context of orders made by the family law courts, a failure by the court to comply with equivalent requirements under that section does not affect the validity of a parenting order.

I consider that the no-invalidity clause is justified in this context for the following reasons.

The objective of proposed section 11PC is to ensure that parties are aware of their obligations and, therefore, are more likely to comply. In this sense, it is a preventive measure directed at improving rates of compliance. The no-invalidity clause recognises that failure to comply with the requirements of section 11PC does not go to the substance of the determination itself. The determination must have been made in accordance with the decision-making framework provided for in the Bill, and the process for making the determination must have been procedurally fair.

Further, in the context of contraventions of parenting orders, section 70NAE of the Family Law Act sets out the meaning of 'reasonable excuse', and includes where a person has contravened an order 'because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order on the person who was bound by it' and the court is satisfied that the person should be excused in respect of the contravention. The PMH Bill would amend section 70NAE to ensure that that section also applies in the context of parenting determinations (Schedule 1, Part 1, item 69 of the PMH Bill). This would ensure that any misunderstanding of a party as to the obligations a parenting determination creates, and the consequences that may follow if he or she contravenes the determination, can be appropriately taken into account in the context of any contravention proceedings.

For the above reasons, I consider that non-compliance with section 11PC is not of such a nature to justify a sound determination being invalid, and that the no-invalidity clause in subsection 11PC(8) is justified.

*How parenting determinations are made*

Sections 11PB of the PMH Bill sets out the requirements for how a parenting determination is to be made. Subsections 11PB(1) and (2) provide that a parenting determination may be made orally or in writing; and that the Panel must give a written copy of the determination to each party within 28 days. Subsection 11PB(3) provides that the Panel must give each party a statement notifying parties that they may request written reasons and that they have a right to appeal the determination to the Federal Circuit Court.

Subsections 11PB(4), (6) and (7) provide for the provision of reasons for determinations made by the Panel. Subsection 11PB(5) provides that if the Panel does not give written reasons for a parenting determination, the Panel must give each party a notice stating that the parties to the hearing may request written reasons. Subsection 11PB(8) provides that a failure by the Panel to comply with the section does not affect the validity of the determination.

Formal notification by the Panel to a party about their ability to request written reasons and their appeal rights following a determination is important. However, the Panel's non-compliance with the notification requirements in subsections 11PB(3) and (5) would not go to the substance of the determination itself. It would not be in a child's best interests to allow a party to argue that a determination made in accordance with the relevant statutory decision-making framework, and following a full and fair hearing process, is invalid because the Panel did not provide formal notice about the right to obtain written reasons and to appeal. For this reason, I consider that the no-invalidity clause is justified.

Having had regard to the Committee's concerns about the additional scope of the no-invalidity clause I am giving further consideration to the operation of subsection 11PB(8).

***Committee comment***

2.415 The committee thanks the Attorney-General for this response. With respect to the no-invalidity clause in proposed subsection 11LG(8), the committee notes the Attorney-General's advice that proposed subsection 11LG(8) is necessary to ensure that noncompliance with obligations in section 11LG cannot of itself be used to invalidate a determination, and that this is particularly important in parenting disputes—where it may be tactically advantageous for a party not to inform the Panel (or a court) about an order, notification or arrangement in relation to a child.

2.416 The committee also notes the Attorney's advice that the Panel would have broad information-gathering powers, and that the bill would ensure that the Panel is able to obtain all relevant information prior to making a parenting determination.

2.417 The committee also notes the Attorney's advice that that the bill would require the Panel to regard the best interests of the child as the paramount consideration, and that proposed section 11PA expressly requires that the Panel consider family violence when making a determination. The committee further notes the Attorney's advice that proposed section 11PH provides that if a determination is inconsistent with a State or Territory family violence order, the order would prevail, and that State and Territory courts would have the power to adjust parenting determinations to ensure consistency with subsequent family violence orders.

2.418 With respect to the no-invalidity clause in proposed subsection 11PC(7), the committee notes the Attorney's advice that proposed section 11PC is intended to improve rates of compliance by ensuring that parties are aware of their obligations. The committee notes the Attorney's advice that proposed subsection 11PC(7) recognises that a failure to comply with the requirements of proposed section 11PC does not go to the substance of a determination, that the determination must have been made in accordance with the decision-making framework in the bill, and that the process for making the determination must have been procedurally fair.

2.419 The committee further notes the Attorney's advice that the bill would amend section 70NAE of the *Family Law Act 1975* to ensure that any misunderstanding by a party as to the obligations a parenting management determination creates, and the consequences that may follow a contravention of such a determination, can be appropriately taken into account in the context of any contravention proceedings.

2.420 Finally, with respect to the no-invalidity clause in proposed subsection 11PB(8), the committee notes the Attorney-General's view that the provision is also justified. The committee notes the Attorney's advice that the Panel's non-compliance with proposed section 11PB (that is, the Panel's failure to give reasons) does not go to the substance of the determination itself. The committee further notes the Attorney's advice that it would not be in a child's best interests to argue that a determination is invalid because the Panel failed to provide notice about the right to obtain reasons and to appeal—despite the determination being made in accordance with the statutory decision-making framework and following a full and fair hearing.

2.421 While noting the Attorney's advice regarding the no-invalidity clauses proposed by the bill, the committee remains concerned that the obligations to which those clauses relate (for example, to provide reasons for and to explain the consequences of a parenting determination) do not appear to be enforceable. In this regard, the committee reiterates its views (outlined in initial comments) that enforceable obligations to provide reasons for and to explain the consequences of a particular decision promote good administrative practice, guard against arbitrariness, and increase public confidence in the exercise of administrative power. A failure to provide reasons for, or the consequences of, making a parenting determination could compromise a person's right to a fair hearing.

**2.422** The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

**2.423** In relation to the provision of reasons, the committee welcomes the Attorney-General's indication that formal notification to a party about their ability to request written reasons and their appeal rights is important and that, as a result, the Attorney-General is giving further consideration to the operation of the no-invalidity clause in subsection 11PB(8). The committee would welcome any amendment to this provision which recognises the importance of the provision of reasons.

**2.424** The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including no-invalidity clauses in the bill which mean that the obligations to which those clauses relate (for example, to provide reasons for and to explain the consequences of a parenting determination) do not appear to be enforceable.

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### **Reversal of evidential burden of proof<sup>160</sup>**

2.425 Proposed subsections 11PP(2), 11PQ(2), 11PR(2) and 11PS(2) create a number of offences relating to removing a child to whom a parenting management determination relates from Australia. Proposed subsections 11PP(3), 11PQ(3), 11PR(4) and 11PS(4) provide exceptions (offence-specific defences) to those offences, providing that the offences do not apply where the child leaves Australia with the consent of the parties to a parenting management hearing, in accordance with a parenting management determination or in accordance with a court order. Proposed subsections 11PP(4) and 11PQ(4)<sup>161</sup> provide additional exceptions to the offences in proposed subsections 11PP(2) and 11PQ(2), providing that a person is not prohibited from taking a child outside Australia where the person reasonably believes that to do so is necessary to prevent family violence.

2.426 Proposed subsections 11PPA(2) and 11PQA(2) create offences relating to retaining a child outside Australia. Proposed subsections 11PPA(3) and 11PQA(3)

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160 Schedule 1, item 22, proposed subsections 11PP(3), 11PQ(3), 11PR(4), 11PS(4), 11RA(4). Schedule 2, item 6, proposed subsection 11PP(4); item 7, proposed subsection 11PPA(3); item 9, proposed subsection 11PQ(4); and item 10, proposed subsection 11PQA(4). The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

161 Proposed subsections 11PP(4) and 11PQ(4) are contingent on the commencement of relevant provisions of the Civil Law and Justice Legislation Amendment Act 2017, and will only take effect after the commencement of that Act.

provide exceptions (offence-specific defences) to those offences, providing that the offences do not apply where the person reasonably believes that to retain a child outside Australia is necessary to prevent family violence.<sup>162</sup>

2.427 Finally, proposed subsections 11RA(1) and (3) create offences relating to publishing accounts or lists of parenting management hearings. Proposed subsection 11RA(4) provides an exception (offence-specific defence) to those offences, providing that the offences do not apply where specified documents are communicated to particular entities, or where the publication of a specified document is authorised by the Panel.

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

2.429 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 require a defendant to disprove, or to raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

2.430 While in each of the instances identified above 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 committee notes that, in relation to proposed subsections 11PP(4), 11PPA(3), 11PQ(4), 11PQA(3), 11PR(2) and 11PS(2), the explanatory memorandum does not justify the reversal of the evidential burden of proof, merely restating the effect of the relevant provisions.

2.431 In relation to proposed subsections 11PP(3) and 11PQ(3), the explanatory memorandum states that the reversal of the burden of proof is appropriate, 'as the facts in relation to how the person was 'authorised' to take or send the child to a place outside of Australia would be peculiarly within the knowledge of [the defendant]'.<sup>163</sup> The explanatory memorandum suggests that the defendant may, for example, be able to show an email communication with the other parent whereby the other parent gave them permission to take the child for an overseas holiday.<sup>164</sup>

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162 Proposed sections 11PPA and 11PQA are contingent on the commencement of relevant provisions of the Civil Law and Justice Legislation Amendment Bill 2017, and will only take effect after the commencement of that bill.

163 Explanatory memorandum, p. 80.

164 Explanatory memorandum, pp. 79-81.

2.432 Regarding proposed subsection 11RA(4), the explanatory memorandum states:

It is appropriate for the burden of proof to be placed on the [defendant] as the facts in relation to why the person has published an identifying account of a hearing, would be peculiarly within the knowledge of that person, for example, to show that they were directed by a Panel member to do so.<sup>165</sup>

2.433 The committee notes that the *Guide to Framing Commonwealth Offences*<sup>166</sup> 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.<sup>167</sup>

2.434 With regard to proposed subsections 11PP(3) and 11PQ(3), it is not apparent to the committee that a whether a person is permitted to take a child outside of Australia is a matter that is *peculiarly* within the defendant's knowledge, or that it would be significantly more costly for the prosecution to establish the matter. Moreover, the exceptions set out in proposed paragraphs 11PP(3)(b) and (c), and 11PQ(3)(b) and (c), rely on whether a parenting determination or court order has been issued. These appear to be matters of which the Panel or a relevant court would be particularly apprised, and would not appear to be matters peculiarly within the defendant's knowledge.

2.435 Similarly, it is not apparent to the committee that the matters set out in proposed subsection 11RA(4), which provide that the offences do not apply where specified documents are communicated to particular entities, or where the publication of a specified document is authorised by the Parenting Management Hearings Panel, are *peculiarly* within the knowledge of the defendant. The matters set out in that subsection appear to be primarily factual. For example, whether the Panel had issued a direction (contemplated by proposed paragraph 11RA(4)(e)) would appear to be a matter of which the Panel would be particularly apprised.

2.436 As the explanatory materials do not address, or do not adequately address, these issues, the committee requests the Attorney-General's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in these instances. The committee's consideration of the appropriateness of a

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165 Explanatory memorandum, p. 90.

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

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

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*.<sup>168</sup>

### ***Attorney-General's response***

2.437 The Attorney-General advised:

I will address the Committee's concerns in three categories.

#### *Removal of child from Australia offences*

Sections 11PP, 11PQ, 11PR and 11PS of the Bill would create offences for wrongfully removing a child from Australia where a parenting determination has been made or an application is pending. These provisions replicate sections 65Y, 65Z, 65ZA and 65ZB of the Family Law Act, which make it an offence to wrongfully remove a child from Australia where a parenting order is in force or is pending.

As noted by the Committee, subsections 11PP(3), 11PQ(3), 11PR(4) and 11PS(4) of the PMH Bill provide for an exception to the offence of unlawfully removing a child, if the removal of the child was in accordance with a parenting determination; a court order; the written agreement of each party to the Parenting Management Hearing (sections 11PP and 11PQ); or the child leaves in the company, or with the written consent of, the person who made the statutory declaration (under sections 11PR and 11PS).

I am giving further consideration to these provisions; specifically, whether changes could be made to align the drafting of these provisions with the principles set out in the *Guide to Framing Commonwealth Offences*. The potential impact of such changes on the elements of the offences, and the evidentiary burden, is being considered.

#### *Fleeing family violence exceptions*

I note that subsections 11PP(4) and 11PQ(4), and sections 11PPA and 11PQA, are contained in Schedule 2 to the Bill and would take effect subject to the passage of the Civil Law and Justice Legislation Amendment Bill 2017.

Subsections 11PP(4) and 11PQ(4) would provide a defence of 'fleeing family violence' to the offences of removing a child unlawfully from Australia in proposed sections 11PP and 11 PQ of Schedule 1 of the Bill.

Sections 11PPA and 11PQA would replicate proposed sections 65YA and 65ZAA of the Civil Law and Justice Legislation Amendment Bill 2017. These provisions would make it an offence for a person to retain a child outside Australia otherwise than in accordance with the written consent of the other parties, or an order of a court and provide a defence of 'fleeing

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

family violence' (consistent with the defences proposed in subsections 11PP(4) and 11PQ(4)).

These provisions of the Civil Law and Justice Legislation Amendment Bill 2017 have been the subject of significant consideration, including by the Family Law Council who recommended that the defence of 'fleeing family violence' be included.<sup>169</sup> The Senate Standing Committee on Legal and Constitutional Affairs, in its final report on the Civil Law and Justice Legislation Amendment Bill 2017 (10 May 2017), recommended:

"...that the Bill be amended to amend the *Family Law Act 1975* to include a defence of 'fleeing from family violence' to ensure that the existing and proposed offences of unlawful removal and retention of children abroad do not apply in circumstances of family violence."

I am of the strong view that victims of family violence should not be further harmed or disadvantaged through exposure to a criminal sanction. The defence of fleeing family violence would help to protect against this, by ensuring that the existing offences in sections 65Y and 65Z of the Family Law Act, and the proposed offences of unlawfully retaining a child (proposed sections 65Y A and 65ZAA, put forward in the Civil Law and Justice Legislation Amendment Bill) do not apply in circumstances of family violence.

I consider it appropriate that the fleeing family violence defence is available for the equivalent offences in the PMH Bill 2017.

Importantly, the proposed defence will only be able to be relied on where the removal or retention of a child in breach of the offence provisions was reasonable and done in response to the defendant's *perception* that it was necessary to prevent family violence.

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

While this is an important principle, I do not consider that this particular defence in the context of the international parental child abduction offences would interfere with the defendant's right to be presumed innocent unless proven guilty. The Parliamentary Joint Committee on Human Rights has noted that offences that reverse the burden of proof are likely to be 'compatible with the presumption of innocence where they

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169 Letters of advice to the Hon Robert McClelland MP, International Parental Child Abduction, 14 March 2011 and 5 August 2011.

are... reasonable, necessary and proportionate in pursuit of a legitimate objective'.<sup>170</sup>

I consider that the reversal of the evidentiary burden, as provided for in subsections 11PP(4), 11PQ(4), 11PPA(3) and 11PQA(3), is reasonable and proportionate.

A specific defence of fleeing family violence is necessary because the circumstances are not sufficiently addressed by the general defences in the Commonwealth Criminal Code. The defence of self-defence in section 10.4 of the Commonwealth Criminal Code has shown to have practical impediments for defendants who have experienced family violence.<sup>171</sup> The defence needs to be applied in a way that recognises the nature and dynamics of family violence which may include non-physical violence and coercive and controlling behaviour over a period of time.

To ensure that the 'fleeing family violence' defence is applied only in appropriate cases, the proposed defence includes both a subjective and objective element. The defence would be satisfied if it is reasonable to carry out the conduct constituting an offence (of removing or retaining a child overseas) (the objective element) in response to the defendant's own perceptions that it was necessary to take the action to prevent family violence (the subjective element).

Similar to self-defence, the new defence would include conduct which may constitute a reasonable response to an honest but unreasonable misapprehension of the relevant circumstances. The more unreasonable the perception, however, the more likely it is that a trier of fact will determine that this perception was not subjectively held at the time of the alleged offending. This allows the defence to apply in cases where a person believes that a serious threat may exist, but does not have the opportunity to accurately assess this threat before taking action.

The objective element would ensure that the defence is limited to situations where fleeing the country or retaining the child out of the country is a reasonable response to the feared family violence. This would likely limit the defence to scenarios that involve more serious and direct forms of family violence. The defence does not require that family violence or threats of family violence have previously occurred, although evidence of actual family violence would likely make both elements easier to prove.

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170 Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014) 2.

171 ALRC and NSWLRC, Family Violence-A National Legal Response (ALRC Report 114), chapter 14 (in the context of the application of the general defence of self-defence to victims of family violence who kill their partners and are charged with homicide), November 2010. See also: Victorian Law Reform Commission, Defences to homicide: final report, October 2004, pp. 61–64 at [3.8]–[3.14]

Clearly the matter of whether the defendant 'believes' that the retention of the child is necessary to prevent family violence will be peculiarly within their knowledge, and it is difficult to envisage how the prosecution would be able to more readily show that the defendant did not have this belief.

For the above reasons, I consider that the reversal of the evidential burden in respect of the 'fleeing family violence' defence provided for in subsections 11PP(4), 11PQ(4), 11PPA(3) and 11PQA(3) is appropriate.

*Restriction on publication of parenting management hearings offence*

Section 11RA of the PMH Bill is modelled on section 121 of the Family Law Act and creates two offences for publishing identifying accounts of a parenting management hearing and publishing identifying lists of the hearings. Section 11RA restricts the publication of any accounts of Panel proceedings, or parts of any proceedings, that identify the parties or others involved in the case. The restriction applies to publication, or other dissemination, to the public or a section of the public, and can apply to disclosures online as well as through the media. A breach of section 11RA is an offence punishable by imprisonment of up to one year.

Subsection 11RA(4) sets out the circumstances in which the general prohibition does not apply. This mirrors the defences in subsection 121(9) of the Family Law Act which was introduced in 1983.

As the Committee has noted, an accused person bears the evidential burden in relation to proving that one of the circumstances applies, and this reverses the criminal law principle that the prosecution should ordinarily prove every element of the offence.

While the Committee is of the view that the range of circumstances which can be relied on as a defence appear to be primarily factual, I consider that the offence-specific defence is justified on the basis that an accused person is in the best position to discharge the burden of proof and would be readily able to do this.

The nature of the offence set out in section 121 (and mirrored in section 11RA) has been the subject of some commentary. A report by Professor Richard Chisholm on how experts' reports can be better shared between the federal family law system and the State and Territory child protection systems contained an analysis of section 121 which may assist the Committee:<sup>172</sup>

The essential purpose of s.121 is to prevent the media from publishing to the public material that identify parties in family court proceedings. The substance of the section is the creation of a criminal offence: to publish or disseminate *to the public or to a section of the public* an

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172 *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration: A report* Professor Richard Chisholm AM, published by the Attorney-General's Department, March 2013, p. 32.

account of proceedings that identifies a party or other person involved in a case.<sup>173</sup>

There are numerous exceptions and elaborations. But resort to them is unnecessary unless there is a publication or dissemination of the kind specified, namely '*to the public or to a section of the public*'. The case law indicates clearly that it would not include providing documents or copies of documents to a child protection officer or other person from that sector.<sup>174</sup> Such people are clearly not a 'section of the public': the communication - 'dissemination' to use the language of s.121 - is directed to individuals selected because they have a professional interest in it.<sup>175</sup>

Nevertheless, presumably to put the matter beyond doubt, the section spells out that providing documents to courts and other responsible agencies is not an offence. It specifically exempts *the communication, to persons concerned in proceedings in any court*, of any pleading, transcript of evidence or other document for use in connection with those proceedings.<sup>176</sup> And there are other such exemptions, for example communications to legal aid. But these detailed exemptions should not distract from the basic point, namely that none of these communications would constitute an offence anyway, because they are not communications to the public or a section of the public.

I consider that it is appropriate for the evidential burden to remain on the accused person in this context. If the prosecution successfully establishes that the accused's dissemination of information is 'to the public or a section of the public', then the defendant would be in a better position to point to the evidence that the sharing of information was authorised by, for example, the need to share information with authorities of States and Territories that have responsibilities relating to the welfare of children (paragraph 11RA(4)(b)) or communication of any document to a body that is responsible for disciplining members of the legal profession in a State or Territory (subparagraph 11RA(4)(c)(i)). Given the number of defences that are available (eight in total) it would also be difficult and costly for the prosecution to prove the non-existence of a particular authorisation.

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173 Section 121(1). Section 121(2) creates a similar offence, relating to court lists, but involves the words about a section of the public.

174 See *Marriage of Tingley* (1984) 10 Fam LR 707; FLC 91-588 (the transmission of documents to the Attorney-General or departmental officers is not a communication to the public or to a section of the public); *Marriage of Bateman and Pallerso* 11 (1981) 7 Fam LR 33; FLC 91-057; *Marriage of P & ?* (1985) 9 Fam LR 1100 at 1113; FLC 91 - 605; *Marriage of Toric* (1981) 7 Fam LR 370; FLC 91-046.

175 Of course those people, too, are bound by s.121; but again, using the documents in the course of their work would not seem to involve disseminating them to a section of the public.

176 Section 121(9)(a).

Further, I also note that subsection 11RA(5) of the PMH Bill provides that proceedings for an offence against subsections (1) or (3) must not be commenced except by, or with the written consent of, the Director of Public Prosecutions. This is consistent with subsection 121(8) of the Family Law Act which also requires the written consent of the Director of Public Prosecutions to commence proceedings for an offence relating to publishing information about court proceedings under the Act. This is an important safeguard in addition to the Prosecution Policy of the Commonwealth which requires that a prosecution only be pursued where there is sufficient evidence to prosecute the case, and the prosecution would be in the public interest.

### **Committee comment**

2.438 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that, with respect to the exceptions to the 'removal of child from Australia offences' (in proposed subsections 11PP(3), 11PQ(3), 11PR(4) and 11PS(4)), the Attorney is giving further consideration to the provisions—and specifically whether changes could be made to align the provisions with the principles set out in the *Guide to Framing Commonwealth Offences*.

2.439 With respect to the 'fleeing family violence defences' (in proposed subsections 11PP(4), 11PQ(4), 11PPA(3) and 11PQA3(3)), the committee notes the Attorney-General's advice that the defences may be relied upon where the removal of the child or the retention of the child outside Australia was reasonable and done in response to the defendant's perception that it was necessary to remove the child to prevent family violence. The committee also notes the Attorney's advice that the matter of whether the defendant believes that retaining a child outside Australia is necessary to prevent family violence will be peculiarly within the defendant's knowledge, and the Attorney's views that it is difficult to envisage how the prosecution could more readily show that the defendant did not have this belief.

2.440 Finally, with respect to the defences relating to the publication of parenting management hearings (in proposed subsection 11RA(4)), the committee notes the Attorney-General's view that the offence-specific defence is justified on the basis that the accused person is in the 'best position' to discharge the burden of proof and would be readily able to do this. The committee further notes the Attorney's advice that, given the number of defences that are available under proposed subsection 11RA(4), it would also be difficult and costly for the prosecution to prove the non-existence of a particular authorisation.

2.441 The committee welcomes the Attorney-General's indication that he proposes to give further consideration to the framing of the defences in proposed subsections 1PP(3), 11PQ(3), 11PR(4) and 11PS(4). The committee further acknowledges that the defences in proposed subsections 11PP(4), 11PQ(4), 11PPA(3) and 11PQA3(3) (the 'fleeing family violence exceptions') appear to turn on whether the defendant believed that to take or to retain a child outside Australia is necessary to prevent

family violence. In this regard, the committee acknowledges that the defendant's belief about a particular set of circumstances is likely to be peculiarly within the defendant's knowledge.

2.442 However, with respect to the defences in proposed subsection 11RA(4) (relating to the publication of parenting management hearings), it remains unclear to the committee that the matters to which those defences relate would be peculiarly within the defendant's knowledge. The committee reiterates its initial view that the matters in that subsection (for example, whether the Panel has issued a direction) appear to be primarily factual, and could be matters of which persons other than the defendant (e.g. the Panel) would be particularly apprised.

2.443 In this regard, the committee further notes that the *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence where it is peculiarly within the defendant's knowledge and it would be significantly more difficult for the prosecution to disprove than for the defendant to establish the matter. The committee emphasises that a defendant being in the 'best position' to discharge the burden of proof in relation to a matter does not equate to the matter being *peculiarly* within the defendant's knowledge.

**2.444 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.445 With respect to the defences in proposed subsection 11RA(4), the committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in that subsection.**

**2.446 In light of the information provided by the Attorney-General, the committee makes no further comment on the other exceptions proposed by the bill.**

## Foreign Influence Transparency Scheme Bill 2017

<b>Purpose</b>	<p>This bill seeks to establish the Foreign Influence Transparency Scheme to:</p> <ul style="list-style-type: none"> <li>• require registration by persons undertaking activities on behalf of a foreign principal;</li> <li>• contain appropriate exemptions for certain activities or classes of persons;</li> <li>• require registrants to disclose information about the nature of their relationship with the foreign principal and activities undertaken pursuant to that relationship;</li> <li>• place additional disclosure requirements on registrants during elections and other voting periods;</li> <li>• allow some information to be made publicly available, to serve the transparency purposes of the scheme;</li> <li>• set charges (for cost recovery purposes);</li> <li>• vest powers in the Secretary, including issuing notices to produce information or documents and collecting charges; and</li> <li>• introduce criminal offences for non-compliance.</li> </ul>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 7 December 2017
<b>Bill status</b>	Before the House of Representatives

2.447 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The Attorney-General responded to the committee's comments in a letter dated 14 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the Attorney-General's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>177</sup>

177 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

## Reversal of evidential burden of proof<sup>178</sup>

### *Initial scrutiny – extract*

2.448 The bill seeks to introduce a number of offences relating to compliance with the requirements of the proposed Foreign Influence Transparency Scheme (the Scheme). In a number of cases, the offences include offence-specific defences, which provide that the offence does not apply in certain circumstances. In doing so, the provisions reverse the evidential burden of proof, as 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.

2.449 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, interfere with this common law right.

2.450 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.

2.451 The committee notes that the *Guide to Framing Commonwealth Offences* 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.<sup>179</sup>

2.452 The bill contains a number of offence-specific defences that do not appear to meet these criteria, in that it does not appear that the relevant matters would be peculiarly within the knowledge of the defendant.

2.453 Subclause 34(1) provides that, if a person who is registered under the Scheme in relation to a foreign principal becomes aware that information provided to the secretary for the purposes of the registration is, or will become, misleading, or omits or will omit any matter or thing without which it is or will be misleading, that person would be required to give the secretary a notice correcting the inaccuracy or misleading impression. Failure to provide such a notice would be an offence under

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178 Subclauses 34(5), 59(2), 60(2), (3), (4) and (6). The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

subclause 58(1). Subclause 34(5) states that the requirement to provide a notice to the secretary does not apply in relation to information that has already been included in a notice provided under clause 36 or 37. That the relevant information has been provided to the department by another means does not appear to the committee to be a matter that would be peculiarly within the knowledge of the defendant, as it would also be known by the department.

2.454 Subclause 59(1) seeks to make it an offence for a person to fail to comply with notices given under clauses 45 or 46. However, subclause 59(2) provides that the offence does not apply if the failure to comply occurred only because the person did not provide the information or document within the applicable period, took all reasonable steps to provide the information or document within that period, and provides the information or document as soon as practicable after the end of the period. With the exception of whether a person took reasonable steps to provide the information or document, these matters do not appear to be matters peculiarly within the knowledge of the defendant.

2.455 Subclause 60(1) seeks to make it an offence to give information or produce a document in response to notices given under sections 45 or 46, knowing that the information or document is false or misleading, or that the information omits any matter or thing without which it is misleading. Subclauses 60(2), (3), (4) and (6) state that the offence does not apply if:

- the information or document is not misleading in a material particular;
- the information did not omit any matter or thing without which it is misleading in a material particular;
- the Secretary did not take reasonable steps to inform the person of the existence of the offence; or
- if the document is accompanied by a signed statement to the effect that the document is known to be false or misleading in a material particular.

2.456 Again, none of the matters in these offence-specific defences appear to be matters that are peculiarly within the knowledge of the defendant.

2.457 The explanatory memorandum provides detailed information about the effect of each of these offence-specific defences, and states that reversing the evidential burden of proof is appropriate in each case as the defendant will be 'best placed' to provide relevant evidence.<sup>180</sup> However, the committee reiterates that the *Guide to Framing Commonwealth Offences* states 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. That a

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180 See explanatory memorandum, pp. 78, 134, 137–139.

defendant may be 'best placed' to point to evidence in relation to a matter does not mean that the relevant matter is 'peculiarly' within the knowledge of the defendant.

2.458 The committee requests the Attorney-General's detailed justification as to the appropriateness of including each of the specified matters as an offence-specific defence, by reference to the principles set out in the *Guide to Framing Commonwealth Offences*.

2.459 The committee also seeks the Attorney-General's advice as to the appropriateness of amending the bill to provide that the relevant matters are included as an element of the offence or that, despite section 13.3 of the *Criminal Code*, a defendant does not bear the burden of proof in relying on the offence-specific defences.

### **Attorney-General's response**

2.460 The Attorney-General advised:

The committee notes that offence-specific defences interfere with the common law duty of the prosecution to prove all elements of an offence. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) acknowledges that offence-specific defences are appropriate in certain circumstances. This includes where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>181</sup> The Guide also states that offence-specific defences can be more readily justified if:

- the matter in question is not central to the question of culpability for the offence
- the offence carries a relatively low penalty, or
- the conduct proscribed by the offences poses a grave danger to public health or safety.<sup>182</sup>

The committee notes that the Foreign Influence Transparency Scheme Bill 2017 (the Bill) establishes offence-specific defences in sections 59 and 60 and in relation to section 58.

#### *Section 58: Failure to fulfil responsibilities under the scheme*

Section 58 is a strict liability offence for 'failure to fulfil responsibilities under the scheme'. The offence at section 58 applies where a person fails to fulfil the requirements set out at section 34 in relation to reporting material changes in circumstances. Subsection 34(5) provides a person does not need to report material changes in circumstances if the

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

182 Ibid.

information has been included in a notice given under section 36 or section 37 of the Bill, which impose particular reporting requirements during voting periods. Consistent with the note under subsection 34(5), the defendant bears an evidential burden in relation to these matters.

Imposing an evidential burden on the defendant is consistent with principles set out in the Guide. The Guide states a defendant will usually bear an evidential burden for defences, which can include ‘words of exception, exemption, excuse, qualification or justification.’<sup>183</sup> The Guide also highlights that imposing an evidential burden does not displace the prosecutor’s burden, but merely defers it.<sup>184</sup>

Imposing an evidential burden on the defendant is appropriate because the matters set out at subsection 34(5) are matters that are peculiarly within the knowledge of the defendant. An example is as follows:

Person A is registered with the Scheme with relation to activities undertaken on behalf of Foreign Government B. A voting period begins for a federal election and Person A provides the Secretary with a notice under section 36, advising that he or she will undertake a new registrable activity of distributing information and materials on behalf of Foreign Government B. The Secretary subsequently contacts Person A when it is discovered that he or she is also managing a social media campaign for Foreign Government B and states that Person A should have reported this in accordance with section 34, ‘reporting material changes in circumstances.’

In response, Person A advises that this had been reported as part of the notice provided to the Secretary under section 36, in which it was described, at a high-level, as ‘distributing information and materials.’ The way in which Person A conceives of and describes his or her registrable activities is peculiarly within the mind of Person A. Person A is best placed to demonstrate that he or she has not contravened section 34 and has in fact already provided the information in question, as per section 36. This information is peculiarly within the mind of the Person A, and aligns with the principles in the Guide that support the establishment of offence-specific defences.

*Section 59: Failure to comply with notice requiring information*

The committee also notes that the offence at section 59 for ‘failure to comply with notice requiring information’ contains an offence-specific defence at subsection 59(2). It is a defence to the offence at subsection 59(1) if the person:

- (a) fails to comply with the notice because he or she did not provide the information or a document within the applicable period

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183 Ibid, page 51.

184 Ibid.

- (b) took all reasonable steps to provide the information or document with that period, and
- (c) provides the information or document as soon as practicable after the end of that period.

This defence is consistent with the principles set out in the Guide. The notions of ‘reasonable steps’ in paragraph 59(2)(b) and ‘as soon as practicable’ in paragraph 59(2)(c) rely on assessments of the unique circumstances of the defendant. For example, in relation to ‘reasonable steps’, a person who does not have access to the internet will take different steps to provide the information or document to a person that does, and an assessment of whether those steps are reasonable would be different in each of those scenarios. In relation to ‘as soon as practicable’, a person who is very unwell may not be able to provide the information or document for an extended period of time, while a fit and healthy person may be able to provide the information or document much sooner. An assessment of whether that time period is ‘as soon as practicable’ would be different in each of those scenarios.

It would be significantly more difficult and costly for prosecution to go behind the individual circumstances of a defendant to understand what does and does not constitute reasonable steps, and to prove this beyond reasonable doubt as an element of an offence. This information is peculiarly within the mind of the defendant and therefore aligns with the principles set out in the Guide that supports the establishment of offence-specific defences. For example, if a person was unwell and unable to meet the applicable timeframe, they will be able to point to evidence of this very easily, whereas the Commonwealth would not necessarily be able to even identify that the person was unwell, let alone to know that this was the reason why they had failed to meet the applicable timeframe. It would be significantly more difficult and costly for prosecution to go behind the individual circumstances of a defendant to understand whether the person took all reasonable steps to provide the information or document within the applicable period, and whether the person provides the information or document as soon as practicable.

*Section 60: False or misleading information or documents*

The committee further notes that the offence at section 60 relating to ‘false or misleading information or documents’ contains offence-specific defences at subsections 60(2) – 60(6).

The defences at subsection 60(2) and 60(3) apply where the information or document, provided in accordance with section 45 or 46, is not false or misleading in a material particular or does not omit any matter without which the information is misleading in a material particular. Whether something is false or misleading in a material particular is peculiarly within the mind of the defendant because only the registrant will know the nature of their activities and how they align with the direction or wishes of the foreign principal. An example is as follows:

Person X is engaged by Foreign Business Y to undertake parliamentary lobbying and communications activities on its behalf. Person X completes and submits a registration under the scheme but omits information about some of the activities he or she will undertake on behalf of Foreign Business Y. The Secretary gives Person X a notice under section 46 of the Act requesting further information and documents about Person X's relationship with Foreign Business Y, including the nature of activities undertaken on behalf of Foreign Business Y. Person X receives the notice and responds by providing information about the parliamentary lobbying activities he or she is undertaking on behalf of Foreign Business Y, but omits information about distributing communications materials on behalf of Foreign Business Y, which has the effect of making the information provided misleading. However, Person X knows that the information omitted relates to activity that is exempt under the Scheme because of the news media exemption at section 28 because the communications materials are distributed solely for the purposes of reporting news.

In this example, it is Person X's unique and peculiar knowledge of its registrable arrangement with Foreign Business Y that makes Person X best-placed to raise the defence at subsection 60(3). Person X will be able to point to evidence that shows the omission does not render the information misleading in a material particular, because the information omitted is exempt under section 28 of the Bill. This information is peculiarly within the mind of Person X and is consistent with the principles set out in the Guide relating to offence-specific defences. The Commonwealth may not have the unique knowledge and expertise to make this assessment.

The defences at subsection 60(4) – 60(5) are consistent with the defence to the equivalent Criminal Code offence at section 137.1, relating to giving false or misleading information. Subsection 137.1(5) of the Criminal Code provides an offence-specific defence where 'the second person did not take reasonable steps to inform the first person of the existence of the offence against subsection (1)'.

Similarly, the defence at subsection 60(6) is consistent with the defence to the equivalent Criminal Code offence at section 137.2 relating to producing false or misleading documents. Subsection 137.2(3) of the Criminal Code provides an offence-specific defence where a person produces a signed written statement stating that the document is false or misleading and setting out the material particular in which the document is false or misleading.

The defence at subsection 137.1(5) of the Criminal Code was included in response to a recommendation by the Standing Committee on Legal and Constitutional Affairs in its advisory report of the inquiry into the Criminal Code Amendments (Theft Fraud, Bribery and Related Offences) Bill 1999. This defence was suggested as a measure that would limit the offence at section 137.1 of false and misleading information, while ensuring the offence remained robust and able to meet its policy objective.

**Committee comment**

2.461 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that it is appropriate to impose an evidential burden on the defendant with respect to the matters set out in subclause 34(5), as they would be peculiarly within the knowledge of the defendant. The committee notes the example provided in the Attorney-General's advice, in which it is suggested that the way a person conceives of and describes his or her registrable activities when providing a notice to the secretary is peculiarly within the mind of that person, and that the person would therefore be 'best placed' to demonstrate they have not contravened the obligations in section 34 by virtue of having already provided the relevant information to the secretary.

2.462 However, it remains unclear to the committee how information provided in a notice given to the secretary could be described as peculiarly within the knowledge of the defendant. Such information would necessarily also be available to the secretary. With respect to the offence-specific defence set out under subclause 59(2), the committee notes the Attorney-General's advice that whether a person took 'all reasonable steps' to provide the information or document within the applicable period, and whether the person then provides the information or document 'as soon as practicable' after the end of the period are matters peculiarly within the knowledge of the defendant because what constitutes 'reasonable steps' and what is 'as soon as practicable' will differ depending on the circumstances of each case. The committee notes the Attorney-General's advice that it would also be significantly more difficult and costly for the prosecution to 'go behind the individual circumstances of a defendant to understand what does and does not constitute reasonable steps' and to prove this beyond reasonable doubt.

2.463 With respect to the offence-specific defences set out under subclauses 60(2) and (3), the committee notes the Attorney-General's advice that whether information is false or misleading in a material particular is peculiarly within the knowledge of the defendant because 'only the registrant will know the nature of their activities and how they align with the direction or wishes of the foreign principal', and this makes the registrant best-placed to raise these defences. The committee notes the example given by the Attorney-General emphasises that the person would know whether information was omitted because it was exempt under the legislative requirements of the Scheme.

2.464 It remains unclear to the committee how the matters contained in the defences under subclauses 60(2) and (3) would be peculiarly within the knowledge of the defendant. With respect to the example provided by the Attorney-General, the committee emphasises that a defendant being 'best-placed' to raise a defence does not equate to the matter being peculiarly within his or her knowledge. The committee considers that whether information or a document is not false or misleading in a material particular, or the information did not omit any matter or thing without which it is misleading in a material particular, particularly whether

something is exempt because it is exempted under the Scheme itself, would be matters that would also be known to the secretary.

2.465 The committee notes that the Attorney-General's response did not address the reverse evidential burden in subclauses 60(4) and (6), other than to note that these defences is consistent with existing defences in other legislation. As such, with respect to subclause 60(4), the Attorney-General's advice did not provide any reason for considering that whether the secretary took reasonable steps to inform the person of the existence of the offence prior to the person providing the information to the secretary would be peculiarly within the defendant's knowledge. With respect to subclause 60(6), the Attorney-General's advice also did not provide any reason for considering that whether a document is accompanied by a signed statement to the effect that the document is known to be false or misleading in a material particular would be peculiarly within the defendant's knowledge.

**2.466 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.467 In light of the information provided, the committee makes no further comment in relation to the reversal of the evidential burden of proof by subclause 59(2).**

**2.468 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the matters set out under subclauses 34(5) and 60(2), (3), (4) and (6).**

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### **Significant matters in delegated legislation<sup>185</sup>**

2.469 The bill contains a number of provisions which would allow what is, in the committee's view, significant matters that relate to the operation of the Scheme, to be set out in rules (delegated legislation). The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. This is because a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposals forward in a bill.

2.470 Subclause 38(1) of the bill seeks to require a person, who is registered under the Scheme in relation to a foreign principal and undertakes registrable

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185 Clauses 38 and 53. The committee draws Senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(iv).

communications activity on behalf of that foreign principal, to make a disclosure about the foreign principal in accordance with rules made under subclause (2). Subclause (2) allows the rules to prescribe any or all of the following matters: instances of communications activity; when and how disclosures are to be made in relation to instances of communications activity; the content, form and manner of disclosures; and circumstances in which a person is exempt from making a disclosure. A failure to make a disclosure as required by this clause would be an offence under subclause 58(2). As a result, the content of the offence, as well as any circumstances in which a person is exempt from the requirements of an offence, are to be set out in the delegated legislation.

2.471 The explanatory memorandum provides several examples of when the disclosure requirements may apply, and also states that the rules may require that registrable written communications material contain a disclosure that identifies the foreign principal concerned and the arrangement under which the material was developed.<sup>186</sup> However, the explanatory memorandum does not address the question of why it is necessary to allow these significant policy matters to be determined by rules rather than being included in primary legislation.

2.472 In addition, subclause 53(1) sets out a number of purposes for which the secretary may communicate Scheme information and the person or body to whom this information may be provided. Item 4 of the table under subclause 53(1) would allow the communication of Scheme information for a purpose, and to a person, prescribed by the rules. The type of information to be communicated is information obtained by a Scheme official in the course of performing a function or exercising powers under the Scheme.<sup>187</sup> Subclause 52(2) requires the minister to consult the Information Commissioner before making rules for this purpose.

2.473 The explanatory memorandum states that the power to specify in the rules further purposes for which Scheme information can be communicated is required as it may be necessary to disclose information for purposes beyond those specified in subclause 53(1) once the Scheme is established. However, it does not provide any specific examples of when and how it is envisaged this power would be exercised.<sup>188</sup> The explanatory memorandum further states that it is intended that 'any additional purposes and/or persons prescribed in rules would be kept narrow' and that any requests for Scheme information would need to set out how the information relates to the purpose as prescribed in the rules.<sup>189</sup>

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186 Explanatory memorandum, pp. 84-86.

187 See clause 50 and the definition of 'scheme information'.

188 Explanatory memorandum, p. 107.

189 Explanatory memorandum, p. 107.

2.474 The committee notes, however, that the bill does not itself limit the rule making power so as to require the prescription of any additional purposes and/or persons to be kept narrow. Similarly, although the minister will be required under subclause 53(2) to consult the Information Commissioner prior to making such rules, the bill does not require that any comments made by the Information Commissioner be taken into account before the rules are made.

2.475 The committee also notes that the two delegations of legislative power in clauses 38 and 53 (discussed above), 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*.<sup>190</sup> 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. 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.<sup>191</sup>

2.476 The committee's view is that significant matters, such as the disclosure of information about a foreign principal (with non-compliance an offence) and the purposes for which Scheme information can be communicated, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.477 In this regard, the committee requests the Attorney-General's detailed advice as to:

- why it is considered necessary and appropriate to leave these significant aspects of the Scheme to delegated legislation; and
- why it is appropriate to include these matters in rules rather than regulations; and
- with respect to table item 4 of subclause 53(1):
  - what circumstances it is envisaged it may be necessary to expand the purposes for which Scheme information can be communicated; and

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

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

- the appropriateness of amending the bill so as to require the minister to consider any comments made by the Information Commissioner prior to making any rules.

### ***Attorney-General's response***

2.478 The Attorney-General advised:

The committee's report raises concerns that the Bill contains a number of provisions that allow particular matters to be set out in delegated legislation. The committee draws attention to:

- subsection 38(2) which sets out a range of matters that may be prescribed by rules that will guide the specifics of disclosures required by subsection 38(1), and
- subsection 53(1) which provides that the Secretary may communicate Scheme information for a purpose, and to a person, prescribed by the rules.

#### *Section 38 – disclosure in communications activity*

Achieving the Scheme's transparency objective requires that disclosures be made in communications activity so that Australian decision-makers and the public can make informed assessments about the forms and sources of foreign influence that may be represented in particular information and materials. The provision for matters to be prescribed in rules under subsection 38(2) seeks to provide flexibility about particular matters relating to disclosures in communications activity. Examples of the types of matters that might be prescribed by rules in accordance with subsection 38(2) could include:

- the specific words that must be included in disclosures,
- the font size of written disclosures,
- the placement of written disclosures,
- the length of time for which television disclosures must be displayed, and
- any accessibility requirements.

Matters such as these are detailed and technical and not appropriate for inclusion in the primary Act.

Prescription in delegated legislation is also necessary because of the changing nature of matters that will be prescribed in accordance with subsection 38(2). It will be necessary for the rules relating to disclosures to keep abreast of changes in communications technologies and methods, and of community expectations about the transparency of communications activity. It is appropriate that the matters specified at subsection 38(2) be prescribed by rules so that they are responsive and adaptive to these changes.

*Section 53 – Authorisation – other purposes*

Subsection 53(1) allows the Secretary to communicate Scheme information for any of the listed purposes. These purposes are:

- to an enforcement body for the purpose of an enforcement related activity (within the meaning of the *Privacy Act 1988*)
- to a department, agency or authority of the Commonwealth, a state or a territory or an Australian police force for:
  - the protection of public revenue, or
  - the protection of security within the meaning of the *Australian Security Intelligence Organisation Act 1979*.

In addition to these purposes, Scheme information will be able to be shared with a person prescribed by the rules for a purpose prescribed by the rules. This provision is appropriate and necessary so that Scheme information can be communicated in circumstances that were not foreshadowed at the time of establishment of the Scheme. As noted in paragraph 107 of the Explanatory Memorandum, it is possible that there may be additional purposes for which Scheme information may need to be disclosed once the Scheme is established. It is intended that any additional purposes and/or persons would be kept narrow and that any request for scheme information would need to justify how the information relates to the purpose as prescribed in the rules.

An example of when a rule under Item 4 of subsection 53(1) might be made could be where a Commonwealth agency identifies a need to access Scheme information in order to carry out their functions. Depending on the information sought and the purpose for seeking that information, it might fall outside the criteria for sharing Scheme information as set out at Items 1-3 of subsection 53(1). In such a situation, the Commonwealth agency might make a request that it be prescribed as an agency with which the Secretary may share Scheme information, to support the agency in fulfilling its functions. The Minister may then consider making a rule in accordance with Item 4 of subsection 53(1). This would only be done in consultation with the Information Commissioner, as required by subsection 53(2) of the Bill.

Any rules made in accordance with subsection 38(2) or 53(1) will be legislative instruments under the *Legislation Act 2003* and would be subject to the normal disallowance processes under that Act. Any rules will also comply with the *Privacy Act 1988*, and will be guided by the Australian Privacy Principles. The Minister would consult with and consider the views of the Information Commissioner and relevant stakeholders in the development of rules, as is required under subsection 53(2) for rules made under Item 4 of the table in subsection 53(1). The legislation does not specify that the Minister must consider any comments of the Information Commissioner because the term 'consult' at subsection 53(2) implicitly

encompasses both seeking and considering the views of the Information Commissioner.

It is considered appropriate that these matters be dealt with in ‘rules’ rather than ‘regulations’. The Office of Parliamentary Counsel takes as its starting point the principle that ‘subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so’.<sup>192</sup> Further guidance is provided on the material that should be included in regulations rather than other instruments. These matters include offence provisions. Paragraph 71(2)(a) of the Bill specifically prevents rules from creating an offence or civil penalty.

The Bill’s approach of using rules to prescribe the matters mentioned in subclause 38(2), as well as various other matters, has a number of advantages, including:

- facilitating the use of a single type of legislative instrument for the Bill, thereby reducing the complexity otherwise imposed on the regulated community if these matters were to be prescribed across a number of different types of instruments;
- simplifying the language and structure of the provisions in the Bill that provide the authority for the legislative instruments; and
- shortening the Bill.

Importantly, the rules will be subject to a level of parliamentary scrutiny identical to that of regulations. Section 71 of the Bill makes it clear that the rules are a legislative instrument for the purposes of the *Legislation Act 2003*. Under sections 38 and 39 of that Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within six sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of Parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee on Regulations and Ordinances), and a motion to disallow the rules may be moved in either House of the Parliament within 15 sitting days of the date the rules are tabled (see section 42 of the *Legislation Act 2003*).

### **Committee comment**

2.479 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General’s advice that allowing matters to be prescribed in the rules under subclause 38(2) is intended to allow the prescription of detailed and technical requirements in relation to disclosures in communications activity that would not be appropriate to include in primary legislation—for example, requirements as to the use of specific words, font sizes, placement, duration and

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<sup>192</sup> Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate Legislation*, 2017, page 3.

accessibility. The committee also notes the Attorney-General's advice that it is necessary to allow these matters to be prescribed in the rules so that they can be kept up to date with changes in communications technologies and community expectations in relation to the transparency of communications activity.

2.480 In relation to table item 4 of subclause 53(1), the committee notes the Attorney-General's advice that it is necessary to allow further purposes for which scheme information can be communicated to be prescribed in the rules so that scheme information can be communicated in circumstances that were not foreshadowed at the time the scheme was established; however, it is intended that any additional purposes and/or persons would be kept narrow and any request for information would need to be justified in relation to the purpose prescribed in the rules. The committee also notes the Attorney-General's advice that this may occur if a Commonwealth agency identifies a need to access scheme information in order to carry out its functions.

2.481 The committee also notes the Attorney-General's advice that it is unnecessary to specify that the minister must consider any comments of the Information Commissioner in relation to making rules for the purposes of table item 4 of subclause 53(1), as the term 'consult' included in subclause 53(2) 'implicitly encompasses both seeking and considering the views of the Information Commissioner.'

2.482 Finally, the committee notes the Attorney-General's advice that it is appropriate to allow these matters to be dealt with in rules rather than regulations as these types of legislative instrument are both subject to the same level of parliamentary scrutiny, and the use of rules allows a single type of legislative instrument to be used throughout the bill, simplifies the language and structure of the bill, and shortens the bill.

2.483 The committee remains concerned about the breadth of the power to specify additional purposes and/or persons under table item 4 of subclause 53(1) to whom Scheme information may be communicated. While the committee acknowledges the Attorney-General's advice that it is intended that any additional purposes and/or persons be kept narrow, the bill currently contains no such limitation. The committee considers that, if it is envisaged that the power to prescribe additional purposes and/or persons will only be used with respect to Commonwealth agencies, as in the example provided by the Attorney-General, it would be appropriate for the bill to be amended to limit the power to prescribe additional persons to Commonwealth agencies

2.484 In relation to the Attorney-General's advice that it is unnecessary to specify that the minister must consider any comments of the Information Commissioner, the committee notes that other legislation<sup>193</sup> specifically provides that the minister must

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193 See for example, subsection 28(1A) of the *National Cancer Screening Register Act 2016*.

have regard to any submission made, and as such it would be clearer if the bill were amended to specifically require that the minister have regard to any submission made by the Information Commissioner.

**2.485** The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

**2.486** In light of the information provided, the committee makes no further comment in relation to subclause 38(2).

**2.487** The committee otherwise draws its scrutiny concerns in relation to table item 4 of subclause 53(1) to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring on the secretary a broad power to prescribe additional purposes for which, or persons to whom, Scheme information can be communicated.

**2.488** The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

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### Significant penalties<sup>194</sup>

**2.489** The bill seeks to establish a scheme which includes broad registration obligations for persons or entities that have arrangements with, or undertake activities on behalf of, foreign governments or foreign principals. Failure to register carries significant criminal penalties, as outlined below. A 'foreign principal' is defined as including a foreign government, a foreign public enterprise, a foreign political organisation, a foreign business or an individual who is neither an Australian citizen nor a permanent resident.<sup>195</sup> Division 3 of Part 2 sets out the activities which are to be 'registrable' when done in Australia, as comprising:

- parliamentary lobbying on behalf of a foreign government;<sup>196</sup>
- activities on behalf of a foreign principal for the purpose of political or governmental influence<sup>197</sup> (which is defined as activity which has the purpose of directly or indirectly influencing a process relating to federal elections, federal government decisions, registered political parties or

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194 Clause 57. The committee draws Senators' attention to this provision pursuant to Standing Order 24(1)(a)(i) of the committee's terms of reference.

195 Clause 10.

196 Clause 20.

197 Clause 21.

independent candidates or members of Parliament, political campaigners or proceedings in Parliament).<sup>198</sup> These registrable activities comprise:

- parliamentary lobbying, which means lobbying a member of Parliament or their staff;<sup>199</sup>
  - general political lobbying, which means lobbying a Commonwealth public official, department, registered political party, candidate in a federal election or a political campaigner;<sup>200</sup>
  - communications activities, which means communicating or distributing information or material;<sup>201</sup> and
  - donor activity, which means disbursing money or things of value which is not required under the *Commonwealth Electoral Act 1918* to be disclosed;<sup>202</sup>
- activity by a recent Cabinet Minister on behalf of a foreign principal (who is not an individual);<sup>203</sup> or
  - activity by recent ministers, members of parliament and other holders of senior Commonwealth positions on behalf of a foreign principal (who is not an individual), where in undertaking the activity the person contributes experience, knowledge, skills or contacts gained in their former capacity.<sup>204</sup>

2.490 There are a number of exemptions from registration for certain types of activities undertaken on behalf of a foreign principal, and a broad power for the rules to prescribe activities as exempt from registration.<sup>205</sup> The committee also notes that the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 contains amendments to this bill that would expand the definition of 'general political lobbying' to include lobbying of a person or entity registered as a political campaigner, and expand the definition of activity for the purpose of political

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198 See clause 12. See also amendments sought to be made to this bill by item 4 of Schedule 5 of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

199 See clause 21 and the definition of 'parliamentary lobbying' in clause 10.

200 See clause 21 and the definition of 'general political lobbying' in clause 10 and amendments sought to be made to this bill by item 3 of Schedule 5 of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

201 See clause 21 and the meaning of 'communications activity' in clause 13.

202 Clause 21.

203 Clause 22.

204 Clause 23.

205 See clauses 24 to 30.

or governmental influence to include influencing the processes of such registered political campaigners.<sup>206</sup>

2.491 Clause 57 of this bill seeks to establish a number of criminal offences in relation to registration obligations under the Scheme. These offences are subject to significant custodial penalties ranging from imprisonment for 12 months to imprisonment for seven years. In summary:

- Subclauses 57(1) and (3) seek to make it an offence for a person who knows they are required to register to intentionally or recklessly omit to apply for registration or renew their registration, where the person undertakes a registrable activity on behalf of a foreign principal. This offence is punishable by a maximum penalty of seven years imprisonment (for intentional omission) and 5 years imprisonment (for reckless omission).
- Subclause 57(2) seeks to make it an offence for a person to give notice that they are no longer liable to register under the Scheme, knowing there is a registrable arrangement in existence between the person and a foreign principal and the person undertakes a registrable activity on behalf of the foreign principal. This offence is punishable by a maximum penalty of seven years imprisonment.
- Subsection 57(4) seeks to make it an offence for a person to intentionally omit to, or be reckless as to whether he or she has omitted to, apply for registration or renew their registration. This offence is punishable by a maximum penalty of 12 months imprisonment.
- Subsection 57(5) seeks to make it an offence for a person to give notice indicating they are no longer liable to register under the Scheme, with the knowledge there is a registrable arrangement in existence between the person and a foreign principal (but no requirement that the person actually undertakes a registerable activity on behalf of a foreign principal). This offence is punishable by a maximum penalty of 12 months imprisonment.

2.492 The committee's expectation is that a detailed justification for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar penalties for similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties

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206 See items 3 to 5 of Schedule 5 of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017. These amendments are to commence at the same time as the *Foreign Influence Transparency Scheme Act 2017* commences (see clause 2, table item 7).

for existing offences of a similar kind or of a similar seriousness. This should include a consideration of...other comparable offences in Commonwealth legislation'.<sup>207</sup>

2.493 The explanatory memorandum states that the seven year maximum penalties under subclauses 57(1) and (2) are appropriate given the 'significant consequences that can flow from hidden foreign influence on Australia's political and governmental processes and the high level of culpability of the offender',<sup>208</sup> and states that these penalties are consistent with 'comparable offences that relate to conduct that negatively affects Australia's governmental and political processes, including the offence at section 951 of the United States Code (agents of foreign governments) which attracts a maximum penalty of 10 years imprisonment.'<sup>209</sup> However, the explanatory memorandum does not provide any specific examples of comparable offences in Commonwealth legislation.

2.494 The explanatory memorandum justifies the penalties for the remaining offences by referring variously to the serious implications that unchecked and unknown sources of foreign influence could have on Australia's system of government, the need to provide incentives to register under the Scheme, and the need to prevent behaviour that undermines the transparency objective of the Scheme.<sup>210</sup> Again, the explanatory memorandum does not provide specific examples of comparable offences in Commonwealth legislation.

2.495 The committee is concerned that a failure to register under the Scheme could lead to the imposition of up to seven years imprisonment, in a context where a broad range of persons would be required to register in a broad range of circumstances. In particular, the definition of 'foreign principal', 'political or governmental influence', 'lobby' and 'general political lobbying' is very broad with the effect that potentially a wide range of activities would fall within the requirement to register.

2.496 As the explanatory material does not provide any specific examples in Commonwealth legislation of similar offences that are subject to penalties of this magnitude, the committee is concerned that the penalties discussed above may be disproportionate and could unduly limit the liberty of the person.

2.497 It is not apparent to the committee that the penalties in proposed section 57 of the bill are appropriate by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.

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207 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 39.

208 Explanatory memorandum, pp. 112, 116.

209 Explanatory memorandum, pp. 112, 116.

210 Explanatory memorandum, pp. 119, 122 and 124.

2.498 The committee therefore seeks the Attorney-General's detailed advice as to the justification for the significant custodial penalties proposed by clause 57, in the context of the breadth of the requirement to register under the scheme. In particular, the committee seeks the Attorney-General's advice as to specific examples of applicable penalties for comparable offences in other Commonwealth legislation.

### ***Attorney-General's response***

2.499 The Attorney-General advised:

The maximum penalties proposed in section 57 of the Bill have been set in accordance with the principles set out in the Guide, including that:

- penalties have a single maximum penalty that is adequate to deter and punish a worst case offence, and
- penalties are set consistent with penalties for existing offences of a similar kind or of a similar level of seriousness.<sup>211</sup>

The penalties in section 57 contain single maximum penalties consistent with the Guide and are adequate to respond to the 'worst case' conduct that is punishable under section 57. The penalties in section 57 are intended to address the most serious of conduct, intentionally committed in contravention of requirements under the Scheme, and recognise the high level of culpability of the offender.

In setting the penalties for the offences in section 57 of the Bill, consideration was given to the level of harm to Australia and Australia's political and governmental processes that may result from a person or entity failing to apply for, or maintain, registration under the scheme. As an example, significant adverse consequences meriting a substantial term of imprisonment could flow from a deliberate failure to register an arrangement with a foreign principal to undertake public relations and communications activities on their behalf. An arrangement stipulating that the activities are to commence when a federal election is called, and to target a vulnerable sector of the community in marginal electorates where it is likely that voters will change their vote if influenced by the activities, could have an appreciable impact on the outcome of a democratic process. A seven year penalty is appropriate when the person knows they are required to register but does not do so and undertakes the activities. Failure to register deprives the public of the opportunity to know the foreign influence being brought to bear in respect of their vote in the federal election. The maximum penalties in section 57 seek to deter such serious conduct.

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211 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, page 40.

Consideration was also given to the penalties for offences that support the United States' (US) equivalent scheme, established under the *Foreign Agents Registration Act 1938*. Section 951 of the US Code (agents of foreign governments) attracts a maximum penalty of ten years imprisonment.

The US offence applies where a person acts as an agent of a foreign government in the US without prior notification to the Attorney-General, other than a diplomatic or consular officer. The types of activities that constitute 'acting as an agent of a foreign government' are not defined except that they must be undertaken at 'the direction or control of a foreign government or official'. The US offence requires that a person intentionally acts on behalf of a foreign principal without prior notification and could apply to the same activities that are considered registrable activities in sections 20 – 23 of the Bill. The offence at section 57 applies where a person deliberately fails to register under the Scheme and goes on to engage in registrable activities. This conduct is equivalent to acting as a foreign agent and would constitute an offence under section 951 of the US Code.

### ***Committee comment***

2.500 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that , in setting these penalties, consideration was given to the level of harm to Australia and Australia's political and governmental processes that may result from a person or entity failing to apply for, or maintain, registration under the scheme. The committee also notes the Attorney-General's advice that consideration was given to offences that support the equivalent registration scheme for foreign agents in the United States, and that section 951 of the US Code (agents of foreign governments) attracts a maximum penalty of imprisonment for 10 years.

2.501 However, the committee notes that the Attorney-General's advice does not identify any existing offences of a similar kind or similar level of seriousness in Commonwealth legislation that attract penalties comparable to those proposed under clause 57. The committee reiterates its concerns that a failure to register under the Scheme could lead to the imposition of up to seven years imprisonment, in a context where a broad range of persons would be required to register in a broad range of circumstances. In particular, the definition of 'foreign principal', 'political or governmental influence', 'lobby' and 'general political lobbying' is very broad with the effect that potentially a wide range of activities would fall within the requirement to register.

**2.502 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.503** The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the significant custodial penalties proposed under clause 57, in the absence of any identified examples of existing offences in Commonwealth legislation of a similar level of seriousness that attract similar penalties.

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### **Absolute liability offence**<sup>212</sup>

2.504 Clause 40 would require registrants under the Scheme to keep Scheme records in relation to a number of specified matters both while registered and for period of five years after their registration ends. Clause 61 would make it an offence to damage or destroy a Scheme record, conceal a Scheme record or prevent a registrant from keeping Scheme records with the intention of avoiding or defeating the object of the Act or any element of the Scheme. Subclause 61(2) states that absolute liability applies to paragraph 61(1)(a), which sets out the requirement for registrants to keep records. The proposed offence would be subject to a maximum penalty of imprisonment for three years.

2.505 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 absolute 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. The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised, a defence that remains available where strict liability is applied.

2.506 As the imposition of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>213</sup>

2.507 In this instance, the explanatory memorandum states that the application of absolute liability to paragraph 61(1)(a) is appropriate as there is a need to ensure that a person does not avoid criminal liability because they claim to be unaware that a registrant is required to keep Scheme records. The explanatory memorandum

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212 Clause 61. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) of the committee's terms of reference.

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

further states that a registrant's obligation to keep Scheme records is clear on the face of the legislation.<sup>214</sup>

2.508 However, this explanation does not set out how the application of absolute liability in this instance is consistent with the *Guide to Framing Commonwealth Offences*, which states that absolute liability should only be applied where requiring proof of fault would undermine deterrence, there are legitimate grounds for penalising a person lacking fault and a person who made a reasonable mistake of fact in respect of the element to which absolute liability applies, or that the element is a jurisdictional element rather than one going to the essence of the offence.<sup>215</sup>

2.509 In particular, it is not clear to the committee why it is necessary to apply absolute liability to this element of the offence rather than strict liability, which would allow for a defence of reasonable and honest mistake of fact.

2.510 The committee requests a detailed justification from the Attorney-General for the application of absolute liability to an element of the offence under clause 61 with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.<sup>216</sup>

### **Attorney-General's response**

2.511 The Attorney-General advised:

Subsection 61(2) applies absolute liability to the element of the offence in paragraph 61(1)(a), that a registrant is required to keep records under section 40 of the Scheme. The Guide sets out the circumstances in which absolute liability can be applied to a particular physical element of an offence. Absolute liability may be applied where:

requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact in respect of that element.<sup>217</sup>

If absolute liability did not apply to paragraph 61(1)(a), recklessness would be the default fault element. Requiring proof of this fault element is unnecessary given the fault elements attached to paragraphs 61(1)(b), 61(1)(c) and 61(1)(d), which state:

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214 Explanatory memorandum, p. 140.

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

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

217 Ibid, at page 23.

(b) the person (whether or not the registrant) does an act, or omits to do an act; and

(c) the person does the act, or omits to do the act, with the intention of avoiding or defeating the object of this Act or an element of the scheme; and

(d) the act or omission results in:

- (i) damage to, or the destruction of a scheme record; or
- (ii) the concealment of a scheme record; or
- (iii) the registrant being prevented from keeping scheme records.

It is not necessary for the person to have 'fault' for paragraph 61(1)(a) because the person's culpability must otherwise be clearly established for the remaining elements of the offence. This is particularly the case for paragraph 61(1)(c), which carries the fault element of 'intent'. To establish the offence, prosecution must prove this intention beyond a reasonable doubt.

It is also not appropriate that a defendant be able to avail themselves of the defence of reasonable and honest mistake of fact for this element of the offence at section 61. Applying strict liability to this element of the offence would undermine the deterrent effect of the offence.

### ***Committee comment***

2.512 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that it is appropriate to apply absolute liability to paragraph 61(1)(a) because the defendant's culpability must otherwise be clearly established in relation to the remaining elements of the offence. The committee also notes the Attorney-General's advice that it would be inappropriate to apply strict liability to paragraph 61(1)(a), instead of absolute liability, as allowing a defendant to use the defence of reasonable and honest mistake of fact would undermine the deterrent effect of the offence.

**2.513 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.514 In light of the information provided, the committee makes no further comment on this matter.**

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**Broad delegation of administrative powers**<sup>218</sup>

2.515 Clause 67 would allow the delegation of powers granted to the secretary under the bill to Senior Executive Service (SES) employees of the department, or to Australian Public Service employees of the department in an Executive Level 2 or equivalent position. The powers granted to the secretary under bill include broad information gathering powers and powers to authorise the communication of scheme information.<sup>219</sup>

2.516 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 SES. 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.

2.517 In this instance, the explanatory memorandum states that the delegation power has been included for administrative convenience and that it has been restricted to employees with an appropriate level of seniority, thereby ensuring that the powers and functions granted by the legislation would only be exercisable by senior officers with experience and judgement in matters of public administration.<sup>220</sup>

2.518 The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials outside the SES. In this case, it is not clear to the committee why it is necessary to extend the scope of the delegation to Executive Level 2 employees. The committee is particularly concerned about the delegation to non-SES employees of powers to require persons to answer questions or produce documents (failure to comply being an offence) and the communication of scheme information as set out in Divisions 3 and 4 of Part 4.

2.519 The committee requests the Attorney-General's detailed advice as to why it is considered necessary to allow for the delegation of any or all of the secretary's functions or powers to Executive Level 2 employees, and the appropriateness of amending the bill so as to, at a minimum, limit the delegation of coercive information gathering powers and the communication of scheme information to Senior Executive Service employees.

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218 Clause 67. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) of the committee's terms of reference.

219 Proposed Part 4, Divisions 3 and 4.

220 Explanatory memorandum, p. 145.

**Attorney-General's response**

2.520 The Attorney-General advised:

As the committee notes, section 67 would allow the delegation of powers granted to the Secretary under the Bill to Senior Executive Service (SES) employees of the department, or to Australian Public Service employees of the department in an Executive Level 2 or equivalent position. The purpose of this delegation is to provide flexibility and timeliness in dealing with matters within the department, to ensure the Scheme is administered efficiently.

The application of the delegation power extends only to SES employees and/or APS officers at the Executive level 2 level to ensure that the powers and functions of the Act are only exercisable by senior officers with experience and judgement in matters of public administration.

It is not practical or feasible to require the Secretary to personally exercise the powers and functions of the Scheme. This would be counterproductive and would lead to delays in processing matters under the Scheme. Section 67(2) provides that the delegate must comply with any written directions of the Secretary when performing delegated functions or exercising delegated powers under the Act. This ensures the delegates are undertaking duties directly at the request of the Secretary, in compliance with the Secretary's directions and consistent with the objective of the Scheme in ensuring its efficient administration. Delegation to the level of Executive Level 2 employees is consistent with delegations in comparable pieces of Commonwealth legislation, for example the *AusCheck Act 2007*.

The committee enquires whether Government would amend the Bill to limit the delegation of powers to SES employees, at least with relation to coercive powers and the communication of scheme information. The Government considers that this would be an appropriate amendment that ensures that information-gathering powers are limited only to more senior officers within the department.

**Committee comment**

2.521 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the bill proposes to allow delegations of the secretary's powers in order to ensure 'flexibility and timeliness' in dealing with matters under the scheme, and that these delegations have been restricted to SES and Executive Level 2 employees so as to ensure that powers and functions under the bill are only exercisable by 'senior officers with experience and judgement in matters of public administration.'

2.522 The committee welcomes the Attorney-General's advice that the government considers it would be appropriate to amend the bill to limit the delegation of coercive information gathering powers, or powers relating to the communication of scheme information, to SES employees.

**2.523** The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

**2.524** The committee welcomes the Attorney-General's statement that the government considers it would be appropriate for the bill to be amended so as to limit the delegation of coercive information gathering powers, or powers relating to the communication of scheme information, to SES employees. The committee will consider any amendments made to the bill in a future Scrutiny Digest.

**2.525** In light of the information provided, and on the basis that the bill may be amended to limit the delegation of certain powers to SES employees, the committee makes no further comment on this matter.

## Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

<b>Purpose</b>	This bill seeks to impose a charge for applications for registration or renewal of registration under the <i>Foreign Influence Transparency Scheme Act 2017</i>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 7 December 2017
<b>Bill status</b>	Before the House of Representatives

2.526 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The Attorney-General responded to the committee's comments in a letter dated 14 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>221</sup>

### Charges in delegated legislation<sup>222</sup>

#### *Initial scrutiny – extract*

2.527 This bill seeks to impose a charge for applications for registration or renewal of registration under the *Foreign Influence Transparency Scheme Act 2017*. Clause 6 provides that the amount of the charge payable 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.

2.528 The explanatory memorandum states that enabling charges to be dealt with in regulations 'provides sufficient flexibility to be able to align the amount and methodology with the [Australian Cost Recovery] Guidelines, and will reduce the need to amend the primary legislation in the future'.<sup>223</sup>

221 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.apf.gov.au/senate\\_scrutiny\\_digest](http://www.apf.gov.au/senate_scrutiny_digest)

222 Clause 6. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

223 Explanatory memorandum, p. 9.

2.529 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).<sup>224</sup> 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 enabling the charges to be prescribed in regulations reflects the cost recovery policy and processes adopted by the Australian Government.<sup>225</sup> However, no guidance is provided on the face of the bill limiting the imposition of the charge in this way, nor are maximum charges specified.

2.530 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.

2.531 The committee requests the Attorney-General's advice as to why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the bill.

### ***Attorney-General's response***

2.532 The Attorney-General advised:

A statutory limit for charges for applications for registration and renewal of registration under the Foreign Influence Transparency Scheme (the Scheme) is not specified in the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017 (the Bill) to provide for flexibility in the operation of the Scheme and because the amount to be charged will be subject to established principles, oversight and scrutiny.

The calculation of charges will be in accordance with the Australian Government's decision to partially cost recover the Scheme, and will adhere to the Australian Government Cost Recovery Guidelines (the Guidelines).<sup>226</sup> Under the Guidelines, each cost recovered activity must ensure that there is an alignment between the expense incurred and income generated through charges for that activity.

The Guidelines also require that Government entities consult with the Department of Finance to develop a Cost Recovery Impact Statement (CRIS). The CRIS must be:

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224 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'.

225 Explanatory memorandum, p. 9.

226 Australian Government Department of Finance, Australian Government Cost Recovery Guidelines: Resource Management Guide No. 304, Third edition, 2014.

- certified by the accountable authority of the entity
- approved by the responsible minister, and
- agreed for release by the Finance Minister, if the cost recovery risk rating is 'high'.<sup>227</sup>

The Guidelines further require regular reporting on cost recovery, requiring an entity to report on cost recovery at both the aggregate level in the entity's annual financial statements, in accordance with the financial reporting rules, and at the cost recovered activity level on the entity's website as part of the CRIS.<sup>228</sup>

Additionally, the CRIS must be made publicly available before any charging activity begins. This means that the method of calculation of the charges will be publicly available in advance of any charging regime being implemented.

The Australian Government's decision to partially, rather than fully, cost recover reflects the Government's commitment to upholding the transparency objective of the Scheme by ensuring registration and compliance is not discouraged by prohibitive fees. The Government has stated that the amount that will be charged in connection with the Scheme will be less than fees charged under the United States (US) equivalent *Foreign Agents Registration Act* (FARA). The fees under FARA are set at approximately US\$305 for the initial filing and then for each mandatory six-monthly supplemental statement.

The committee's report characterises the charges in the Bill as taxation, and states at paragraph 1.256 that '[o]ne of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise). 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 approach taken in subsection 6(2) of the Bill is consistent with guidance from the Office of Parliamentary Counsel that the imposition of taxes should be included in regulations rather than another type of legislation.<sup>229</sup> Regulations are subject to parliamentary oversight, including disallowance processes. Parliament therefore has the ability to oversee the charges and play a role in setting the tax.

Subsection 6(2) allows the amount of charges to remain responsive and adaptive to circumstances not foreseen at the time of the establishment of the Scheme. This could include with relation to the estimated number of registrants, and the estimated cost to administer the Scheme. Charges

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227 Ibid, page 16.

228 Ibid, page 50.

229 Office of Parliamentary Counsel, Drafting Direction No. 3.8: Subordinate Legislation, 2017, page 3.

established by regulations in accordance with subsection (6)(a) will be legislative instruments under the *Legislation Act 2003* and would be subject to the normal disallowance processes.

The committee has also enquired whether the Bill could be amended to include guidance on the method of calculation of the charge and/or the maximum charge. Government is open to considering amendments to the Bill to establish a maximum charge.

### **Committee comment**

2.533 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that a statutory limit for charges for applications for registration and renewal of registration under the Foreign Influence Transparency Scheme is not specified in the bill so as to provide flexibility in the operation of the scheme and because the amount to be charged will be subject to 'established principles, oversight and scrutiny'.

2.534 The committee notes the Attorney-General's advice that charges will be set in accordance with the Australian Government Cost Recovery Guidelines (Guidelines), which require an 'alignment' between expenses incurred and income generated through charges for an activity, and the development of a Cost Recovery Impact Statement (CRIS) in consultation with the Department of Finance. The Guidelines also require reporting of cost recovery activities in the entity's annual financial statements and on the entity's website. The CRIS, and therefore the method of calculation of the charges, must be made public prior to the commencement of charging activity.

2.535 The committee also notes the Attorney-General's advice that the regulations setting the amount of the charge will be subject to the normal parliamentary disallowance processes under the *Legislation Act 2003*.

2.536 While the committee acknowledges the Attorney-General's advice that the charge will be designed only to partially recover certain costs, the committee notes that there is nothing on the face of the bill that actually limits the amount of the charge in this way. The committee therefore takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation.<sup>230</sup> 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. Therefore, where there is any possibility that a charge could be characterised as general taxation (as in this case where the bill provides that the prescribed amount of a charge does not need to

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230 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'.

bear any relationship to the cost of providing the relevant services),<sup>231</sup> the committee considers that guidance in relation to the level of a charge should be included on the face of the primary legislation.

2.537 In light of this, the committee welcomes the Attorney-General's statement that the government is open to considering amendments to the bill to establish a maximum charge. The committee notes that such an amendment could reflect the government's intention that the fees charged in connection with this scheme will be less than the United States' equivalent *Foreign Agents Registration Act*. The committee further notes that including a maximum limit in the bill would not inappropriately limit flexibility in the setting of the rate of the charge, nor would it necessarily result in amendments needing to be made to the primary legislation. Instead, it would simply represent an upper limit on the amount of the charge that could be levied without such amendments being needed. Such a limit would also provide greater certainty to those who are liable to be charged the fee.

2.538 While the committee welcomes the fact that the government is open to considering amendments, the committee emphasises that, as it stands, the bill contains no guidance as to the method of calculation of the charge or a maximum charge and that the setting of the charge will therefore be subject to only limited parliamentary scrutiny.

**2.539 The committee requests that the key information provided by the Attorney-General be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.540 The committee acknowledges the Attorney-General's statement that the government is open to considering an amendment to establish a maximum charge on the face of the bill. The committee would welcome such an amendment. However, in the absence of any amendment to the bill the committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing regulations to determine the amount of a charge payable without any guidance being provided on the face of the bill as to the method of calculation or the maximum amount of the charge.**

**2.541 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

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231 Subclause 6(3).

## Road Vehicle Standards Bill 2018

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

2.542 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2018*. The minister responded to the committee's comments in a letter dated 2 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>232</sup>

### **Broad delegation of legislative power**<sup>233</sup>

2.543 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.

2.544 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.

2.545 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'.<sup>234</sup> In addition, the explanatory memorandum states that, in the absence of this power,

232 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

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

234 Explanatory memorandum, pp. 24–25.

innovations in the automotive industry could undermine the regulatory scheme set out in the bill and 'potentially compromise community safety.'<sup>235</sup> 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.'<sup>236</sup>

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

2.547 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.

### ***Minister's response***

2.548 The minister advised:

The Senate Standing Committee for Scrutiny of Bills (the Committee) has raised concerns about the broad power delegated to the Secretary of the Department of Infrastructure, Regional Development and Cities (the Department) to determine the scope of road vehicles and road vehicle components that will be subject to the regulatory scheme set out in the Bill. Subclause 6(5) of the Bill allows the Secretary, by legislative instrument, to determine whether a class of vehicle is or is not a road vehicle for the purposes of the Bill. Similarly, subclause 7(3) allows the Secretary to determine by legislative instrument that a class of component is, or is not, a road vehicle component for the purposes of the Bill.

A core issue that arises when regulating road vehicles and their components is the variety and complexity of vehicles that people may seek to use on roads. The Bill provides a definition of road vehicles that makes it clear whether the vast majority of vehicles provided in Australia are, or are not, road vehicles. However, given the breadth and complexity of devices that can be used for the purposes of transportation, the intention of these provisions is to allow the assessment of vehicles that fall into the 'grey area' – where a vehicle may have some road going features and some features which are not. This will be especially required in the rapidly changing context of the vehicle industry that sees, for example, personal transportation devices such as self-balancing scooters entering the market.

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235 Explanatory memorandum, p. 24.

236 Explanatory memorandum, p. 23.

These provisions provide for an objective assessment that will apply broadly, rather than requiring individual suppliers or importers to apply under the Bill to obtain a case-by-case assessment. They add on-going clarity to the legislation for potential current and future vehicle import applicants.

The Committee has indicated its view that significant matters such as range of vehicles and components that are to be subject to the legislative scheme should be determined by primary legislation, unless there is a sound justification for use of delegated legislation. If the scope of the definition of road vehicle or road vehicle component could be determined only through the Bill itself, this could pose a significant risk to public safety, given the practicalities and timeframes involved in developing amendments to primary legislation. Decisions around vehicles falling into this 'grey area' must be made relatively quickly and by a person with relevant technical expertise, to ensure vehicles entering Australia and being used on public roads fall within the scope of the Bill, and therefore are required to meet safety, security, and environmental standards.

Section 5B of the *Motor Vehicle Standards Act 1989* currently permits the Minister to make determinations in relation to what is not a road vehicle. The instruments made under section 5B (and those that would be made under clauses 6(5) and 7(3)) are highly technical instruments, requiring detailed technical explanation. Detailed technical matters are more appropriately contained in legislative instruments. The expertise to develop technical instruments rests with the Secretary who, through the Department, has the appropriate technical knowledge to develop, and be responsible for, these instruments.

For example, a power-assisted bicycle might be introduced to the Australian market without being regulated by the Bill. However, the bicycle may have road going features, such as power, speed, indicators etc., that indicate that the vehicle is designed for use on public roads and should therefore be regulated by the Bill.

The Secretary, using the expertise of engineers employed by the Department and in consultation with stakeholders, will be able to make a legislative instrument determining that these bicycles are road vehicles, and therefore must meet minimum safety, environmental and anti-theft standards. This provides the Government with the ability to swiftly address issues that will emerge in relation to road vehicles, ensuring the objectives of the Bill can be achieved on an ongoing basis within a rapidly changing industry.

In addition to being able to make decisions about vehicles that should be characterised as road vehicles or road vehicle components, it is important that the Secretary is able to make decisions about vehicles that should not be characterised as road vehicles or road vehicle components. This is particularly the case where the breadth of the definition of road vehicle unintentionally captures vehicles and it would be inappropriate for them

to be regulated by the Bill. An example of this was motorised personal mobility devices such as electric wheelchairs. Improvements in these devices such as increased motor power, meant that such devices unintentionally fell within the definition of road vehicles in the Motor Vehicle Standards Act. In this case, the Minister was able to determine under section 5B that these vehicles were not road vehicles, ensuring people with disability were able to access personal mobility devices without requiring these to meet unnecessary national road vehicle standards.

It should also be noted that the determinations will be legislative instruments and therefore subject to scrutiny from the Senate Standing Committee on Regulations and Ordinances, and also subject to disallowance by Parliament. The Secretary must also make determinations that are consistent with the objectives of the Bill, providing a set of principles that must be considered in making these determinations. It is not expected that these instruments will be made often – there have been two during the operation of the Motor Vehicle Standards Act – however when they are made, they are in direct response to an immediate problem faced in the regulation of road vehicles.

For the above reasons it is appropriate that the Bill allows the Secretary to determine, by legislative instrument, what is and is not a road vehicle. Legislative instruments made by the Secretary strike an appropriate balance between the core considerations that must go into these decisions: the requirement for quick decisions; the detailed technical knowledge required; and the need for parliamentary scrutiny of these decisions.

### **Committee comment**

2.549 The committee thanks the minister for taking the opportunity to provide this additional information. The committee notes the minister's advice that because of the variety and complexity of vehicles that people may seek to use on the roads it is necessary to allow the secretary to quickly make a determination, by legislative instrument, with respect to whether vehicles over which there is some ambiguity are or are not captured by the regulatory framework. The committee further notes the minister's advice that if changes to the scope of the vehicles and components were capable of being made only by amending the primary legislation, the resulting delays 'could pose a significant risk to public safety'.

2.550 The committee also notes the minister's advice that this approach matches that currently in place under the *Motor Vehicles Standards Act 1989*, that instruments making such determinations include highly technical material that is not appropriate for inclusion in primary legislation, and that personal mobility devices (for example, electric wheelchairs) provide an example of a type of vehicle for which it has been necessary to make such a determination in the past.

2.551 Finally, the committee notes the advice that it is not expected such determinations will be made often, given that only two have been made during the operation of the *Motor Vehicle Standards Act 1989*.

**2.552 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.553 In light of the information provided, the committee makes no further comment on this matter.**

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### **Broad discretionary power**<sup>237</sup>

2.554 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.

2.555 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.'<sup>238</sup>

2.556 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.<sup>239</sup> 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.

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

238 Explanatory memorandum, p. 23.

239 The determination of review rights in the rules is discussed below at paragraphs 2.672 to 2.674.

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

- 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.

### ***Minister's response***

2.558 The minister advised:

The Committee has sought advice in relation to subclauses 6(6) and 7(4) of the Bill, which seek to allow the Secretary to determine, by notifiable instrument, that an individual vehicle or component is, or is not, a road vehicle.

These powers are required due to the complexity of the automotive regulatory environment. As outlined in the response to subclauses 6(5) and 7(3), there is often a 'grey area' between whether a vehicle should be considered a road vehicle or not a road vehicle. However, there is an additional level of complexity when modified vehicles are considered. Individual vehicles can easily be modified in a way that changes the nature of the vehicle and therefore how it should be regulated. It is these modified vehicles that are most likely to require determinations on an individual basis.

For example, someone may modify an individual non-road vehicle in such a way that it is unclear whether it becomes a road vehicle; perhaps it could be modified through the addition of features such as higher engine capacity, indicators, or road tyres, to an off-road motorcycle. The physical features of the individual vehicle may indicate that it should be regulated as a road vehicle, and thus will be subject to requiring a level of compliance with the national road vehicle standards.

In this circumstance, a tool enabling the Secretary to determine that the vehicle is a road vehicle ensures that the community is provided protection by capturing the vehicle under the Bill, meaning the national vehicle standards apply to that vehicle.

In addition, the inability to declare an individual vehicle or components as 'not a road vehicle or component' could impose significant burden on the community. For example someone may have modified a road vehicle in such a way that it is clearly no longer for public road use - therefore the community does not require that vehicle to be subject to the requirements imposed by the Bill. For example, an individual may have installed tracks

on a road vehicle, instead of wheels and tyres because they want the vehicle to be used in off-road in snow tourism. Providing the Secretary with the power to notify that a specific vehicle is not a road vehicle facilitates the supply of individual specialist vehicles into Australia by ensuring that these types of special purpose non-road vehicles are not unduly hindered in their provision to the Australian market.

Delegates in the Department make thousands of decisions per year on the importation of individual vehicles (as opposed to classes of vehicles - around 17,000 applications per year). While many of these require decisions as to whether the vehicle is or is not a road vehicle, it is not envisaged that each of these will result in a notifiable instrument. Instead, it is envisaged that the determination-making power for individual vehicles will be used in complex cases where definitive advice is considered by the Secretary to be in the interests of meeting the objectives of the Bill. The objects of the Bill provide the high level principles that the Secretary needs to consider when making notifiable instruments.

The fact that the determination is by notifiable instrument ensures that, where a determination is made, it is published and publicly accessible (as required by the *Legislation Act 2003*). This provides greater public scrutiny of decisions, helps consumers understand the practical application of the legislation, and improves public transparency of complex decisions.

It is not proposed that determinations under clauses 6(6) and 7(4) about individual road vehicles be reviewable.

### **Committee comment**

2.559 The committee thanks the minister for this response. The committee notes the minister's advice that the power of the secretary to determine, by notifiable instrument, that an individual vehicle or component is, or is not, a road vehicle or a road vehicle component is required due to the complexity of the automotive regulatory environment. The committee notes the advice that the power is most likely to be used in relation to modified vehicles, and that providing the secretary with this power 'ensures that the community is provided protection' by capturing modified vehicles under the bill where necessary, and preventing the imposition of an undue burden with respect to individual specialist vehicles that should not be subject to the requirements of the bill.

2.560 The committee further notes the minister's advice that the department currently makes approximately 17,000 decisions per year with respect to the importation of individual vehicles and while many of these require decisions as to whether the vehicle is or is not a road vehicle, it is not envisaged that a notifiable instrument will be made in every case. Rather, determinations will be made 'in complex cases where definitive advice is considered by the Secretary to be in the interests of meeting the objectives of the Bill'.

2.561 Finally the committee notes the minister's advice that the objects of the bill will provide high level principles the secretary must consider when exercising this

power to make determinations, and that it is not proposed that determinations made in relation to individual road vehicles or road vehicle components be reviewable.<sup>240</sup>

2.562 The committee reiterates its concern about the lack of guidance in the bill in relation to the exercise of the power to make determinations as to whether specified vehicles or components are, or are not, captured by the regulatory framework. The committee notes that clause 3 sets out the objects of the bill as a whole. While the objects clause may be referred to by courts when ascertaining the meaning of ambiguous text it is not clear that it would provide any specific guidance in relation to the making of these specific determinations.

2.563 The committee's concerns over the breadth of the secretary's discretionary power to make determinations in relation to individual road vehicles or road vehicle components are compounded by the fact that these determinations will not be subject to merits review. The committee notes that the minister's advice provides no justification for excluding these determinations from merits review.

**2.564 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.565 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring a broad discretionary power on the secretary to determine, by notifiable instrument, that a specified vehicle or component is, or is not, captured by the regulatory scheme, in the absence of any specific guidance about the exercise of this power, and without subjecting such determinations to merits review.**

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### **Incorporation of external material into the law<sup>241</sup>**

2.566 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:

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240 Determinations made under subclauses 6(6) and 7(4) are not included in the list of decisions subject to review by the Administrative Appeals Tribunal set out in clause 219 of the Road Vehicle Standards Rules 2017 exposure draft. The exposure draft is available at [https://infrastructure.gov.au/vehicles/mv\\_standards\\_act/files/RVS\\_Rules\\_2017.pdf](https://infrastructure.gov.au/vehicles/mv_standards_act/files/RVS_Rules_2017.pdf).

241 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).

- 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)).

2.567 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.

2.568 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
- 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).

2.569 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.

2.570 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.<sup>242</sup> 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.

2.571 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

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

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.'<sup>243</sup> No explanation is provided as to whether documents incorporated under these provisions would be freely and readily available.

2.572 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.<sup>244</sup> 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 other public documents is vital to the 'flexibility and adaptability' of Australia's response to changes in automotive technology.<sup>245</sup>

2.573 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.<sup>246</sup>

2.574 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.

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243 Explanatory memorandum, p. 25.

244 Explanatory memorandum, p. 26.

245 Explanatory memorandum, p. 26.

246 Explanatory memorandum, p. 60.

**Minister's response**

2.575 The minister advised:

The Committee notes concerns about the provisions of the Bill permitting instruments made under it to apply, adopt and incorporate matters contained in other instruments or writings as in force or existing from time to time. In particular, the Committee has concerns about the possibility that incorporated material may not be freely and readily available to all those interested in the law.

The Government has a long-standing policy of harmonising Australia's vehicle standards with international best practice vehicle standards. The clauses of the Bill noted by the Committee continue the existing policy under 7A of the Motor Vehicle Standards Act, which allow the Minister to make National Road Vehicle Standards by incorporating international standards.

The National Road Vehicle Standards adopt or point to a variety of material, the overwhelming majority of which is publically available United Nations Regulations and other internationally agreed standards. Within the UN Regulations there are a number of minor technical standards referenced in turn. Many of these are also free to access, although some, like International Standards Organisation (ISO) Standards, are generally only available for purchase.

In addition to incorporating material into the National Road Vehicle Standards, technical standards are likely to be incorporated into other determinations made through the Rules (subclause 82(6)), consistent with the policy to harmonise with international standards.

Entities regulated by the Bill are likely to have their own access to standards or documents that are incorporated as part of their professional library, given the global use of such documents. Where the general public has an interest in the law the National Library of Australia has a collection of International, British, Canadian, German, Japanese New Zealand and United States Standards available for viewing. While not a complete collection, this provides significant access to these areas of the law.

The benefit of incorporating international standards is clear – regulation that is based on internationally agreed standards provides consumers with access to the safest vehicles from the global market at the lowest possible cost. It reduces the burden on manufacturers and provides an economic benefit to consumers. Imposing a different standard, on the basis it is freely and readily available to the public at large, may require departure from the internationally accepted best-practice encompassed within standard published by the United Nations.

The Government considers that the benefit gained from ensuring best-practice standards are adopted outweighs the minimal detriment caused by the standard potentially not being freely and readily available to persons who are interested, but not directly affected by, the law.

**Committee comment**

2.576 The committee thanks the minister for taking the opportunity to provide this additional information. The committee notes the minister's advice that the provisions in the bill permitting instruments to apply, adopt or incorporate matters in other documents as in force from time to time replicate the current approach under the Motor Vehicle Standards Act. The committee also notes the minister's advice that the 'overwhelming majority' of the material adopted or pointed to by the National Road Vehicle Standards are publicly available United Nations regulations and other international standards; however, these UN standards themselves refer to other technical standards which are generally only available for purchase.

2.577 The committee notes the minister's further advice that entities regulated by the bill are likely to have their own access to this range of incorporated standards and documents, and that the general public may view a number of international and country-specific standards through the National Library of Australia. Finally, the committee notes the minister's advice that the benefit gained from the adoption of best-practice standards clearly outweighs the detriment that arises where such standards are not freely and readily available to all persons interested in the law.

2.578 While the committee welcomes this further explanation, the committee takes this opportunity to reiterate that it is fundamental principle of the rule of law that every person subject to the law should be able to freely and readily access its terms. As a result, the committee will have scrutiny concerns when external materials that are incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law.

2.579 The committee also takes this opportunity to highlight the expectations of the Senate Standing Committee on Regulations and Ordinances that delegated legislation which applies, adopts or incorporates any matter contained in an instrument or other writing should:

- clearly state the manner in which the documents are incorporated—that is, whether the material is being incorporated as in force or existing from time to time or as in force or existing at a particular time. This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material (see also section 14 of the *Legislation Act 2003*); and
- contain a description of the documents and indicate how they may be obtained (see paragraph 15J(2)(c) of the *Legislation Act 2003*).

**2.580 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

2.581 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 incorporation of external material into the law in circumstances where at least some of this material may not be freely and readily available to all those interested in or affected by the law.

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### Reversal of evidential burden of proof<sup>247</sup>

2.582 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'.<sup>248</sup> 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.

2.583 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.

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247 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).

248 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.).

2.584 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.

2.585 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.

2.586 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.

2.587 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.

2.588 The committee notes that the *Guide to Framing Commonwealth Offences*<sup>249</sup> 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.

2.589 The explanatory memorandum makes the general comment that the clauses subject to reversal of the evidential burden of proof contain elements that 'would be 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.'<sup>250</sup> 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.

2.590 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

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

250 Explanatory memorandum, p. 13.

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.<sup>251</sup> 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).

2.591 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.<sup>252</sup> 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.

2.592 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.<sup>253</sup> 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.

2.593 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.

### ***Minister's response***

2.594 The minister advised:

The Committee has sought justification as to the appropriateness of reversing the evidential burden in offence specific defences.

The 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' provides that a matter should only be included in an offence-specific defence where:

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251 Explanatory memorandum, p. 28.

252 Explanatory memorandum, p. 33.

253 Explanatory memorandum, p. 38.

- 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.

#### Subclause 16(3) – Entry of non-compliant vehicles on the RAV

This clause prevents vehicles that do not meet the requirements of a Register of Approved Vehicles (RAV) entry pathway from being entered onto the RAV. Paragraphs 16(3)(a), (b), (c) and (d) provide a defence if the only reason that the vehicle did not comply with the entry pathway was due to the use of a non-compliant component represented by its supplier to be covered by a component type approval.

The precise details of the design and manufacture of the vehicle, and the procurement and use of components, is peculiarly within the knowledge of the type approval holder. It is a core requirement of type approvals that the type approval holders retain this information in ‘supporting documentation’, rather than provide this information to the Department to gain an approval. While the Department can access this information by requesting it, this is a costly and resource intensive exercise, requiring the Department to request a full outline of the design and manufacturing process and spend time to develop a detailed understanding of one type approval holder’s production process.

The type approval holders, to whom this offence relates, should already have both the documentation, and a detailed understanding of their own processes. This means that in addition to the type approval holder being the specific holder of this knowledge, it is significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to establish the matters in paragraphs (a), (c), and (d).

#### Clause 24 - Providing road vehicle for the first time in Australia vehicle not on RAV

Subclause 24(1) makes it an offence for a person to provide a road vehicle to another person in Australia for the first time, if the vehicle is not on the RAV.

Paragraph 24(3)(f) provides that subclause 24(1) does not apply ‘in a circumstance set out in the Rules’. Under clause 48 of the proposed Rules, a circumstance for the purposes of paragraph 24(3)(f) of the Bill is where:

- A road vehicle is a vehicle to which an intergovernmental agreement applies; and
- The vehicle is provided in circumstances allow by the intergovernmental agreement.

Vehicles that are imported under intergovernmental agreements include speciality vehicles used in defence operations. It is peculiarly within the knowledge of the defendant that the vehicle is subject to an intergovernmental agreement. The Department, and at times, the

Australian Government, does not provide these approvals and therefore does not have these records.

Subclause 24(4)(a) provides a defence if the person providing the vehicle holds a non-RAV entry import approval for vehicle. While the Department has access to records of non-RAV entry import approval holders, whether a specific vehicle relates to the non-RAV entry import approval is knowledge peculiarly within the knowledge of the defendant, as determining this requires access to the vehicle. The defendant has access to the vehicle, its sale and importation documents and would therefore be able to link the vehicle and non-RAV entry import approval. This makes it significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

#### Clause 32 – False or misleading information

Subclause 32(1) creates an offence for providing false or misleading information.

Subclause 32(2) creates a defence if the information or document is not false or misleading in a material particular. This places an evidential burden on the defendant in relation to proving that the information or documents were not false or misleading in a material particular (that is, they must point to evidence that the false or misleading information is inconsequential or not relevant to the matter at issue; if they do so, the prosecution must disprove this beyond reasonable doubt).

Given the objectives of the Bill to provide safe and secure vehicles, the provision of false or misleading information can have serious ramifications for achieving the legitimate outcomes of the Bill. For example, an applicant may mislead the Department about their engineering qualifications, saying that they are more qualified than they actually are. This false statement could have a material impact on vehicle safety and the Department may seek to prosecute. The applicant's real qualification, however, may actually meet the minimum expected threshold. The defendant could offer this as evidence that the misleading information they provided was inconsequential to the outcome. In situations such as this, the evidence of whether the matter is misleading in a material particular is peculiarly within the knowledge of the defendant and it is therefore appropriate for the defendant to bear the evidential burden.

The reversal of evidential burden in this offence is consistent with the *Criminal Code Act 1995* and other Commonwealth legislation that operates in a similar regulatory environment, such as the *Biosecurity Act 2015*.

#### **Committee comment**

2.595 The committee thanks the minister for this response. With respect to paragraphs 16(3)(a), (c) and (d), the committee notes the minister's advice that the details of the design and manufacture of a vehicle, as well as the procurement and use of components, is peculiarly within the knowledge of the type approval holder as

it is a requirement of type approvals that type approval holders retain this information, rather than providing it to the department. Although the department may request this information, this would be a 'costly and resource intensive exercise'. The committee notes the minister's advice that it would therefore be significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to establish, the matters in paragraphs (a), (c), and (d).

2.596 With respect to paragraph 24(3)(f), the committee notes the minister's advice that the exposure draft of the Road Vehicle Standards Rules 2017 specifies the following circumstances in which the offence of providing a road vehicle to another person in Australia for the first time when the vehicle is not on the RAV will not apply:

- the road vehicle is a vehicle to which an intergovernmental agreement applies; and
- the vehicle is provided in circumstances allowed by the intergovernmental agreement.<sup>254</sup>

2.597 The committee notes the minister's advice that whether a vehicle is subject to an intergovernmental agreement will be peculiarly within the knowledge of the defendant and that the department, and at times the Australian government, does not provide such approvals and therefore does not have a record of them.

2.598 With respect to paragraph 24(4)(a), the committee notes the minister's advice that, although the department has access to records of non-RAV entry import approvals, it is necessary to have access to the vehicle itself to determine whether it is the vehicle to which the permit relates. The committee also notes the minister's advice that, as the defendant has access to the vehicle and its sale and importation documents, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

2.599 Finally, with respect to subclause 32(2), the committee notes the minister's advice that it is appropriate to reverse the evidential burden in relation to establishing that information or documents were not false or misleading in a material particular because, in some circumstances, this matter will be peculiarly within the knowledge of the defendant. The committee notes the example provided relating to information about an applicant's engineering qualifications. The committee also notes the minister's advice that the reversal of the evidential burden in relation to this matter is consistent with the *Criminal Code Act 1995* and other Commonwealth legislation in a similar regulatory environment, such as the *Biosecurity Act 2015*.

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254 See clause 48 of the Road Vehicle Standards Rules 2017 exposure draft. The exposure draft is available at [https://infrastructure.gov.au/vehicles/mv\\_standards\\_act/files/RVS\\_Rules\\_2017.pdf](https://infrastructure.gov.au/vehicles/mv_standards_act/files/RVS_Rules_2017.pdf).

2.600 Noting the information provided by the minister, the committee makes no further comment in relation to the proposed reversal of the evidential burden of proof in relation to the matters set out in paragraphs 16(3)(a), (c) and (d), and paragraph 24(4)(a).

2.601 With respect to the matters specified in the draft rules for the purposes of paragraph 24(3)(f) of the bill, the committee considers that, although neither the department nor in some cases the Australian government will have records of approvals granted under intergovernmental agreements, it is not clear that this matter would be peculiarly within the knowledge of the defendant. In addition, as this exception relies on circumstances set out in delegated legislation it is possible for further circumstances to be prescribed that are clearly not peculiarly within the knowledge of the defendant or significantly more difficult and costly for the prosecution to disprove.

2.602 In relation to the exception set out under subclause 32(2), the committee acknowledges that, in the particular example provided, the evidence required to demonstrate that information provided was not misleading in a material particular may be said to be peculiarly within the knowledge of the defendant. However, the committee considers that it is not clear that a similar situation would exist in relation to other types of information or documents given under or for the purposes of the bill. It therefore remains unclear to the committee that it is appropriate to reverse the evidential burden of proof in relation whether a document or information is not false or misleading in a material particular.

**2.603 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.604 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including the matters set out in paragraph 24(3)(f) and subclause 32(2) as offence-specific defences (and therefore placing an evidential burden of proof in relation to these matters on the defendant).**

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### **Strict liability offence<sup>255</sup>**

2.605 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

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

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.

2.606 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*.<sup>256</sup>

2.607 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.<sup>257</sup> 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.

2.608 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.'<sup>258</sup> Further, the explanatory memorandum states that '[p]ersons who operate in this industry are already aware 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'.<sup>259</sup> 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.

2.609 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.

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

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

258 Explanatory memorandum, p. 41.

259 Explanatory memorandum, p. 13.

**Minister's response**

## 2.610 The minister advised:

The Committee has noted their concerns regarding strict liability applying to clause 38 of the Bill, which is subject to maximum penalty of 1,050 penalty units for an individual.

Clause 38 creates an offence of strict liability where a person refuses or fails to comply with a recall notice, or a person supplies to another person a road vehicle or road vehicle component to which a recall notice relates. Failing to comply with a recall notice is a significant contravention that goes to the core objectives of the Bill – to ensure that vehicles in Australia are safe, secure, and meet relevant environmental standards.

The use of strict liability for this offence is consistent with the principles relating to strict liability at 2.2.6 of the *'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers'*, insofar as strict liability is required to ensure the integrity of a regulatory regime. The penalty unit amount, while far exceeding the maximum recommended penalty units, is also vital for ensuring the integrity of the regulatory regime.

Rectifying vehicles that are subject to a recall notice is an expensive exercise for regulated entities, but vital for ensuring community health and safety. The amount of a penalty, regardless of whether the supplier is an individual or corporation, must be set high enough that the supplier does not consider non-compliance with the recall notice to be a less expensive or more attractive option. Generally, high initial outlays by automotive industry suppliers will be required to comply with recall notices. In these circumstances, the upper limit of 60 penalty units for strict liability offences is inadequate as a meaningful deterrent. Given the high value of road vehicles, the proposed 1,050 penalty units for individuals is necessary to ensure integrity in the regulatory regime.

It is worth noting that the likelihood of an individual committing this offence is very low. Vehicle suppliers most likely to be subject to recall notices are type approval holders. To obtain a type approval, an individual or body corporate must demonstrate control over the entire design and manufacturing process of a vehicle. An individual is unlikely to meet these requirements. In the event that an individual has the means and sophistication of design and manufacture to hold a type approval, then they have opted into regulation by the Bill and must be aware of their obligations under the legislation.

In addition, this strict liability offence, and the amount of the penalty units, is already applicable to individuals who are supplying consumer goods, such as road vehicles, under the existing Australian Consumer Law. This Bill is deliberately consistent with this requirement to ensure that there can be no way for suppliers to pressure the Government to issue recall notices under legislation with lower penalties.

**Committee comment**

2.611 The committee thanks the minister for taking the opportunity to provide this additional information. The committee notes the minister's advice that the application of a penalty unit amount far in excess of the 60 penalty units recommended by the *Guide to Framing Commonwealth Offences* with respect to strict liability offences<sup>260</sup> is necessary for 'ensuring the integrity of the regulatory framework'. In particular, regardless of whether the supplier is an individual or a corporation, it is necessary to set the penalty high enough so that non-compliance with a recall notice is not considered to be a less expensive or more attractive option. The committee notes the minister's advice that, because compliance with recall notices is expensive, the 60 penalty unit upper limit 'is inadequate as a meaningful deterrent' and that the proposed 1,050 penalty units for individuals is necessary to 'ensure integrity in the regulatory regime'.

2.612 The committee also notes the minister's advice that the likelihood of individuals committing the offence is very low as the vehicle suppliers most likely to be subject to a recall notice will be type approval holders and individuals are unlikely to meet the requirements of such approvals. However, in the event that an individual did obtain a type approval (which would require the individual to demonstrate control over the entire design and manufacturing process of a vehicle), the minister suggests that they will have opted into regulation by the bill and should be aware of their obligations under the legislation.

2.613 The committee finally notes the minister's advice that, under the Australian Consumer Law, a strict liability offence subject to the same amount of penalty units is already applicable to individuals who are supplying consumer goods, such as road vehicles, and that consistency between the bill and the Australian Consumer Law is important to prevent suppliers from attempting to arrange for recall notices to be issued under legislation with lower penalties.

2.614 The committee welcomes this additional explanation and, in particular, notes that the minister's advice that the likelihood of individuals committing the offence is very low.

**2.615 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

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

**2.616 In circumstances where the likelihood of individuals committing the offence is very low, the committee makes no further comment on this matter.**

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### **Privilege against self-incrimination<sup>261</sup>**

2.617 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.

2.618 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.

2.619 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.<sup>262</sup> However, no explanation is given as to why it is appropriate to provide a use immunity but not a derivative use immunity.

2.620 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*.<sup>263</sup>

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

262 Explanatory memorandum, p. 44.

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

**Minister's response**

## 2.621 The minister advised:

The Committee has noted that clause 42 of the Bill provides for 'use immunity', that is, information given to the Department under a disclosure notice cannot be used as evidence against that individual. However, clause 42 does not provide for 'derivative use immunity'. This means that information that is obtained as a consequence of producing the original information can be used as evidence against the individual.

Including a derivative use immunity for this offence is not appropriate in the broader context of ensuring that the Bill is able to meet its objectives.

Firstly, the Bill, including clause 42, has been drafted to be consistent with the existing requirements of the *Australian Consumer Law*. This is designed to prevent suppliers of road vehicles 'legislation shopping' by pressuring regulators to use legislation with more lenient compliance tools.

Secondly, a disclosure notice is a tool to be used in situations where information about unsafe or non-compliant vehicles is not forthcoming from vehicle suppliers. These are situations that present an immediate risk of harm to the community. Any incentive to delay providing information is inconsistent with community safety. A derivative use immunity may provide an incentive to non-compliant suppliers to withhold information, then use the subsequent disclosure notice to 'confess' to other serious non-compliance. This is not appropriate in the context of the serious community harm that can be caused by any delay.

Thirdly, derivative use immunity may prevent the Department from sharing information with other Departments or State and Federal Police. This is because the other agency will also be bound by any derivative use immunity. In the event that the other agency wished to commence criminal or civil penalty proceedings against that person, it would not be able to make use of any evidence derived as a result of the originally received information. It would also face the additional evidentiary hurdle of establishing that no use was made of the shared information in obtaining the evidence to be relied upon in the prosecution. This is particularly concerning as the Department will need to work in conjunction with the Australian Competition and Consumer Commission where information raises consumer protection issues.

Fourthly, the circumstances where an individual will be required to provide evidence are very limited. The suppliers most likely to be subject to disclosure notices are type approval holders. To obtain a type approval, an individual or body corporate must demonstrate control over the entire design and manufacturing process of a vehicle. It is very unlikely that an individual will be able to meet these requirements and therefore unlikely for an individual to be impacted by this clause.

Given costs imposed on the community by potential 'legislation shopping'; any incentives to delay providing information about unsafe vehicles;

additional burdens imposed on the prosecution of non-compliant entities; and, the limited likelihood of individuals having to disclose information, the public benefit in the removal of the derivative use immunity outweighs the limited loss of personal liberty in this case.

***Committee comment***

2.622 The committee thanks the minister for this response. The committee notes the minister's advice that it would not be appropriate to include a derivative use immunity with respect to the information provided in response to a disclosure notice for the following reasons:

- first, the disclosure notice provisions in the bill are designed to be consistent with those in the Australian Consumer Law;
- second, the inclusion of a derivative use immunity may encourage non-compliant suppliers to withhold information and then take advantage of a subsequent disclosure notice to 'confess' to other serious non-compliance, leading to a situation that would be 'inconsistent with community safety';
- third, a derivative use immunity may prevent the department from sharing information gained through a disclosure notice with other departments or with police, and require other departments or agencies to prove they made no use of the shared information in any subsequent civil or criminal proceedings against a person, a situation that may hamper cooperation between the department and the Australian Competition and Consumer Commission; and
- fourth, as the suppliers most likely to be subject to disclosure notices will be type approval holders and those holding such approvals are most likely to be bodies corporate, it is unlikely that the disclosure notice provisions will affect individuals.

**2.623 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.624 In circumstances where the lack of a derivative use immunity appears unlikely to affect individuals, the committee makes no further comment in relation to this matter.**

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## Broad delegation of administrative powers<sup>264</sup>

2.625 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.<sup>265</sup> 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.

2.626 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.<sup>266</sup> 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'.<sup>267</sup>

2.627 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.

### **Minister's response**

2.628 The minister advised:

The Committee has requested 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.

People who may assist an inspector in monitoring and investigating include people within the Department, but also externally. Advances in technology with road vehicles mean that the Department must be able to use a wide range of people to assist in the monitoring and investigating of regulated entities. In complex investigations, the Department may have to procure

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

265 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.

266 Explanatory memorandum, pp. 47-48.

267 Subclause 49(3).

the services of persons that are experts in specific fields. For example, the monitoring or investigation of emissions testing might involve the Department procuring an expert in the emission field to accompany an inspector in an investigation. In investigating an autonomous vehicle system, software engineers may be required. In addition to technical skillsets, the Department may also require, for example, translation and interpretation services.

To be prescriptive in the Bill as to who may assist an authorised officer, including being prescriptive of their specific skills, training and experience, would limit the ability of authorised persons to obtain the assistance of appropriately qualified persons and may jeopardise the monitoring and investigation outcomes intended under the Bill.

### ***Committee comment***

2.629 The committee thanks the minister for this response. The committee notes the minister's advice that it would not be appropriate to amend the bill to require that persons assisting an authorised officer when exercising monitoring and investigation powers under the bill be required to possess specified skills, training or experience because this would limit the ability of authorised persons to obtain assistance from appropriately qualified persons. The committee also notes the minister's advice that the department may require a wide range of expertise—for example, expertise in emissions testing, software engineering, translation or interpretation—during its investigations.

2.630 The committee's consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have received appropriate training. The committee understands the need for flexibility in determining who may be appropriate 'other persons' in the particular circumstances of an investigation; however, the committee remains concerned that 'other persons' will be authorised to assist in monitoring and investigation without any requirement for them to have received training in the use of the relevant monitoring or investigatory powers.

**2.631 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing 'other persons' to assist authorised officers in exercising potentially coercive or investigatory powers<sup>268</sup> in circumstances where there is no legislative guidance about the appropriate skills and training required of those 'other persons'.**

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268 See Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*.

**Limitation on judicial review**<sup>269</sup>

2.632 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.

2.633 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.

2.634 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.'<sup>270</sup> 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.<sup>271</sup>

2.635 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 2.671).

2.636 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.

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

270 Explanatory memorandum, p. 53.

271 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.<sup>272</sup>

2.637 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.

### ***Minister's response***

2.638 The minister advised:

The Committee has sought the Minister's response on why a no-duty-to-consider clause is necessary 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.

Subclause 63(1) of the Bill allows the Minister to substitute a decision where the initial decision was made by the operation of a computer program. The Minister may exercise this power if the computer program was not functioning correctly at a specific time or in relation to a specific outcome. 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.

The Government considers a discretionary power appropriate. A duty to consider clause could place an undue burden on the Minister if they were required to consider exercising the power in subclause 63(1) in respect of every decision made by the operation of a computer program under an arrangement made under clause 62(1), particularly where applicants may seek to abuse this provision with frivolous claims. It is anticipated that there will be minimal cases that will be referred to the Minister to consider exercising this power, and that the Minister would consider whether to exercise the power, where reasonably asked to do so.

### ***Committee comment***

2.639 The committee thanks the minister for this response. The committee notes the minister's advice that a duty to consider the exercise of the power in subsection 63(1) could place an 'undue burden' on the minister. However, the committee does not consider that amending the no-duty-to-consider clause to ensure that 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 would amount to there being a positive duty to consider whether to exercise the

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272 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.

power in relation to every computer-based decision. The committee's suggestion would merely make it clear that the no-duty-to-consider clause would not apply in the limited circumstance 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. In this way, the practical concerns raised by the minister may be balanced against the committee's concern about the breadth of this power and the limited facility for review of its exercise.

**2.640 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.641 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including a no-duty-to-consider clause in the bill.**

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### **Broad delegation of administrative powers<sup>273</sup>**

2.642 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.

2.643 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.

2.644 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.

2.645 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

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

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.
- 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.<sup>274</sup>

2.646 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.

2.647 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.

2.648 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.

### ***Minister's response***

2.649 The minister advised:

The Committee sought a response as to why the Bill proposes to allow the rules to provide for the delegation of most of the Minister's, and all of the Secretary's powers and functions under the rules, or any instruments made under the rules, to any Australian Public Service (APS) employee.

The draft Road Vehicle Standards Rules require the Minister or Secretary to consider most applications from industry within 30 to 60 days. Applications that will be received include application for type approvals, testing facilities, entry onto the specialist and enthusiast register,

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274 Explanatory memorandum, p. 57.

authorised vehicle verifiers, model reports and individual concessional imports. This is expected to be in the order of 200,000 decisions per year. The applications vary greatly in complexity and there is significant administrative efficiency to be gained by allowing less complex or sensitive applications to be dealt with by a broader range of appropriately trained staff. As part of the extensive consultation process, industry has provided feedback that more timely processing of regulatory applications would bring greater operational flexibility and efficiency.

Allowing the rules to provide for the delegation of the Minister's and Secretary's powers to APS employees will not automatically grant lower level employees the authority to make decisions and nor would the rules actually permit such delegations. As in other Commonwealth agencies, the delegation of powers is managed through a Delegation Instrument. The Minister and Secretary would determine on a risk management basis the classes of persons who are to be delegated these powers. Accordingly, significant, complex or sensitive regulatory decisions - such as decisions to vary, suspend or terminate approvals - will remain with Senior Executive Service and Executive Level staff. Less complex regulatory decisions, for example to approve a concessional import approval, may be delegated to a small number of appropriately trained, APS level employees within the Department.

Administrative processes are also in place to ensure staff exercise delegations appropriately. The regulatory management system used by staff within the Vehicle Safety Standards branch of the Department has existing controls in place to ensure that only duly authorised persons can exercise a function or power. Delegates who exercise powers and functions under the Motor Vehicle Standards Act receive appropriate training and support to make effective and lawful decisions, including internal training courses specifically covering the exercise of delegations. These processes and training courses will be updated to reflect the new regulatory regime under the Bill and will continue for all relevant staff.

The measures currently in place appropriately manage the proper exercise of power under a delegation.

### ***Committee comment***

2.650 The committee thanks the minister for this response. The committee notes the minister's advice that the minister or secretary will be required to consider most applications from industry within 30 to 60 days, and that close to 200,000 decisions are expected to be made per year. Given this volume of decisions, and their varied complexity, the minister advises that 'significant administrative efficiency' can be gained by allowing a broader range of appropriately trained staff to deal with less complex or significant matters.

2.651 The committee also notes the minister's advice that the minister or secretary will determine, on a risk management basis, the classes of persons to whom particular powers are to be delegated, with significant, complex or sensitive

regulatory decisions remaining with Senior Executive Service or Executive Level staff and less complex regulatory decisions being delegated to APS level employees in the department with appropriate training. The committee finally notes the minister's advice that current administrative processes—including controls within the regulatory management system and the provision of appropriate training and support—ensure staff exercise delegations appropriately and will be updated to reflect the regulatory regime under the bill.

2.652 The committee welcomes the minister's advice that, in delegating powers and functions under the rules, it is intended to match the significance and complexity of regulatory decisions to the qualifications and attributes required of different staff levels, and that APS level employees will have appropriate training to make less complex decisions. Nevertheless, the committee reiterates its concern that the bill itself contains no legislative guidance as to the scope of powers that might be delegated (with limited exceptions), or the categories of people to whom those powers might be delegated, and that these matters are to be entirely determined in the rules.

**2.653 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.654 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing 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.**

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### **Immunity from liability**<sup>275</sup>

2.655 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

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

(d) an approval granted under this Act.

2.656 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.

2.657 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.

2.658 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.<sup>276</sup>

2.659 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.

### ***Minister's response***

2.660 The minister advised:

The Committee sought reasons as to why it is appropriate for clause 81 to prevent certain legal proceedings being brought against the Commonwealth, the Minister, Secretary and Departmental employees.

Clause 81 of the Bill is a policy continuation of section 37 of the Motor Vehicle Standards Act. Under section 37 of the Motor Vehicle Standards Act, no action or other proceeding could lie against the Commonwealth in respect of any loss incurred or any damage suffered due to reliance on the following factors:

- an identification plate or a used import plate; or
- any test carried out under this Act or the regulations or a determination under this Act; or

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276 Explanatory memorandum, p. 59.

- any express statement, or any statement or action implying, that a road vehicle or a vehicle component complied with a national standard.

Subclause 81(1) models the exemptions set out section 37 of the Motor Vehicle Standards Act, but updates these to provide for the modernised regulatory regime that the Bill introduces. For example, instead of a vehicle's key compliance information being placed on an identification plate or used import plate, it will be now entered onto the Register of Approved Vehicles – a publically accessible online database. Under clause 16 of the Bill, it is a contravention to enter a non-compliant road vehicle onto the Register of Approved Vehicles.

The Department is unable to inspect each of the 1.2 million new vehicles and 30,000 used vehicles that enter the Australian market each year. The Department relies on approval holders, in particular type approval holders, to provide evidence that each road vehicle has conformity of production and is compliant with the national vehicle standards.

The Department has appropriately trained staff that consider and review the evidence provided, and who are required at all times to act in accordance with the Australian Public Service Code of Conduct. Nonetheless, it is possible that losses may be incurred because of reliance on, for example, approvals granted under the Act. This may occur because of fraud on the part of an approval holder. To make the Minister, the Secretary and Departmental employees criminally responsible or civilly liable for such loss, where persons involved in decisions have acted in good faith, would be detrimental and unfair. From an administrative perspective, this additional legal burden placed on the Department would significantly increase decision times and could result in the Department being more cautious and restrictive in relation to the approval of applications. This would be detrimental to not only consumers and the general public but to the greater automotive industry within Australia.

Clause 81 of the Bill does not prevent proceedings being brought against the listed persons if the listed persons did not act in good faith. The question of whether a person did or did not act in good faith is subject to judicial determination – likely to be decided in a preliminary stage of any proceeding. Clause 81 in the Bill prevents frivolous claims being brought against the Minister, Secretary and Departmental employees.

### ***Committee comment***

2.661 The committee thanks the minister for this response. The committee notes the minister's advice that the department is unable to inspect each of the 1.2 million new vehicles and 30,000 used vehicles that enter the Australian market each year and must instead rely on approval holders to provide evidence that each vehicle has 'conformity of production' and is compliant with the national vehicle standards. The committee also notes the minister's advice that, although the department has appropriately trained staff who consider this evidence, it is possible that losses may

be incurred due to a reliance on approvals granted under the Act, which may be a result of fraud on the part of an approval holder.

2.662 The committee also notes that minister's advice that it would be 'detrimental and unfair' to make the minister, secretary or departmental employees criminally responsible or civilly liable for such losses where these persons acted in good faith, and that placing such a legal burden on the department would significantly increase decision times, lead to a more cautious and restrictive approach to approvals, and be detrimental to the general public and the automotive industry.

2.663 Finally, the committee notes the minister's advice that proceedings may still be brought against persons listed in clause 81 if they did not act in good faith and that the question of whether a person has acted in good faith is a matter for judicial determination.

2.664 The committee restates its concern that clause 81 appears to remove any common law right to bring an action to enforce legal rights, except where a lack of good faith can be demonstrated with respect to anything done in connection with the performance or purported performance of functions or duties or the exercise of powers under the Act. The committee also notes that, although the minister's response provides a justification for preventing individuals, such as the minister, the secretary or departmental employees, being held criminally responsible or civilly liable for any losses, it does not address why it is necessary to also prevent actions or proceedings being brought against the Commonwealth. The response merely notes that this provision is a continuation of the current protection provided under section 37 of the Motor Vehicle Standards Act.

**2.665 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.666 In light of the detailed explanation provided, the committee makes no further comment on this matter.**

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### **Review rights<sup>277</sup>**

2.667 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

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

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'.

2.668 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 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.<sup>278</sup>

2.669 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.

2.670 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.

### ***Minister's response***

2.671 The minister advised:

The Committee has raised concerns as to why the Bill does not set out which decisions will be subject to merits review before the Administrative Appeal Tribunal (AAT). The decision points in the legislation are contained in the Rules, therefore it is practical that the Rules also set out which decisions will be subject to merits review.

The Bill allows the Rules to set out which decisions can be subject to merit review, but does not require that decisions must be subject to merit review. This drafting ensures that when the Rules are made there are no foregone conclusions about the suitability of a decision for merits review. Instead, the drafting provides the Minister with the scope to consider the suitability of each decision point for merits review, taking into account the

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

unique circumstances and requirements of the matter. This allows for a more nuanced and considered approach to merits review.

The Committee may wish to note that the draft Rules provide extensive rights to merit review by the AAT (see clause 219).

For the Committee's reference, the Exposure Draft of the Road Vehicle Standards Rules is available on the Department's website: [https://infrastructure.gov.au/vehicles/mv\\_standards\\_act/files/RVS\\_Rules\\_2017.pdf](https://infrastructure.gov.au/vehicles/mv_standards_act/files/RVS_Rules_2017.pdf)

### ***Committee comment***

2.672 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate to allow the rules to set out which decisions under the bill, the rules or any instrument under the rules will be subject to merits review as this provides the minister with the 'scope to consider the suitability of each decision point for merits review' and allows for a 'more nuanced and considered approach to merits review'. The committee also notes the minister's advice that clause 219 of the Road Vehicle Standards Rules exposure draft identifies decisions under the rules that are proposed to be subject to review by the AAT.

2.673 The committee reiterates its preference that, as it is a significant matter, the availability of merits review should, wherever possible, be set out in primary legislation.

**2.674 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.675 In light of the information provided, the committee makes no further comment on this matter.**

## Road Vehicle Standards Charges (Imposition—Customs) Bill 2018

## Road Vehicle Standards Charges (Imposition—Excise) Bill 2018

## Road Vehicle Standards Charges (Imposition—General) Bill 2018

<b>Purpose</b>	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
<b>Portfolio</b>	Infrastructure, Regional Development and Cities
<b>Introduced</b>	House of Representatives on 7 February 2018
<b>Bill status</b>	Before the House of Representatives

2.676 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2018*. The minister responded to the committee's comments in a letter dated 2 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>279</sup>

### Charges in delegated legislation<sup>280</sup>

#### *Initial scrutiny – extract*

2.677 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.

279 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

280 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).

2.678 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.<sup>281</sup> 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 allow charges to be more easily increased or decreased in line with changes to costs for delivering services under the Road Vehicle Standards Bill.<sup>282</sup>

2.679 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).<sup>283</sup> 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.<sup>284</sup> 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.

2.680 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.

### ***Minister's response***

2.681 The minister advised:

The Committee has raised concerns as to why there are no limits on the specific charges in each of the three charging Bills. Additionally, the Committee seeks advice on whether the method of calculation of these

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281 Explanatory memorandum, pp. 2-3.

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

283 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'.

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

charges and/or a maximum charge could be specifically included in each Bill.

Specifying the amount of a charge or the method for calculating the amount of a charge in regulations, as opposed to the Bill itself, ensures that there is appropriate flexibility to change the amount of a charge or the method for calculating the amount of a charge over time. This helps to avoid over or under recovery and will eliminate the need to amend primary legislation as cost recovery arrangements evolve because the efficiency of administering the new scheme improves.

The types of costs that the Charging Bill(s) will be used to recover are matters such as development of the national vehicle standards, a comprehensive compliance and enforcement system, and the establishment and maintenance of the regulatory framework for recalls. These are central activities for the Government to undertake to ensure the objectives of the Bill are being met and go to the core of a safe, secure, and environmentally friendly vehicle fleet.

These activities are dynamic rather than predictable in nature, reflecting the complexity and rapid change in the vehicle industry. For example, the issuing of a recall notice may occur on an urgent basis and can affect a wide range of approval holders. In such circumstances, the Department needs to be able to fund an adequate response, requiring cost recovery measures to be developed quickly and responsively. This is most effectively implemented by having charging points and amounts in legislative instruments, rather than being prescriptive in the Charging Bills. In such a circumstance, the charge would still need to be consistent with the Government's Cost Recovery Guidelines. The charge would be subject to Parliamentary scrutiny through the disallowance process.

As part of the Department of Infrastructure, Regional Development and Cities consultation process, a Draft Cost Recovery Implementation Statement (CRIS) has been released and submissions sought from industry stakeholders and the general public. The outcomes of this consultation process will inform the government's final decision on the fees and charges to apply under the proposed Road Vehicle Standards Bill. The amount of the charge imposed would reflect the overall costs of the activity being recovered and be set at a level that is designed to recover no more than the estimated cost of regulating the type of application.

Regulations must be tabled in both Houses of the Parliament, and are subject to motions of disallowance and scrutiny by the Senate Standing Committee on Regulations and Ordinances. This Parliamentary scrutiny provides another safeguard against over-recovery through the imposition of excessive charges. This provides a high degree of accountability and transparency to stakeholders, such that the need to include a maximum charge in the bills is reduced.

The Department has undertaken to review the charging points made under future regulations twelve months after their commencement. The

Department is also required, at a minimum, to conduct a periodic review of all existing and potential charging activities within its portfolio at least every five years. The review is to be in accordance with the published schedule of portfolio charging reviews updated by the Finance Minister from time to time, in consultation with the responsible Minister. The portfolio charging review report must be submitted to the responsible Minister, and a copy must be provided to the Finance Minister.

For these reasons, the Government does not believe a method of calculation to these charges and/or a maximum charge can be specifically included in each Bill.

### **Committee comment**

2.682 The committee thanks the minister for this response. The committee notes the minister's advice that setting out the amount of a charge payable, or a method of working out an amount, in the regulations ensures that there is 'appropriate flexibility to change the amount of a charge or the method for calculating the amount of a charge over time', and that this both helps avoid over or under recovery and eliminates the need to amend primary legislation as cost recovery arrangements evolve.

2.683 The committee also notes the minister's advice that the types of costs that these bills will be used to recover are matters such as development of the national vehicle standards, a comprehensive compliance and enforcement system, and the establishment and maintenance of the regulatory framework for recalls, and that, because these activities are dynamic rather than predictable in nature, cost recovery measures must be developed quickly and responsively. The committee also notes the minister's advice that the Department has undertaken to review the charging points made under future regulations 12 months after their commencement, however it appears that such a review is not a legislative requirement.

2.684 While the committee acknowledges the minister's advice that the charge will be designed only to recover certain costs, the committee notes that there is nothing on the face of the bills that actually limits the amount of the charge in this way. The committee therefore takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation.<sup>285</sup> 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. Therefore, where there is any possibility that a charge could be characterised as general taxation (as in this case where the bills provide that the charge is imposed as a tax), the committee considers that

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285 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'.

guidance in relation to the level of a charge should be included on the face of the primary legislation.

2.685 In addition, the committee does not consider that including a maximum limit on the face of the bill would necessarily result in amendments needing to be made to the primary legislation. Instead, it would simply represent an upper limit on the amount of the charge that could be levied without such amendments being needed. If setting a maximum limit is not considered appropriate, guidance as to the method of calculation of the charge (for example, a provision explicitly limiting the charge to cost recovery) could still be provided on the face of the primary legislation.

**2.686 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.687 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing regulations to determine the amount of a charge payable without any guidance being provided on the face of the bill as to the method of calculation or the maximum amount of the charge.**

**2.688 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

## Security of Critical Infrastructure Bill 2017

<b>Purpose</b>	<p>This bill seeks to create a framework for managing critical infrastructure, including:</p> <ul style="list-style-type: none"> <li>• establishing a register of critical infrastructure assets;</li> <li>• providing the minister with a authority to direct a reporting entity or operator of a critical infrastructure asset to do, or refrain from doing, an act or thing within a specified period of time;</li> <li>• providing the secretary with the authority to request certain information from reporting entities and operators of critical infrastructure assets;</li> <li>• enabling a direction to be issued by the Minister to the owner or operator of a critical infrastructure asset to mitigate national security risks; and</li> <li>• providing that the minister can privately declare an asset to be a critical infrastructure asset in certain circumstances</li> </ul>
<b>Portfolio</b>	Attorney-General <sup>286</sup>
<b>Introduced</b>	Senate on 7 December 2017

2.689 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 27 February 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>287</sup>

### **Power for delegated legislation to amend primary legislation (Henry VIII clause)<sup>288</sup>**

#### ***Initial scrutiny – extract***

2.690 Proposed Division 3 seeks to impose requirements on reporting entities to give certain information to the secretary in specified circumstances, and sets out the manner in which that information must be given. Clause 27 provides that rules may exempt any entity, specified classes of entities or specified entities from all or

286 Responsibility for this bill has now been transferred to the Home Affairs portfolio.

287 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.apf.gov.au/senate\\_scrutiny\\_digest](http://www.apf.gov.au/senate_scrutiny_digest)

288 Clause 27. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 241(a)(iv).

specified provisions of proposed Division 3, either generally or in specified circumstances. Clause 27 therefore effectively allows the rules to amend the operation of proposed Division 3 (that is, to amend primary legislation).

2.691 A provision that enables delegated legislation to amend primary legislation (including amending the *operation* of primary legislation) is known as a Henry VIII clause. There are significant concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between 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.

2.692 In this instance, the committee notes that the explanatory memorandum provides an example of when the rules may be used to exempt entities from requirements in proposed Division 3.<sup>289</sup> However, the explanatory memorandum does not provide clear justification for the appropriateness of using delegated legislation to amend the operation of proposed Division 3. Further the committee notes that the bill does not appear to provide any limitations on the power to make rules under clause 27. For example, it does not set out any criteria that must be satisfied.

2.693 The committee seeks the Attorney-General's more detailed justification as to why it is proposed to allow the rules to exempt entities from all or specified requirements of proposed Division 3.

2.694 The committee also seeks the Attorney-General's advice as to whether it would be appropriate to amend the bill to insert (at least high-level) guidance concerning the making of rules under clause 27.

### ***Minister's response***

2.695 The Minister for Home Affairs advised:

Clause 27, as drafted, provides me with the power to exempt certain entities from complying with some or all of the obligations to provide information to the Register of Critical Infrastructure Assets. The intent of this provision is to ensure the Bill does not impose an unnecessary burden on industry. In particular, it will enable an entity to be exempted from providing information required under the legislation. This would include where that information is otherwise available to government, either through open sources or other reporting mechanisms. Importantly, the provision does not enable me to increase the reporting obligations on an entity.

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289 Explanatory memorandum, p. 42.

**Committee comment**

2.696 The committee thanks the minister for this response. The committee notes the minister's advice that the intent of clause 27 is to ensure that the bill does not impose an unnecessary burden on industry, and that the clause will enable the minister to exempt entities from the requirement to provide information under the bill where the relevant information is otherwise available to government. The committee further notes the minister's advice that clause 27 will not enable the minister to increase the reporting obligations on an entity.

2.697 However, the committee notes that the minister's response does not address its question as to whether it would be appropriate to amend the bill to provide guidance around the making of rules under clause 27—for example, to specify that the power may be used in situations where the information is otherwise available to government.

**2.698 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.699 The committee leaves to the Senate as a whole the appropriateness of allowing rules made under clause 27 to override the operation of primary legislation, without any limitations or guidance on the use of that power in the primary legislation.**

**2.700 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.**

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**Reversal of evidential burden of proof<sup>290</sup>*****Initial scrutiny – extract***

2.701 Clause 45 seeks to create an offence of disclosing, making a record of or otherwise using protected information where the making of the record, the disclosure or the use is not authorised. The offence carries a maximum penalty of imprisonment for 2 years or 120 penalty units, or both.

2.702 Clause 46 creates a number of exceptions (offence specific defences) to this offence, stating that the offence does not apply if the making of the record, the disclosure or the use:

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290 Clause 46. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 241(a)(i).

- is required or authorised by or under a Commonwealth law, a law of a state or territory or prescribed by the rules;
- is done in good faith in attempting to comply with provisions relating to authorised use or disclosure; or
- is to a person to whom the protected information relates, is disclosed by the entity to itself, or it is done with the express or implied consent of the entity to whom the information relates.

2.703 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.

2.704 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, interfere with this common law right.

2.705 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 committee notes that the explanatory memorandum does not provide a justification for the reversals of the evidential burden of proof in clause 46, merely restating the effect of the relevant provisions.

2.706 As the explanatory materials do not address this issue, the committee requests the Attorney-General's advice as to why it is proposed to use offence-specific defences (which reverse 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*.<sup>291</sup>

### **Minister's response**

2.707 The Minister for Home Affairs advised:

Clause 46 sets out exceptions to the offence of disclosing protected information and reverses the burden of proof for these exceptions. In this instance, the reversal is appropriate as the applicability of the exceptions are best known to the defendant and would be significantly more difficult for the prosecution to prove as an element of the offence. Importantly, the provision only shifts the evidential burden, and if an exception is raised, the legal burden still resides with the prosecution. This approach is

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

consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

I will look to amend the explanatory memorandum to provide further guidance on the application of these provisions.

### **Committee comment**

2.708 The committee thanks the minister for this response. The committee notes the minister's advice that the reversal of the burden of proof in clause 46 is appropriate as the applicability of the relevant exceptions are 'best known' to the defendant and would be significantly more difficult for the prosecution to prove as an element of the offence. The committee also notes the minister's advice that he will consider amending the explanatory memorandum to provide further guidance on these provisions (that is, the exceptions in clause 46 of the bill).

2.709 The committee notes that the *Guide to Framing Commonwealth Offences* states that a matter should only be included as 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 significant more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>292</sup> In this regard, the committee notes that a matter being 'best known' to a defendant is not the same as the matter being *peculiarly* within the defendant's knowledge.

2.710 The committee acknowledges that some of the matters in clause 46 (such as whether an action was undertaken in good faith or in purported compliance with particular provisions) are likely to be peculiarly within the knowledge of the defendant, and could be significantly more difficult for the prosecution to establish. However, it is not apparent to the committee that *all* of the matters to which the exceptions in clause 46 apply would be matters of that nature. For example, the committee considers that whether the making of a record, the disclosure or the use of protected information is authorised or required under a Commonwealth, state or territory law, or prescribed by the rules, are not matters that would be peculiarly within the knowledge of the defendant.

**2.711 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in these circumstances.**

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

## Treasury Laws Amendment (2018 Measures No. 1) Bill 2018

<b>Purpose</b>	<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>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 7 February 2018
<b>Bill status</b>	Passed the House of Representatives

2.712 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2018*. The minister responded to the committee's comments in a letter received 9 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>293</sup>

293 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

## Power for delegated legislation to amend primary legislation (Henry VIII clause)<sup>294</sup>

### *Initial scrutiny – extract*

2.713 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.

2.714 To implement the withholding obligation, proposed subsection 14-250(1) seeks to require a person who is the recipient of a taxable supply<sup>295</sup> that is, or that includes, a supply to which proposed subsection 14-250(2) applies, to pay to the Commissioner of Taxation (Commissioner) a certain amount.<sup>296</sup> 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.

2.715 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

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294 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).

295 '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.

296 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.

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.

2.716 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.'<sup>297</sup> 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.

2.717 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.

2.718 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).

### ***Minister's response***

2.719 The minister advised:

Schedule 5 to the Treasury Laws Amendment (2018 Measures No. 1) Bill 2018 requires purchasers of new residential premises and subdivisions of potential residential land to make a withholding payment of part of the purchase price on or before the day they first provide consideration (other than as a deposit) to the supplier.

- Suppliers of property to which a withholding obligation applies are required to provide a notice to the purchaser informing them of certain matters, including that the purchaser is required to make a payment.
- To ensure that the obligation does not apply in circumstances that are not intended, the Commissioner of Taxation is provided with a power to exempt classes of supplies from the withholding obligation, as well as the notice requirement.
- More detail is provided on each of these amendments in Appendix A.

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297 Explanatory memorandum, p. 51.

## Appendix A

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

As noted in the explanatory memorandum to the Bill, the inclusion of the power to allow the Commission of Taxation to determine, by legislative instrument, that the withholding obligation under the Bill does not apply to certain kinds of supply, is to avoid any unintended consequences that may arise from imposing a withholding obligation. The legislative instrument will not affect whether GST is payable in relation to the supply.

Broadly, the withholding obligation in the Bill is designed to align with when GST is attributed on the supply and is therefore payable. The general rule for this under the GST law provides that, other than when accounting on a cash basis, that GST payable is attributed to the earliest tax period when either consideration for the supply is first provided, or the tax period which an invoice is provided. However, the Commissioner of Taxation may vary this in certain cases by legislative instrument.

The types of supplies to which the withholding obligation applies are new residential premises, or subdivisions of potential residential land. These are types of supplies that in all cases will be governed by State or Territory (State) laws regulating property and land releases. In some cases, this makes the relevant State the supplier of the new residential premises. As State governments may change these laws and policies over time, it is appropriate that there is some flexibility in the legislation so that the withholding obligation does not apply inappropriately as these rules change.

An example of such a scheme is the ACT Land Rent Scheme, where a Land Rent Release is granted by a government entity over vacant land for 99 years. An annual land rent amount is calculated on the unimproved value of the land at a particular percentage. A lessee under a Land Rent Lease is required to construct a house on the land within two years of the lease being granted. *A New Tax System (Goods and Services Tax) (Particular Attribution Rules Where Total Consideration Not Known) Determination (No. 1) 2000* applies to these supplies, and requires that the supplier attribute GST on each instalment, rather than the tax period in which consideration is first provided. Application of a withholding obligation which would require the whole of the GST payable on the supply across a 99 year lease (where the payment amount may vary) would produce an inappropriate outcome. Therefore it is appropriate to allow the Commissioner of Taxation a broad power to exempt certain classes of supplies.

The determination in each case will also be a legislative instrument, which will be subject to disallowance under section 42 of the *Legislation Act*

2003, so Parliament will be involved in determining whether exemption from the withholding obligation for the class of supply is appropriate.

*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).*

For the reasons I have set out in my earlier response, I do not think that it is necessary to limit or provide additional legislative guidance about the circumstances in which a legislative instrument can be made.

The purpose of the power is to deal with unintended consequences of the application of a withholding obligation, which may arise from a number of sources and

- there are relevant State laws which affect the supply;
- the Commissioner of Taxation has made specific attribution rules to deal with the supply; or
- there are contracts of sale that set out that consideration is to be provided other than as a lump sum cash payment (such as where it is provided as non-monetary consideration, or there are a significant number of instalment payments) and it would be inappropriate to apply the withholding obligation in those circumstances.

These instruments are subject to disallowance, so Parliament will have the opportunity to determine whether it is appropriate that the type of supply is excluded.

Given the reasons why a legislative instrument will be made will be highly-specific to the circumstances of the supply, it is appropriate that the Commissioner of Taxation exercise the power to exempt certain classes of supply in line with this purpose.

### **Committee comment**

2.720 The committee thanks the minister for this response. The committee notes the minister's advice that the supplies to which the withholding obligation would apply are new residential premises, or subdivisions of potential residential land, and that these supplies will in all cases be government by State or Territory (State) laws regulating property and land releases.

2.721 The committee also notes the minister's advice that, as State governments may change laws and policies over time, it is appropriate that there is some flexibility in the legislation so that the withholding obligation does not apply inappropriately as these rules change, and it appropriate to allow the Commissioner of Taxation a broad power to exempt certain classes of supplies. The committee also notes the example provided by the minister of when it may be appropriate for the Commissioner to exercise the power of exemption under proposed subsection 14-250(3).

2.722 The committee further notes the minister's advice that a determination made under proposed subsection 14-250(3) will be a legislative instrument, which

will be subject to disallowance under section 42 of the *Legislation Act 2003*, and that Parliament will therefore be involved in determining whether exemptions from the withholding obligation for the class of supply is appropriate.

2.723 Finally, the committee notes the minister's view that it is not necessary to limit or provide additional legislative guidance about the circumstances in which a determination under proposed subsection 14-250(3) may be made, as each determination made under the subsection will be highly specific to the circumstances of the supply to which it relates.

**2.724 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.725 In light of the detailed information provided by the minister, the committee makes no further comment on this matter.**

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

<b>Purpose</b>	This bill seeks to amend Acts relating to corporations, consumer credit and taxation  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  Schedule 2 seeks to amend the venture capital and early stage investor tax concession provisions
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 8 February 2018
<b>Bill status</b>	Before House of Representatives

2.726 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2018*. The Treasurer responded to the committee's comments in a letter dated 2 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the Treasurer's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>298</sup>

### **Broad administrative powers**<sup>299</sup>

#### ***Initial scrutiny – extract***

2.727 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.

298 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

299 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).

2.728 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;<sup>300</sup>
- 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;<sup>301</sup> and
- 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.<sup>302</sup>

2.729 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.

2.730 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.<sup>303</sup>

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300 See proposed subsection 926B(3).

301 See proposed subsection 926B(4).

302 See proposed subsection 926B(5).

303 Explanatory memorandum, pp. 7-9.

2.731 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.

2.732 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 a person or class of persons will be subject to appropriate Parliamentary scrutiny.<sup>304</sup>

2.733 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.

2.734 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.

2.735 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.

### ***Treasurer's response***

2.736 The Treasurer advised:

Subsections 926B(5) and 110(4) have been included in the Bill to allow ASIC to respond to detected non-compliance with an imposed condition and to act to protect consumer interests from undesirable behaviour. The regulatory sandbox regime encourages innovation by allowing eligible entities to test certain financial and credit services without an Australian financial services licence (AFSL) or Australian credit licence (ACL) where they meet the conditions set out in the regulations.

A regulation power already exists in the law and the Bill amends this power to enable the regulations to prescribe conditional exemptions. The regulation making power will allow appropriate conditions to be

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304 Explanatory memorandum, pp. 8-9.

prescribed and allow for those conditions to be adjusted, providing the flexibility needed to respond to changes in the market. ASIC will be empowered to determine whether the conditions required for the exemption have been met and the exemption should start. ASIC will also be empowered to determine whether the conditions required for the exemption are no longer being met such that the exemption should cease to be provided.

These provisions in item 2 and item 5 in the Bill are informed by the existing powers under section 926A of the *Corporations Act 2001* which empower ASIC to exempt and modify provisions of the Act, either unconditionally or subject to conditions. The Bill provides an analogous power for ASIC to make decisions on how the exemption starts or ceases to apply. This will let ASIC respond to non-compliance and manage risks to protect consumer interests, while at the same time ensuring the regulatory sandbox regime operates effectively, remains fit for purpose and evolves with the growing market.

The regulations prescribing that ASIC may make decisions regarding how the exemption starts or ceases to apply will be subject to disallowance and therefore have an appropriate level of parliamentary scrutiny. The regulations would also prescribe the conditions for the exemption, against which ASIC can make decisions regarding how the exemption starts or ceases to apply.

#### **ASIC decision about how the exemption starts**

Providers accessing the regulatory sandbox must meet certain conditions which will be prescribed in the regulations. ASIC can prevent a provider from accessing and using the exemption if ASIC deems the provider does not meet the conditions set out in the regulations. The draft regulations, which were released for public consultation in October 2017 simultaneously with the exposure draft of the Bill, set out that providers will need to have appropriate procedures in place, such as establishing and maintaining internal dispute resolution procedures and adequate compensation arrangements that comply with the standards and requirements in the Act. Having appropriate procedures and safeguards for compensation ensures protections of consumer interests are maintained. If ASIC deems a provider not to have appropriate procedures in place, ASIC can prevent the provider from accessing and using the exemption.

#### **ASIC decision about how the exemption ceases**

If ASIC finds a provider to be non-compliant with any of the conditions set out in the regulations, it can intervene and cancel the exemption immediately. The conditions set out in the regulations will ensure consumer interests are protected by providing certain obligations that the provider must meet while the provider is offering financial services in the regulatory sandbox.

The draft regulations, released for public consultation in October 2017 simultaneously with the exposure draft of the Bill, set out such conditions including meeting best interest (Part 7.7A of the Act) and client money (Part 7.8 of the Act) obligations and providing a statement of advice (Part 7.7 of the Act) in accordance with the obligations of licensees under the Act. The conditions for the exemption, also intend to provide for investment exposure limits to provide a cap on the total amount that can be invested with the provider.

If the provider breaches certain conditions set out in the draft regulations, ASIC will have the ability to intervene and cancel a provider's exemption. For other conditions, if breached by a provider, the draft regulations will provide that the provider's ability to rely on the exemption will automatically cease.

*Paragraph 1.162 - Advice as to whether a decision of this nature would be a legislative instrument, and would therefore be subject to parliamentary scrutiny.*

The regulations prescribing that ASIC may make decisions regarding how the exemption starts or ceases to apply will be subject to disallowance and therefore have an appropriate level of parliamentary scrutiny. The regulations would also prescribe the conditions for the exemption, against which ASIC can make decisions regarding how the exemption starts or ceases to apply. Decisions made by ASIC under the regulations would not be a legislative instrument. However, any decisions made by ASIC under the regulations, and within the framework and conditions of the regulations, would be subject to merits review by the Administrative Appeals Tribunal. This provides appropriate review rights to entities that disagree with decisions ASIC makes under the regulations.

### **Committee comment**

2.737 The committee thanks the Treasurer for this response. The committee notes the Treasurer's detailed advice regarding the operation and intent of proposed subsections 926B(5) and 110(4). The committee also notes the Treasurer's advice regarding how decisions about how exemptions start and cease to apply would be made, including that the regulations creating the relevant exemptions would prescribe conditions against which ASIC would make decisions of this nature. Finally, the committee notes the Treasurer's advice that any decisions made by ASIC under the regulations (including when exemptions start and cease to apply) would be subject to merits review by the Administrative Appeals Tribunal.

**2.738 The committee requests that the key information provided by the Treasurer be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.739 In light of the detailed information provided by the Treasurer, the committee makes no further comment on this matter.**

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## **Retrospective application**<sup>305</sup>

### ***Initial scrutiny – extract***

2.740 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.

2.741 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.

2.742 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 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*.<sup>306</sup>

2.743 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

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

306 Explanatory memorandum, p. 22.

complied with the law *as written* (including the omission) could be adversely affected by the retrospective application of the amendments in the present bill.

2.744 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.

### ***Treasurer's response***

2.745 The Treasurer advised:

The amendments address an omission in amendments made by the *Tax Laws Amendment (Tax Incentives for Innovation) Act 2016* that were intended to allow managed investment trusts to make certain venture capital investments without ceasing to be a managed investment trust.

The effect of the omission is that, without the amendments proposed in this Bill, it is possible a trust that made such an investment may either be a public trading trust rather than a managed investment trust or be both a managed investment trust and a public trading trust.

This would be wholly disadvantageous for such a trust and would result in the trust losing the tax benefits normally associated with being a managed investment trust (such as the ability to elect to treat all gains on capital account, which is highly valued by trusts and investors).

The amendments will not affect tax outcomes for any entities that do not intend to be managed investment trusts.

Given this, the proposed amendments are wholly beneficial to affected entities. Their retrospective application is necessary to avoid potentially significant adverse consequences for any affected trusts.

### ***Committee comment***

2.746 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the amendments are wholly beneficial to affected entities, and will not affect tax outcomes for any entities that do not intend to be managed trusts. The committee also notes the Treasurer's advice that the retrospective application of the amendments is necessary to avoid potentially significant adverse consequences for affected trusts.

**2.747 The committee requests that the key information provided by the Treasurer be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.748 In light of the information provided by the Treasurer, the committee makes no further comment on this matter.**

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

<b>Purpose</b>	<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>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 7 February 2018
<b>Bill status</b>	Before the House of Representatives

2.749 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2018*. The minister responded to the committee's comments in a letter received 9 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>307</sup>

### Strict liability offences<sup>308</sup>

#### *Initial scrutiny – extract*

2.750 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 tools<sup>309</sup> (ESS tools). The offences (in proposed sections 8WAC, 8WAD and 8WAE) seek to make it unlawful for a person to:

307 See correspondence relating to *Scrutiny Digest No. 3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

308 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).

309 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.

- manufacture, develop or publish an ESS tool;<sup>310</sup>
- 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;<sup>311</sup>
- acquire or possess an ESS tool, in circumstances where the person is required under a taxation law to make or keep a tax record;<sup>312</sup> and
- 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.<sup>313</sup>

2.751 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.

2.752 Under general principles of 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*.<sup>314</sup>

2.753 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

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310 See proposed subsection 8WAC(1).

311 See proposed subsection 8WAC(2).

312 See proposed subsection 8WAD.

313 See proposed subsection 8WAE(1).

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

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.<sup>315</sup>

2.754 The explanatory memorandum also provides similar (though less extensive) explanations for the application of strict liability to the offences in proposed sections 8WAD<sup>316</sup> and 8WAE.<sup>317</sup>

2.755 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.<sup>318</sup> 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.<sup>319</sup> 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.

2.756 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.

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315 Explanatory memorandum, pp.12-13.

316 Explanatory memorandum, p. 15.

317 Explanatory memorandum, p. 17.

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

319 Explanatory memorandum, p. 13.

2.757 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.<sup>320</sup> 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.

2.758 Finally, in relation to proposed section 8WAC, the committee notes that the 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.<sup>321</sup> 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.

2.759 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.

### ***Minister's response***

2.760 The minister advised:

Schedule 1 to the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018 creates a number of offences relating to the production, use, possession and distribution of electronic sales suppression tools.

- The proposed offences are offences of strict liability that can attract maximum penalties of between 500 and 5,000 penalty units (depending on the offence).
- Offence-specific defences are available to individuals who would otherwise commit an offence. These defences apply where the otherwise prohibited action in relation to an electronic sales suppression tool was taken to prevent or deter tax evasion.
- More detail is provided on each of these amendments in Appendix B.

### **Appendix B**

*A more detailed justification for the application of strict liability to offences attracting penalties of between 500 and 5,000 penalty units.*

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320 See Schedule 1, item 4.

321 Explanatory memorandum, p. 13.

As noted in the explanatory memorandum to the Bill, the application of strict liability to the proposed offences is justified on the basis that, with the exception of the activities covered by the applicable defences, electronic sales suppression tools can only be used to facilitate systematic fraud and tax evasion.

Given that there is no legitimate use of an electronic sales suppression tool, it is the Government's view that the physical elements of the proposed offences provide the appropriate basis for determining when a person has committed an offence. That is, the fact of production, distribution, use or possession of an electronic sales suppression tool is of itself unable to be justified (other than in the circumstances covered by the applicable defences).

I also note the Committee raised specific concerns about the potential for the proposed offence for possession to apply in circumstances of 'inadvertent' possession of an electronic sales suppression tool.

In developing the proposed offence for possession, careful consideration was given to this issue and it was determined that the general defence for honest mistake of fact provided appropriate protection to persons who unwittingly came into possession of such a tool, as well as in respect of the other actions covered by the proposed offences (the availability of this defence is noted at paragraphs 1.52, 1.66 and 1.76 of the explanatory memorandum). As such, if a person inadvertently acquired an electronic sales suppression tool but genuinely believed that it did not have that function, the person would not commit an offence.

With respect to the amount of the proposed penalties, these amounts have been specifically set to send the strongest possible signal, short of imprisonment, that appropriately reflects the severity of the behaviour related to systematic fraud and evasion.

In the case of the maximum penalty for production and supply related offences of 5,000 penalty units, the upper limit reflects that the activity related to the offence can involve systematic and commercial scale operations that are specifically designed to profit from the facilitation of fraud and tax evasion. The maximum amount of the penalty is appropriate given the magnitude of the revenue at risk from the commercial manufacture and distribution of electronic sales suppression software.

The maximum penalties for the proposed offences for use and possession have been intentionally scaled down. This reflects that those offences do not apply to wholesale production and distribution but nevertheless involve actions in respect of tools that have no legitimate function.

In setting the amounts of these penalties, specific regard was also had to the principle articulated at Chapter 3.1.2 in the *Guide to Framing Commonwealth Offences* that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. As noted by the Committee, the proposed penalties are comparable to those that

apply in respect of similar prohibited behaviours, such as the penalties for the promoters of tax exploitation schemes and breaches of certain directors' duties. It is the Government's view that the settings for the proposed penalties are appropriate and necessary to maintain a consistent message that schemes and tools that are specifically designed to promote or facilitate systematic fraud and tax evasion are unacceptable.

### ***Committee comment***

2.761 The committee thanks the minister for this response. The committee notes the minister's advice that the application of strict liability is justified because, with the exception of the activities covered by the applicable defences, electronic sales suppression (ESS) tools can only be used to facilitate systematic fraud and tax evasion. The committee also notes the minister's advice that, on this basis, it is the government's view that the physical elements of the proposed offences are sufficient to determine a person's culpability.

2.762 The committee also notes the minister's advice that, in developing the proposed offence for possession of ESS tools, careful consideration was given to the matter of 'inadvertent' possession. The committee notes the minister's advice that it was determined that the defence of honest and reasonable mistake of fact (available in relation to all strict liability offences) would provide an appropriate level of protection for persons who unwittingly come into possession of an ESS tool, as well as in respect of the other actions covered by the proposed offences.

2.763 However, the committee notes that the minister's advice does not appear to address the committee's concerns regarding potential criminalisation of persons who are, under the current law, lawfully in possession of ESS tools. The committee therefore reiterates its concerns (outlined in its initial comments) that a person who acquires an ESS tool from a third party, never uses the tool, and forgets the tool is in their possession, could be convicted of an offence despite not engaging or intending to engage in the type of conduct that the bill seeks to prevent.

2.764 In this regard, while noting the safeguard against criminal liability for inadvertent possession (that is, the proposed notification procedure), the committee considers there is a risk that persons may be unaware of the proposal to criminalise the possession of ESS tools and the proposed notification procedure, and could be immediately subject to a criminal offence on the basis of mere inadvertence. The committee notes that the defence of honest and reasonable mistake of fact would only apply in limited circumstances, for example, where a person inadvertently acquired an ESS tool but genuinely believed that it did not have that function.

2.765 With regard to the amounts of the proposed penalties, the committee notes the minister's advice that the amounts have been specifically set to send the strongest possible signal—short of imprisonment—that appropriately reflects the severity of behaviour related to systematic fraud and evasion. The committee also notes the minister's advice that the proposed penalties are comparable to those that

apply to similar prohibited behaviours under Commonwealth law, such as penalties for the promoters of tax exploitation schemes and breaches of directors' duties.

2.766 Finally, with respect to the offence relating to the production and supply of ESS tools, the committee notes the minister's advice that the penalty is designed to reflect the significant gains that can be made from the facilitation of fraud and tax evasion. The committee also notes the minister's advice that the penalty is appropriate given the magnitude of the revenue at risk from the commercial manufacture and distribution of ESS software (that is, that the magnitude of the penalty is necessary to ensure that the offence functions as an effective deterrent).

2.767 While noting the comprehensive explanation provided by the minister, from a scrutiny perspective, the committee remains concerned about the application of strict liability to offences carrying penalties of between 500 and 5,000 penalty units. In this regard, the committee reiterates that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the relevant offence is only punishable by up to 60 penalty units for an individual.

2.768 Further, while noting the minister's advice that the proposed penalties are consistent with penalties imposed in relation to comparable Commonwealth offences, the committee would have appreciated a more detailed explanation in relation to this matter, including specific examples of provisions imposing similar penalties for comparable offences under Commonwealth law.

**2.769 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.770 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of imposing strict liability in circumstances where a person may be unaware of the proposal to criminalise the possession of ESS tools and where significant penalties attach to the proposed offences.**

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### **Reversal of the evidential burden of proof<sup>322</sup>**

2.771 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-

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322 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).)

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.

2.772 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.

2.773 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, interfere with this important common law right.

2.774 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 conduct was for the purposes of preventing or deterring tax evasion or enforcing a law.<sup>323</sup>

2.775 The committee notes that the *Guide to Framing Commonwealth Offences*<sup>324</sup> 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.<sup>325</sup>

2.776 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

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323 Explanatory memorandum, p. 18.

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

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

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.

2.777 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*.

2.778 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).

### ***Minister's response***

2.779 The minister advised:

#### **Appendix B**

*A 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*

As the committee notes, the statement in the explanatory memorandum to the Bill about a defendant being 'best placed' to raise evidence about a matter does not equate to an explanation about the matter being 'peculiarly' within their knowledge.

In many cases, a person will not only be best placed to raise evidence, but will also be able to provide information about their purpose for undertaking otherwise prohibited actions in respect of an electronic sales suppression tool that is peculiarly within their knowledge. This is because the purpose for which many actions that a person may take in respect of an electronic sales suppression tool will only be able to be identified after the intended purpose has been fulfilled. It will therefore be extremely difficult for the prosecution to establish the intended purpose that an individual had in respect of a particular action that they took, whereas it will be comparatively simple for the person to lead evidence about the reasons for which the action was undertaken. For example, it will be relatively easy for a person who develops an electronic sales suppression tool for research rather than commercial purposes to evidence the way in which they intended their research to be used.

While it is recognised that similar issues are unlikely to apply in respect of law enforcement officers carrying out their duties, it is expected that there will also be no ambiguity about whether a defence is applicable in such cases.

Requiring an accused to raise evidence about the purpose for which they took the otherwise prohibited action in respect of an electronic sales suppression tool also makes clear the expectation that persons must

exercise extreme care and diligence in taking otherwise prohibited actions in respect of such tools.

*Advice as to the appropriateness of amending the Bill to provide that whether a person is acting to prevent or deter tax evasion, or enforce a taxation law, to be an element of the proposed offences (rather than an offence-specific defence).*

While I do not consider that incorporating the relevant matters as an element of the proposed offences would be unequivocally inappropriate, based on the above reasons, it is my view that the current approach that utilises an offence-specific defence is the most appropriate course of action.

### **Committee comment**

2.780 The committee thanks the minister for this response. The committee notes the minister's advice that a defendant will not only be 'best placed' to raise evidence about a matter, but will also be able to provide information about their purpose for undertaking otherwise prohibited actions in respect of an electronic sales suppression (ESS) tool that is peculiarly within their knowledge. The committee also notes the minister's advice that this is because the purpose for which many actions that a person may take in respect of an ESS tool will only be able to be identified after the intended purpose has been fulfilled. Consequently, it will therefore be extremely difficult for the prosecution to establish the intended purpose that an individual had in respect of a particular action, whereas it will be comparatively simple for the defendant to lead evidence about the reasons for which the action was undertaken. The committee also notes the example provided by the minister.

2.781 Although not strictly relevant to the principles set out in the *Guide to Framing Commonwealth Offences*, the committee further notes the minister's advice that requiring an accused to raise evidence about the purpose for which they undertook the otherwise prohibited action in respect of an ESS tool also makes clear the expectation that persons must exercise extreme care and diligence in taking otherwise prohibited actions in respect of such tools.

**2.782 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.783 In light of the detailed information provided by the minister, the committee makes no further comment on this matter.**

## Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Corporations Act 2001</i> and the <i>Taxation Administration Act 1953</i> to: <ul style="list-style-type: none"> <li>• extend corporate whistleblower protections; and</li> <li>• introduce new protections for tax whistleblowers</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	Senate on 7 December 2017
<b>Bill status</b>	Before the Senate

2.784 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter received 9 March 2018. Set out below are extracts from the committee's initial scrutiny of the bill and the minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.<sup>326</sup>

### Reversal of evidential burden of proof<sup>327</sup>

#### *Initial scrutiny – extract*

2.785 Proposed subsections 1317AAE(1) and 14ZZW(1) of the bill amend the *Corporations Act 2001* (Corporations Act) and the *Taxation Administration Act 1953* (Taxation Act) respectively, to provide that it is an offence for a person to disclose certain confidential information relating to the identity of a whistleblower.<sup>328</sup> Proposed subsections 1317AAE(4) and 14ZZW(3) provide exceptions (offence-specific defences) to these offences, providing that the offences do not apply if:

- the disclosure is not of the identity of the whistleblower; and
- the disclosure is reasonably necessary for the purpose of investigating certain prescribed matters; and

326 See correspondence relating to *Scrutiny Digest No.3 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

327 Schedule 1, item 2, proposed subsection 1317AAE(4) and Schedule 1, item 15, proposed subsection 14ZZW(3). The committee draws Senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

328 Schedule 1, item 10 of the bill would make contraventions of proposed subsection 1317AAE(1) subject to a civil penalty.

- the person who has disclosed the information has taken all reasonable steps to reduce the risk that the whistleblower will be identified.

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

2.787 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, interfere with this common law right.

2.788 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 committee notes that the explanatory memorandum does not provide a justification for the reversals of the evidential burden of proof in the provisions identified above, merely stating the operation and effect of those provisions.

2.789 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in these instances. 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*.<sup>329</sup>

2.790 The committee also seeks the minister's advice as to the appropriateness of including some or all of the offence-specific defences identified above as elements of the offences to which they apply.

### ***Minister's response***

2.791 The minister advised:

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 creates tax law offences and broadens and clarifies the corporate offences of victimisation of whistleblowers and disclosure of information likely to reveal the identity of a whistleblower ("confidentiality offence"). The Bill also amends the *Corporations Act 2001* (Corporations Act) by creating civil penalty contraventions, in addition to these criminal offences.

The Bill expands the defence available to the existing corporate confidentiality offence by allowing the disclosure of information which is

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

reasonably necessary for the purposes of investigating the reported misconduct. A similar tax law defence is created by the Bill. The Committee has requested information about these defences and the evidential burden of proof that applies to them.

The proposed provisions support the policy of protecting whistleblowers from victimisation or other detriment, including where a person's identity is revealed as a whistleblower. However, the expanded corporate and tax law defence is intended to ensure entities are not inhibited from properly investigating internal disclosures of misconduct because of the risk that communications relating to the investigation could include information likely to lead to the identification of a whistleblower. The entity may use the defence where it does not identify the whistleblower by name and takes reasonable steps to reduce the risk of the whistleblower's identity being deduced from the information disclosed.

In consulting with regulatory agencies, it became clear that entities in some cases declined to investigate a whistleblower's disclosure to avoid committing an offence. This is because the current corporate law prohibits sharing of not only the whistleblower's identity, but also the information about the underlying actual or potential contravention/s of law reported by the whistleblower, irrespective of whether that information would reveal their identity or not.

The Bill addresses this problem by balancing the need to protect a whistleblower's identity with the need to allow an entity to investigate and remedy contraventions, provided it takes all reasonable steps to avoid inadvertently revealing the whistleblower's identity.

The expanded corporate defence recognises the necessity of revealing particular information to undertake an investigation, and that the reasonableness of steps taken to reduce the risk of disclosing a whistleblower's identity will depend on circumstances particular to the entity. These are matters peculiarly within the defendant entity's knowledge, and not available to the prosecution. For this reason, it is appropriate that the defendant entity bear the burden of adducing evidence about these matters to make out the defence and that this be implemented as an offence-specific defence rather than as an additional element of the offence.

New section 1317AAE of the Corporations Act adapts existing section 1317AE and reflects equivalent sections in the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995* and *Superannuation Industry (Supervision) Act 1993*.

New section 14ZZW of the *Taxation Administration Act 1953* mirrors Corporations Act section 1317AAE.

**Committee comment**

2.792 The committee thanks the minister for this response. The committee notes the minister's advice that the defence in proposed subsections 1317AAE(4) and 14ZZW(3) (the expanded corporate tax law defence) is intended to ensure that entities are not inhibited from properly investigating external disclosures of misconduct because of the risk that communications could include information likely to lead to the identification of a whistleblower. The committee further notes that the defence is designed to balance protecting whistleblowers' identities with the need to effectively investigate and remedy breaches of the corporations and taxation law.

2.793 The committee further notes the minister's advice that the defences recognise the need to reveal certain information to undertake an investigation, and that the reasonableness of steps taken to reduce the risk of disclosing a whistleblower's identity will depend on circumstances particular to the entity. The committee notes the minister's advice that these are matters that are peculiarly within the defendant entity's knowledge, and that are not available to the prosecution.

2.794 Finally, the committee notes the minister's views that, for the reasons outlined above, it is appropriate that the defendant entity bear the burden of adducing evidence about the matters in the defence, and that the defence be implemented as an offence-specific defence rather than as an additional element of the offence.

**2.795 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.796 In light of the information provided by the minister, the committee makes no further comment on this matter.**

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**Power for delegated legislation to amend primary legislation (Henry VIII clause)<sup>330</sup>**

2.797 Proposed section 1317AI of the bill seeks to require certain classes of companies to have in place a policy for the protection and support of whistleblowers, and to make that policy available to the company's officers and employees. Proposed section 1317AJ provides that the Australian Securities and Investments Commission (ASIC) may, by legislative instrument, make an order relieving specified classes of

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330 Schedule 1, item 9, proposed section 1317AJ. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

companies from all or particular requirements of proposed section 1317AI. Proposed section 1317AJ therefore effectively allows ASIC to amend the operation of proposed section 1317AI (that is, to amend primary legislation) by legislative instrument.

2.798 A provision that enables delegated legislation to amend primary legislation (including amending the *operation* of primary legislation) is known as a Henry VIII clause. There are significant concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between 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. In this instance, the explanatory memorandum states:

The rationale for providing ASIC with a power to relieve certain companies from [all or specified requirements of section 1317AI] is to provide it with flexibility in making a determination whether in some limited circumstances, the benefits of this requirement in encouraging good corporate culture and governance could be outweighed by reduced flexibility and unnecessarily high compliance costs.<sup>331</sup>

2.799 While the committee notes this brief explanation, the committee does not consider that it adequately explains why it is appropriate to provide ASIC with broad powers to modify the operation of proposed section 1317AI by legislative instrument. In this regard, the committee also notes that the bill does not provide any limitations on the powers of ASIC to relieve companies from the requirement to have a whistleblower policy. For example, it does not set out any criteria that must be satisfied. Further, the explanatory memorandum does not explain the intended criteria that ASIC will follow when considering to exercise this power, and while the explanatory memorandum indicates that the power will only be exercised in 'some limited circumstances', it does not provide examples of the circumstances in which the power may be used.

2.800 The committee seeks the minister's more detailed justification as to why it is proposed to provide ASIC with broad powers to exempt classes of company from the operation of proposed section 1317AI, including examples of when it is envisaged that such powers would be exercised.

2.801 The committee also seeks the minister's advice as to whether it would be appropriate to amend the bill to insert (at least high-level) rules or guidance concerning the exercise of ASIC's powers under proposed section 1317AJ.

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331 Explanatory memorandum, pp. 42-43.

**Minister's response**

2.802 The minister advised:

The Bill imposes an obligation on larger companies to have a corporate whistleblowing policy to protect whistleblowers. The Australian Securities and Investments Commission (ASIC) may, by legislative instrument, make an order relieving specified regulated entities or classes of regulated entities from this obligation or from particular aspects of this obligation. The Committee has requested information about the appropriateness of ASIC being given such a class order power.

One of the key policy aims of the Bill is to encourage greater self-regulation by large companies and more whistleblowing within regulated entities, including through internally promoting whistleblowing protection.

This is achieved by requiring certain companies to have appropriate whistleblowing policies and the associated systems and procedures to facilitate, investigate, monitor and act on disclosures as well as monitoring internal responses to ensure whistleblowers are not victimised and that their identity is not revealed.

The requirement to have whistleblowing policies is confined to large and public listed entities to ensure the cost impact and compliance burden is minimised. It utilises the existing small proprietary company definition in section 45A of the Corporations Act, which is a fact based test based upon things such as staffing levels, asset value or turnover, as the dividing line between those entities that are not required to have a policy and those that are.

ASIC's class order power may be exercised to reduce the compliance burden on small companies in appropriate circumstances. These circumstances include where the compliance burden is too great given the scale of their operations or staffing levels, or where compliance is unnecessary because of the nature of their businesses. Smaller companies do not have the same economies of scale or resources as larger companies. For these reasons, the Government considered it appropriate to give ASIC an exemption power.

Given the range of corporate and business structures, the Bill permits ASIC a class order power to allow it to make class orders that strike a reasonable balance between promoting widespread self-regulation and protecting smaller entities from unnecessary regulation. These considerations will need to be assessed on a case by case basis. Additional rules or guidance are not appropriate as they may limit the utility of the class order powers, particularly in respect of unforeseen situations.

**Committee comment**

2.803 The committee thanks the minister for this response. The committee notes the minister's advice that the requirement to have a whistleblowing policy in place is

confined to large and public listed entities to ensure the cost impact and compliance burden is minimised.

2.804 The committee also notes the minister's advice that ASIC's class order power may be exercised to reduce the compliance burden on small companies in appropriate circumstances, including where the compliance burden is too great given the scale of those companies' operations or staffing levels, or where compliance is unnecessary because of the nature of the companies' business. The committee notes the minister's advice that, for these reasons, the government considered it appropriate to give ASIC the exemption power in proposed section 1317AJ.

2.805 Finally, the committee notes the minister's advice that the proposed power of exemption permits ASIC to make class orders that strike a reasonable balance between promoting widespread self-regulation and protecting smaller entities from unnecessary regulation, and that these matters will need to be assessed on a case-by-case basis. The committee notes the minister's view that additional rules or guidance are not appropriate as they may limit the utility of the class order powers, particularly in respect of unforeseen situations.

2.806 While noting the minister's advice, it remains unclear to the committee why some guidance could not be included around the exercise of the exemption power in proposed section 1317AJ, particularly given the minister's advice that the fact-based definition of (large and small) proprietary companies in section 45A of the Corporations Act has already been applied to exclude small companies from the requirement to have a whistleblower policy. In this regard, the committee notes that the power in that section is intended to be exercised to reduce the burden on smaller companies that might otherwise be subject to unnecessary regulation. It therefore appears to the committee that it may be appropriate to require ASIC to take into account the size of the companies to which a class order would apply, and potential regulatory impacts of the whistleblower policy requirements on those companies, before making an order.

**2.807 The committee requests that the key information provided by the minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.808 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing ASIC with broad powers to exempt classes of companies from the operation of the proposed requirement to have a whistleblower protection policy, in circumstances where there is nothing on the face of the bill to guide ASIC's exemption power.**

## 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.<sup>1</sup> 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.<sup>2</sup>

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**

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- 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](#).

