

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.

### **Agricultural and Veterinary Chemicals Legislation Amendment (Streamlining Regulation) Bill 2018**

Purpose
<p>This bill seeks to amend various Acts relating to agricultural and veterinary chemicals to:</p> <ul style="list-style-type: none"><li>• enable the use of new, simpler regulatory processes for low-risk chemical products;</li><li>• provide the Australian Pesticides and Veterinary Medicines Authority (APVMA) and industry with more flexibility to deal with certain types of new information provided when the APVMA is considering an application;</li><li>• provide extensions to limitation periods and protection periods;</li><li>• support computerised decision-making by the APVMA;</li><li>• provide for a legislative instrument made by the APVMA to prescribe a scheme that would allow applicants and the APVMA to use accredited third party providers to undertake assessment services;</li><li>• improve the transparency of voluntary recalls;</li><li>• harmonise the need to inform the APVMA of new information relating to safety criteria so that the same obligations apply to all holders and applicants;</li><li>• amend the procedure when dealing with minor variations in the constituents in a product;</li><li>• provide the APVMA with more options when dealing with false or misleading information, and clarify what information must be included on a label;</li><li>• allow the holder of a suspended product to address the reason for the suspension;</li><li>• correct anomalies in the regulation-making powers for the labelling criteria;</li><li>• amend APVMA's corporate reporting requirements.</li></ul>

<b>Portfolio</b>	Agriculture and Water Resources
<b>Introduced</b>	House of Representatives on 18 October 2018

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

1.2 Item 43 seeks to insert proposed section 6G into the *Agricultural and Veterinary Chemical Code Act 1994*. Proposed subsection 6G(1) would allow the Australian Pesticides and Veterinary Medicines Authority (APVMA) to prescribe, by legislative instrument, matters relating to the accreditation of persons by the APVMA for the purposes of the Agricultural and Veterinary Chemicals Code (the Code).<sup>2</sup> It would also enable the APVMA to prescribe matters relating to those persons performing roles prescribed in the instrument, which may include the assessing of information of a kind prescribed in the instrument. Proposed subsection 6G(2) sets out examples of matters a legislative instrument made under proposed subsection 6G(1) may deal with.

1.3 Proposed subsection 6G(4) seeks to allow the regulations to prescribe penalties for offences against the regulations, or declare provisions of the regulations to be civil penalty provisions, in relation to an accredited person contravening a condition of accreditation or any other requirement set out under a legislative instrument made under proposed subsection 6G(1).

1.4 The committee's view is that significant matters, such as a scheme to accredit persons to perform functions in relation to the Code, 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 in the form of an amending bill.

1.5 In this instance, the explanatory memorandum states that proposed section 6G would enable the APVMA to accredit persons for a range of purposes, including preparing assessment reports for industry and conducting assessments of information in applications made to the APVMA.<sup>3</sup> However, the explanatory memorandum provides no justification for leaving all of the content of the proposed accreditation scheme to be set out in a legislative instrument rather than in primary legislation.

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1 Schedule 1, item 43, proposed section 6G. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

2 The Agricultural and Veterinary Chemicals Code is set out in the schedule of the *Agricultural and Veterinary Chemical Code Act 1994*.

3 Explanatory memorandum, p. 19.

1.6 The explanatory memorandum also states that the legislative instrument could include requirements for experience, insurance, conflict of interest measures, data handling protocols, and an audit and compliance program.<sup>4</sup> However, the bill does not require that the legislative instrument include requirements in relation to these matters and it is not clear to the committee why it would not be appropriate to include such requirements in primary legislation.

1.7 In addition, 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 section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* 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>5</sup>

**1.8 The committee's view is that significant matters, such as a scheme to accredit persons to perform functions in relation to the Agricultural and Veterinary Chemicals Code (noting that contraventions of the requirements under the scheme may be subject to penalties prescribed in the regulations), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.**

**1.9 In this regard, the committee requests the minister's detailed advice as to:**

- **why it is considered necessary and appropriate to leave all of the content of the proposed accreditation scheme to delegated legislation;**
- **the appropriateness of amending the bill so as to include at least high-level guidance as to the requirements of the proposed accreditation scheme; and**

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4 Explanatory memorandum, p. 19.

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

- **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).**
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### **Incorporation of external material into the law<sup>6</sup>**

1.10 Proposed subsection 6G(3) provides that, despite subsection 14(2) of the *Legislation Act 2003*, a legislative instrument made under proposed subsection 6G(1) may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force or existing from time to time.

1.11 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).

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

1.13 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>7</sup> This report comprehensively outlines the significant scrutiny concerns associated with the

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6 Schedule 1, item 43, proposed subsection 6G(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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

incorporation of material by reference, particularly where the incorporated material is not freely available.

1.14 In this instance, the explanatory memorandum gives a sufficient justification for why material may need to be incorporated from time to time.<sup>8</sup> However, the explanatory memorandum states that, 'where possible', incorporated material would be available without a fee and published on the APVMA website, and that accredited persons would be advised when standards are amended.<sup>9</sup> The committee notes this explanation; however, it emphasises that its consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all individuals who may be interested in or affected by the law. While the explanatory memorandum states that this will be the case 'where possible', it does not state that it would always be the case.

**1.15 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of incorporating material that may not be freely and readily available to all those interested in the law.**

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8 Explanatory memorandum, p. 21.

9 Explanatory memorandum, p. 21.

## Copyright Amendment (Online Infringement) Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend the <i>Copyright Act 1968</i> to:</p> <ul style="list-style-type: none"> <li>• allow injunctions to be made in respect of an online location that has 'the primary purpose or the <i>primary effect</i>' of infringing, or facilitating an infringement of copyright;</li> <li>• introduce a rebuttable evidentiary presumption that an online location is outside Australia;</li> <li>• enable the courts to order that an online search engine provider take reasonable steps so as not to provide search results that refer users to blocked online locations;</li> <li>• clarify the injunctive powers of the Federal Court relating to copyright; and</li> <li>• enable the minister to make a legislative instrument declaring that certain online search engine providers be exempted from the scheme.</li> </ul>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	House of Representatives on 18 October 2018

### Significant matters in delegated legislation<sup>10</sup>

1.16 Section 115A of the *Copyright Act 1968* sets out a process by which copyright owners may apply to the Federal Court to grant an injunction so as to require a carriage service provider to disable access to online locations outside Australia that infringe copyright, or facilitate the infringement of copyright. The bill seeks to make a number of amendments to this section, including to allow an application for an injunction to request that a carriage service provider take such steps as the Court considers reasonable to disable access to an online location outside Australia and to request an online search engine provider take steps so as not to provide a search result that refers to such an online location.<sup>11</sup>

1.17 Item 9 of Schedule 1 seeks to insert proposed subsection 115A(8B), which provides that the minister may, by legislative instrument, declare that a particular online search engine provider or an online search engine provider that is a member of a particular class must not be specified in an application for an injunction, or an application to vary an injunction.

10 Schedule 1, item 9, proposed subsection 115A(8B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

11 Schedule 1, item 2, proposed subsections 115A(1) and (2).

1.18 The committee's view is that significant matters, such as the specification of providers that are to be exempted from the operation of an injunctive scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that delegated legislation, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.19 The explanatory memorandum states that it is intended that the bill will enable injunctions to be sought against major internet search operators that are 'likely conduits to online locations that host infringing material',<sup>12</sup> but not against 'smaller operators that do not have the same reach'.<sup>13</sup> The explanatory memorandum further explains that the injunctive scheme is not intended to capture entities that: offer intranet search functions; provide search services to employees, members or clients that are confined to discrete sites, including educational and cultural institutions, or not-for-profit organisations; and provide search functionality that is limited to their own sites or to particular content or material, including real estate or employment websites or the National Library of Australia's Trove search.<sup>14</sup>

1.20 However, if proposed subsection 115A(8B) is intended to provide a safeguard to ensure that applications for injunctions do not unfairly target 'smaller operators that do not have the same reach or entities that provide only internal (intranet) or limited search functions',<sup>15</sup> it is unclear to the committee why the bill does not itself exclude such classes of smaller online search engines from the operation of the bill. As the bill is currently drafted, it would enable the minister to, by legislative instrument, exclude *any* online search engine provider from this scheme.

**1.21 The committee requests the minister's detailed advice as to why it is necessary to enable delegated legislation to be made to exempt certain online search engine providers from the copyright injunctive scheme, and the appropriateness of instead amending the bill so as to specifically exclude certain classes of smaller providers.**

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12 Explanatory memorandum, p. 15.

13 Explanatory memorandum, p. 15.

14 Explanatory memorandum, p. 15.

15 Explanatory memorandum, p. 15.

## Migration Amendment (Strengthening the Character Test) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Migration Act 1958</i> to provide additional grounds for non-citizens who commit serious offences to be considered for visa refusal or cancellation
<b>Portfolio</b>	Immigration, Citizenship and Multicultural Affairs
<b>Introduced</b>	House of Representatives on 25 October 2018

### Broad discretionary power

#### Trespass on personal rights and liberties<sup>16</sup>

1.22 Section 501 of the *Migration Act 1958* (the Migration Act) provides both compulsory and discretionary powers to the minister to cancel a visa issued to, or refuse to issue a visa to, a person who does not meet the 'character test'.<sup>17</sup> Subsection 501(6) of the Act sets out a range of circumstances under which a person will not be considered to pass the 'character test'. The bill seeks to add an additional element by providing that a person does not pass the character test if they have been convicted of a 'designated offence'.<sup>18</sup> The bill defines a designated offence as an offence against a law in force in Australia or a foreign country that satisfies two conditions.<sup>19</sup> First, the offence must have one or more physical elements involving:

- violence against a person;
- non-consensual conduct of a sexual nature;
- breaching an order made by a court or tribunal for the personal protection of another person;
- using or possessing a weapon; or
- aiding, abetting, counselling or procuring; inducing; conspiring; or being knowingly concerned in, or a party to, the commission of one of the above offences.<sup>20</sup>

16 Schedule 1, items 5 and 6. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

17 *Migration Act 1958*, subsections 501(1) to (3A).

18 Schedule 1, item 5, proposed paragraph 501(6)(aaa).

19 Schedule 1, item 6, proposed subsection 501(7AA).

20 Proposed subparagraphs 501(7AA)(a)(i) to (viii).

1.23 Second, the offence must be *punishable* by imprisonment for two years or more, regardless of whether the person actually received that sentence.<sup>21</sup> The minister's power to refuse or cancel a visa with respect to a person who does not meet the character test by reason of being convicted of a designated offence would be discretionary.<sup>22</sup>

1.24 The Act currently enables a visa to be refused or cancelled where a person has failed the character test because they have a 'substantial criminal record',<sup>23</sup> which is defined as including any person who has been *sentenced* to a total term of imprisonment of 12 months or more.<sup>24</sup> The Act also enables the minister to exercise discretionary visa refusal and cancellation powers where a person is not of good character, having regard to their past and present criminal conduct and general conduct.<sup>25</sup>

1.25 The statement of compatibility explains that the proposed amendments are intended to ensure the character test 'aligns directly with community expectations, that non-citizens who commit offences such as murder, assault, sexual assault or aggravated burglary will not be permitted to remain in the Australian community.'<sup>26</sup> It states that the practical effect of the amendments will be greater numbers of people being liable for consideration of refusal or cancellation of a visa as they would not meet, or would no longer meet, the relevant character requirements.<sup>27</sup> As such, the amendments are likely to result in more people being held in immigration detention, removed from Australia and potentially separated from their family.<sup>28</sup> This raises scrutiny concerns as to whether the measures proposed in the bill unduly trespass on personal rights and liberties.

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21 Proposed paragraph 501(7AA)(b). If the offence is an offence against a law in force in a foreign country, in order to be a 'designated offence' the act or omission constituting the offence must constitute an offence against a law in force in the Australian Capital Territory (ACT) and be punishable by imprisonment for two years or more were it to have taken place in the ACT. See Schedule 1, item 6, proposed paragraph 501(7AA)(c).

22 *Migration Act 1958*, sections 501(1) to (3). Statement of compatibility, p. 10.

23 *Migration Act 1958*, paragraph 501(6)(a).

24 *Migration Act 1958*, paragraphs 501(7)(a) to (c). Paragraphs 501(7)(d) to (f) contain further provisions relating to a person who has been: sentenced to two or more terms of imprisonment; acquitted on the grounds of insanity or unsoundness of mind; or been found unfit to plead but found to have committed the offence and been detained in a facility or institution.

25 *Migration Act 1958*, paragraph 501(6)(c).

26 Statement of compatibility, p. 9.

27 Statement of compatibility, p. 10.

28 Statement of compatibility, p. 10.

1.26 The committee notes that in providing a basis for cancelling or refusing a visa that is not based on the length of sentence a person has actually received, the proposed amendments would allow the minister the discretion to cancel or refuse to issue a visa to a person who has been convicted of a designated offence but who may have received a very short sentence or no sentence at all. For example, a person carrying pepper spray may be convicted of possession of a weapon,<sup>29</sup> and although the person may only be given a minor fine, this conviction would empower the minister to cancel their visa, leading to their detention and removal from Australia.<sup>30</sup> As the power to cancel would be based simply on the fact of conviction, there is nothing in the legislation that would require the minister to consider the person's overall good character, their family or other connections to Australia or the length of their stay in Australia (noting that this could apply to permanent residents who have lived in Australia for many years).

1.27 The committee also notes that subsection 501(5) of the Act provides that neither the code of procedure for dealing with visa applications<sup>31</sup> nor the rules of natural justice apply to decisions to refuse or cancel a visa made under subsections 501(3) and (3A). Under subsection 501(3) the minister has a discretionary power to cancel a visa if the minister reasonably suspects that a person does not pass the character test—including, under the proposed amendments, because the person has been convicted of a designated offence—and the minister is satisfied that cancellation is in the 'national interest'. As a result, the minister in acting under this power is not required to give the affected person an opportunity to present their case before making the decision. The committee has previously raised scrutiny concerns about the exclusion of natural justice requirements for decisions taken in relation to visa cancellations.<sup>32</sup>

1.28 In addition, while decisions made by a delegate of the minister to cancel or refuse a visa under section 501 are generally subject to merits review by the Administrative Appeals Tribunal (AAT),<sup>33</sup> the minister has the power to overturn the

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29 See, for example, section 5AA of the *Control of Weapons Act 1990* (Vic) and Schedule 3, item 21 of the *Control of Weapons Regulations 2011*, which makes it an offence, punishable by up to two years imprisonment, to possess, use or carry a prohibited weapon, including an article 'designed or adapted to emit or discharge an offensive, noxious or irritant liquid, powder, gas or chemical so as to cause disability, incapacity or harm to another person'. See also proposed subparagraph 501(7AA)(a)(iv) which states that using or possessing a weapon is a designated offence.

30 Statement of compatibility, p. 10; *Migration Act 1958*, s. 189.

31 *Migration Act 1958*, Part 2, Division 3, Subdivision AB.

32 See Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, 19 November 2014, pp. 897-900.

33 *Migration Act 1958*, s. 500(1)(b). Subsection 500(4A) specifies a number of decisions that are not subject to review by the Administrative Appeals Tribunal, including decisions made under s. 501(3A) to cancel a visa.

AAT's decision if the minister is satisfied it is in the national interest to do so. Further, there is no right to merits review where the minister personally exercises a visa cancellation or refusal power under section 501 or a related power.<sup>34</sup>

1.29 The committee notes that it has previously raised scrutiny concerns about the existing framework, noting that the broadly framed powers under section 501 are not, as a practical matter, constrained by law 'due to the breadth of discretion, the absence of procedural fairness obligations, the fact that merits review is unavailable, or a combination of these factors'.<sup>35</sup>

1.30 The committee notes that in light of the already extremely broad discretionary powers available for the minister to refuse to issue or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill. The explanatory memorandum states that the new provisions, in stating that a designated offence must be one punishable by a period of two years imprisonment, sets an objective standard 'which relies upon established existing criminal law and law enforcement processes in states and territories to determine the seriousness of a given offence', ensuring discretionary decisions are based on objective standards of criminality and seriousness.<sup>36</sup> However, the committee notes that section 501<sup>37</sup> already gives a power for the minister to cancel a visa if a person has been *sentenced* to a term of imprisonment for 12 months or more. Including a new power to cancel a visa based on conviction for an offence punishable by two years or more, does not take into account the individual circumstances of that conviction. As noted by the statement of compatibility the amendments 'expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct'.<sup>38</sup> As such it leaves a broad discretion to the minister or his or her delegate, unconstrained by any legislative requirement to consider individual circumstances and without appropriate procedural safeguards.

**1.31 The committee notes that section 501 of the *Migration Act 1958* already gives the minister a broad discretionary power to refuse or cancel a visa in the absence of procedural fairness obligations and where merits review is largely**

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34 See paragraph 501(1)(b) (allowing applications for AAT review to only be made in relation to decisions of the delegates of the minister) and subsections 501A(7), 501B(4) and 501BA(5) of the *Migration Act 1958*.

35 See Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2016*, 16 March 2016, p. 306. See also Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014*, 19 November 2014, pp. 891-907.

36 Explanatory memorandum, p. 7.

37 See paragraph 501(6)(a) and subsection 501(7) of the *Migration Act 1958*.

38 Statement of compatibility, p.10.

unavailable. The committee considers, in these circumstances, expanding powers to empower the minister to cancel a visa (which could lead to the detention and removal of a non-citizen), raises scrutiny concerns as to whether the measure unduly trespasses on rights and liberties.

**1.32** The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of amending the character test set out under the section 501 of the *Migration Act 1958*.

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

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<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>	Ms Cathy McGowan MP
<b>Introduced</b>	House of Representatives on 22 October 2018

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1.33 This bill is identical to a bill that was introduced in the House of Representatives on 26 February 2018.<sup>39</sup> The committee raised a number of scrutiny concerns in relation to the earlier bill in [Scrutiny Digest 3 of 2018](#)<sup>40</sup> and reiterates those comments in relation to this bill.

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39 The earlier bill was introduced by the former Member for Perth, Mr Tim Hammond MP, and was removed from the House of Representatives *Notice Paper* in accordance with standing order 42. See explanatory memorandum, p. 2.

40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2018*, at pp. 24-27.

## Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018

<b>Purpose</b>	This bill seeks to introduce a stronger penalty framework for certain corporate and financial sector misconduct.
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 24 October 2018

### Reversal of evidential burden of proof<sup>41</sup>

1.34 The bill seeks to remake a number of offences in the *Corporations Act 2001* (Corporations Act) to modernise drafting, increase penalties and introduce civil penalties as an alternative to criminal liability. Some of the offences that the bill seeks to remake include offence-specific defences, which reverse the evidential burden of proof. For example:

- proposed subsection 922M(1)<sup>42</sup> seeks to make it an offence for a person to fail to lodge a notice in accordance with a notification provision. Proposed subsection 992M(2) provides that the offence does not apply if the person fails to lodge a notice in specified circumstances;
- proposed subsections 952E(1) and (2)<sup>43</sup> seek to create offences relating to defective disclosure documents and statements. Proposed subsection 952E(3) provides that the offences do not apply if the person took reasonable steps to ensure that the document or statement would not be defective. Proposed subsection 952E(4) further provides that the offence in subsection 952E(2) does not apply if the relevant defect was due to the conduct of a financial services licensee for whom the defendant was an authorised representative;
- proposed subsection 1020A(1)<sup>44</sup> seeks to make it an offence for a person to make certain recommendations or offers or accept certain offers relating to managed investment schemes. Proposed subsection 1020A(3) provides that

41 Schedule 1, item 82, proposed subsection 922M(2); item 86, proposed section 952E; item 100, proposed subsection 1020A(3); and item 101, proposed subsection 1021E(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

42 Schedule 1, item 82.

43 Schedule 1, item 86.

44 Schedule 1, item 100.

this does not apply to a recommendation or offer made in specified circumstances; and

- proposed subsections 1021E(1) and (2)<sup>45</sup> seek to create further offences relating to defective disclosure statements and documents. Proposed subsection 1021E(3) provides that the offences do not apply if the person took reasonable steps to ensure the document or statement is not defective.

1.35 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.

1.36 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.

1.37 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 reversal of the evidential burden of proof to be justified. The committee notes that the reversals of the evidential burden of proof in the provisions identified in paragraph [1.34] above have not been addressed in the explanatory materials.

**1.38 As the explanatory materials do not address this issue, the committee requests the Treasurer's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in the instances identified in paragraph [1.34] above. 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>46</sup>**

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45 Schedule 1, item 101.

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

## Strict and absolute liability offences<sup>47</sup> Infringement notices<sup>48</sup>

1.39 The bill seeks to increase financial penalties, and to remove imprisonment as a penalty, for a number of strict and absolute liability offences under the Corporations Act, the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the *National Consumer Credit Protection Act 2009* (Credit Act). The new penalty amounts would be set at between 20 and 120 penalty units for individuals, and between 200 and 1,200 penalty units for bodies corporate.

1.40 The committee notes that the *Guide to Framing Commonwealth Offences* states that the application of strict or absolute liability to an offence is generally only considered appropriate where:

- the offence is not punishable by imprisonment; and
- the offence is only punishable by a fine of up to 60 penalty units (strict liability), or 10 penalty units (absolute liability) for an individual.<sup>49</sup>

1.41 In this instance, the bill seeks to set the penalty imposed in relation to a number of strict liability offences to 120 penalty units, and to set the penalty imposed in relation to one absolute liability offence<sup>50</sup> at 60 penalty units. In relation to these matters, the explanatory memorandum states that:

While the amendments depart from the Guide, the increased penalty now reflects the seriousness of the offence, and is appropriate as it makes the amounts more proportionate to the other penalty increases and acts as a sufficient deterrent. The increases in the financial penalties also offset the removal of imprisonment as a possible sanction for committing strict or absolute liability offences.<sup>51</sup>

1.42 The committee welcomes the removal of custodial terms applying to offences of strict liability. However, the committee has a long-standing view that where strict liability is applied there should be a cap on monetary penalties that

47 Schedule 1, item 140, proposed Schedule 3 of the *Corporations Act 2001*; Schedule 2, items 26, 34, and 45, proposed subsections 63(2), 66(2) and 200(2) of the *Australian Securities and Investments Commission Act 2001*; Schedule 3, item 49. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

48 Schedule 1, item 113, proposed subsection 1317DAP(2); Schedule 4, item 4, proposed subsection 75Y(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

50 Subsection 606(4B) of the *Corporations Act 2001*.

51 Explanatory memorandum, p. 28.

apply<sup>52</sup> and there should be consistency with the principles outlined in the *Guide to Framing Commonwealth Offences*, so that strict liability offences should only be applied where the relevant penalty does not exceed 60 penalty units for an individual, while absolute liability should only be applied where the penalty does not exceed 10 penalty units.

1.43 The bill also seeks to expand the infringement notice regimes in the Corporations Act, the ASIC Act, the Credit Act and the *Insurance Contracts Act 1984* (Insurance Contracts Act). Under these regimes, notices may be issued in relation to strict and absolute liability offences, as well as certain civil penalty provisions.

1.44 The committee notes that the *Guide to Framing Commonwealth Offences* states that infringement notice provisions should generally ensure that the amount payable under a notice for an individual is one fifth of the maximum amount that a court could impose on the person under the relevant offence provision, but not more than 12 penalty units.<sup>53</sup> However, the bill seeks to set the amounts payable for infringement notices issued under the Corporations Act and the Insurance Contracts Act at half of the amount that could be imposed under the primary offence provision. In relation to this matter, the explanatory memorandum explains that:

The Guide suggests that an appropriate penalty amount under an infringement notice is 20 per cent of the maximum financial penalty applicable to the primary offence. The amendments depart from this ratio as 20 per cent does not act as a sufficient deterrent for offences of a corporate and financial nature. An infringement notice penalty amount of 50 per cent strikes an appropriate balance between providing an adequate deterrent from misconduct and a quick and efficient mechanism to avoid a breach going to court, and ensuring payments of penalties under infringement notices do not simply become a cost of doing business.<sup>54</sup>

1.45 While this explanation is noted, it remains the case that, in order to be consistent with the principles outlined in the *Guide to Framing Commonwealth Offences*, the penalty imposed under an infringement notices should be set at no more than 20 per cent of the amount imposed under the primary offence.

**1.46 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of setting the amounts that may be imposed under strict liability offences, absolute liability offences and infringement notices higher than the amounts prescribed by the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

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52 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2001: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002, p. 284.

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

54 Explanatory memorandum, p. 48.

## **Bills with no committee comment**

1.47 The committee has no comment in relation to the following bills which were introduced into the Parliament between 15 – 25 October 2018:

- A Fair Go for Australians in Trade Bill 2018;
- A Fair Go for Australians in Trade Bill 2018 [No. 2];
- Australian Broadcasting Corporation Amendment (Appointment of Directors) Bill 2018;
- Defence (Honour General Sir John Monash) Amendment Bill 2018;
- Discrimination Free Schools Bill 2018;
- High Speed Rail Planning Authority Bill 2018;
- Migration Amendment (Kids Off Nauru) Bill 2018;
- National Greenhouse and Energy Reporting Amendment (Timely Publication of Emissions) Bill 2018;
- National Housing Finance and Investment Corporation Amendment Bill 2018;
- Treasury Laws Amendment (Lower Taxes for Small and Medium Businesses) Bill 2018; and
- Treasury Laws Amendment (Making Sure Every State and Territory Gets Their Fair Share of GST) Bill 2018.

## Commentary on amendments and explanatory materials

### Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 [Digests 8 & 10/18]

1.48 On 18 October 2018 the Minister for Industry, Science and Technology (Mrs K L Andrews) presented an addendum to the explanatory memorandum to the bill.

**1.49 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.**<sup>55</sup>

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

- Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018;<sup>56</sup>
- Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018;<sup>57</sup>
- Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018;<sup>58</sup>
- Telecommunications Legislation Amendment Bill 2018.<sup>59</sup>

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55 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2018*, 12 September 2018, pp. 13-25.

56 On 25 October 2018 the House of Representatives agreed to nine Government amendments, the Minister for Indigenous Health (Mr Wyatt) presented a supplementary explanatory memorandum and the bill was read a third time.

57 On 25 October 2018 the House of Representatives agreed to four Government amendments, the Minister for Indigenous Health (Mr Wyatt) presented a supplementary explanatory memorandum and the bill was read a third time.

58 On 25 October 2018 the House of Representatives agreed to two Government amendments, the Minister for Indigenous Health (Mr Wyatt) presented a supplementary explanatory memorandum and the bill was read a third time.

59 On 15 October 2018 the Minister for Small and Family Business, Skills and Vocational Education (Senator Cash) tabled a replacement explanatory memorandum.



## Chapter 2

### Commentary on ministerial responses

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

### Higher Education Support Amendment (VET FEE-HELP Student Protection) Bill 2018

<b>Purpose</b>	This bill seeks to amend the <i>Higher Education Support Act 2003</i> to introduce a discretionary power for the secretary to re-credit a person's FEE-HELP balance to provide a remedy for VET FEE-HELP students who incurred debts as a result of inappropriate conduct by VET providers
<b>Portfolio</b>	Education and Training
<b>Introduced</b>	House of Representatives on 20 September 2018
<b>Bill status</b>	Before the House of Representatives

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

2.2 In [Scrutiny Digest 12 of 2018](#)<sup>2</sup> the committee requested the minister's advice as to why it is considered necessary and appropriate to leave to delegated legislation the matters that may constitute inappropriate conduct for the purposes of re-crediting VET FEE-HELP loan amounts.

#### **Minister's response**<sup>3</sup>

2.3 The minister advised:

The Bill provides the Secretary of the Department of Education and Training with the power to re-credit a student's VET FEE-HELP balance, where the student incurred a VET FEE-HELP debt through the inappropriate conduct of a VET provider, or the VET provider's agent. The

1 Schedule 1, item 3, proposed subsections 46AA(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2018*, at pp. 10-11.

3 The minister responded to the committee's comments in a letter dated 31 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

nature of the inappropriate conduct that the Government is attempting to capture through this provision has partly been identified from the experiences of students who have contacted the department and the VET Student Loans Ombudsman (VSLO). It is expected that as more students come forward there will be additional circumstances identified that could be considered as 'inappropriate conduct' under this measure.

The diversity of students affected under VET FEE-HELP is outlined in the 2016 Australian National Audit report on the '*Administration of VET FEE-HELP*'. It noted that during the period the VET FEE-HELP scheme operated from 2009 until 31 December 2016, large numbers of students located all across Australia accessed the scheme. Students that inappropriately acquired VET FEE-HELP debts were not limited to any particular group of people, but included people from a wide range of ages, education levels, socio-economic, cultural, ethnic, and disability groups. All of which suggests that the department may not yet possess all pertinent information as to the full breadth and extent of the type of inappropriate behaviour of providers that has affected students.

To accommodate possible changes to the criteria as new evidence of poor provider conduct emerges, the Government believes it is necessary to specify the criteria in the *Higher Education Support (VET) Guideline 2015* (VET Guideline) to allow changes in a timely fashion so that students are not further disadvantaged.

I note that the VET Guidelines currently also contain the criteria for remitting student VET FEE-HELP debt under the existing unacceptable conduct provisions in the legislation. The new inappropriate conduct criteria are intended to encapsulate, by reference, and go beyond the scope of the existing unacceptable conduct criteria for re-crediting a student's FEE-HELP balance. The VET Guideline also contains a range of related concepts that the new provisions are intended to rely upon.

For these reasons, as well as ease of access to the provisions by the public, I submit that the criteria for inappropriate conduct remain, as provided by the Bill, in the VET Guideline.

### **Committee comment**

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the nature of the inappropriate conduct that the government is attempting to capture has been partly identified from the experiences of students who have contacted the VET Student Loans Ombudsman and it is expected that, as more students come forward, additional circumstances that could be considered inappropriate conduct may be identified. The committee also notes the advice that, given the diversity of affected students, the department may not yet possess comprehensive information about the breadth and extent of inappropriate behaviour by VET providers. Finally, the committee notes the advice that it is necessary to specify criteria in relation to what constitutes inappropriate conduct by VET providers in delegated legislation to allow timely changes to be made to

accommodate new evidence of poor provider conduct and that the minister therefore considers it appropriate to leave these criteria to be set out in delegated legislation.

2.5 However, the committee reiterates its view that what constitutes inappropriate conduct in the context of a student loan re-crediting scheme is a significant matter that should generally be included in primary legislation unless a sound justification for the use of delegated legislation is provided. While noting that the government may not currently possess sufficient information to exhaustively describe what constitutes inappropriate conduct on the part of VET providers, it remains unclear to the committee why it would not be possible to set out in primary legislation criteria that would capture examples of inappropriate conduct that have been discovered to date, noting that it would then be possible to set out in delegated legislation additional criteria to capture any forms of inappropriate conduct that come to light at a later time. The committee considers that such an approach would provide appropriate parliamentary scrutiny of what is currently considered to constitute inappropriate conduct while also allowing flexibility to expand the scheme where necessary.

**2.6 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*).**

**2.7 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving to delegated legislation all of the matters that may constitute inappropriate conduct for the purposes of re-crediting VET FEE-HELP loan amounts.**

## Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018

<b>Purpose</b>	This bill seeks to amend various Acts relating to taxation to: <ul style="list-style-type: none"> <li>• limit access to tax concessions for foreign investors by increasing the managed investment trust withholding rate on fund payments in certain circumstances;</li> <li>• amend thin capitalisation rules to prevent double gearing structures;</li> <li>• limit access to tax concessions for foreign investors by limiting the tax withholding tax exemption for superannuation funds for foreign residents; and</li> <li>• limit access to tax concessions for foreign investors by codifying and limiting the scope of the sovereign immunity tax exemption</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 20 September 2018
<b>Bill status</b>	Before the House of Representatives

### Exclusion of judicial review<sup>4</sup>

2.8 In [Scrutiny Digest 12 of 2018](#)<sup>5</sup> the committee requested the Assistant Treasurer's detailed justification for seeking to exclude judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) in relation to decisions by the Treasurer for an exemption for an economic infrastructure facility under proposed section 12-439.

### Assistant Treasurer's response<sup>6</sup>

2.9 The Assistant Treasurer advised:

4 Schedule 1, item 14. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2018*, at pp. 53-55.

6 The Assistant Treasurer responded to the committee's comments in a letter dated 29 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

The decisions the Treasurer may make to provide the economic infrastructure facility exemption are intended to be excluded from **both** merits review and judicial review under the *Administrative Decision (Judicial Review) Act 1977* (ADJR Act). However, judicial review will be available under section 39B of the *Judiciary Act 1903*.

The Committee seeks advice in relation to providing justification for excluding judicial review under the ADJR Act in relation to decisions the Treasurer may make to provide the economic infrastructure facility exemption.

The power to make a decision to approve a facility specified in an application is contained in subsection 12-450(3) in Schedule 1 of the *Taxation Administration Act 1953*. In making the decision to approve the application, the Treasurer must be satisfied that the following criteria are met:

- the asset is an economic infrastructure facility;
- the estimated capital expenditure on the facility is \$500 million or more;
- the facility has yet to be constructed, or the facility is an existing facility that will be substantially improved;
- the facility will significantly enhance the long-term productive capacity of the economy; and
- approving the facility is in the national interest.

As outlined in the Explanatory Memorandum to the Bill, in determining whether a facility will significantly enhance the long-term productive capacity of the economy, the Treasurer will generally consider whether:

- the economic benefits resulting from the facility outweighs, or will outweigh, the economic costs; and
- in the opinion of Infrastructure Australia, the facility is nationally significant infrastructure within the meaning of the *Infrastructure Australia Act 2008*.

The decisions are not suitable for judicial review under the ADJR Act because key factors that must be taken into account when making a decision include whether:

- the facility will significantly enhance the long-term productive capacity of the economy; and
- approving the facility is in the national interest.

Consideration of these factors involves complex questions of government policy that can have broad ranging implications for persons other than those immediately affected by the [sic] For example, when making a decision, the Treasurer must take into account a broad range of factors, including the national interest, the long-term productive capacity of the

economy, Australian Government policies (including tax), impacts on the economy and the community.

In addition, the decisions relate to the management of the national economy, which do not directly affect the interests of individuals. In my view, it is appropriate that decisions with high political content in relation to the management of the national economy should not be subjected to merits review or judicial review under the *Administrative Decision (Judicial Review) Act 1977* (ADJR Act).

I note that in the *Federal Judicial Review in Australia* (the Review) by the Administrative Review Council (the Council), the Council considered that excluding decisions by the Finance Minister to issue money out of the Consolidated Revenue Fund from the ADJR Act was justified. This was on the basis that the decisions relate to the management of the national economy, do not directly affect the interests of individuals, and are likely to be most appropriately resolved in the High Court.

It is therefore not appropriate for decisions that have such high political content in relation to the management of the economy to be subject to merits review or judicial review under the ADJR Act. These decisions would likely be more appropriately resolved by the High Court. This is consistent with the principle stated in the Review.

### **Committee comment**

2.10 The committee thanks the Assistant Treasurer for this response, and notes the advice that exemption decisions relating economic infrastructure facilities are not considered suitable for review under the ADJR Act as they involve complex questions of government policy, may have broad-ranging implications, and relate to the management of the national economy. The committee notes the advice that such decisions would be more appropriately resolved in the High Court.

2.11 In this regard, the committee also notes the Assistant Treasurer's advice that, in its *Federal Judicial Review in Australia* report, the Administrative Review Council (the Council) considered that excluding decisions by the Finance Minister to issue money out of the Consolidated Revenue Fund (CRF) from review under the ADJR Act was justified. The committee notes the advice that this was because such decisions relate to the management of the national economy, do not directly affect the interests of individuals, and are most appropriately resolved in the High Court.

2.12 However, the committee notes that while the Council's report states that it may be appropriate to exclude decisions relating to the management of the national economy from judicial review, it also states that exemptions of this type will be rare.<sup>7</sup> In this regard, it is not apparent to the committee that exemption decisions relating

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7 Administrative Review Council, *Federal Judicial Review in Australia* (September 2012), pp. 104-105.

to economic infrastructure facilities are of the same nature as decisions to issue money out of the CRF, such as would justify excluding judicial review under the ADJR Act on the grounds set out in the Council's report.

2.13 Further, given that judicial review under the *Judiciary Act 1903* (Judiciary Act) remains available for decisions relating to exemptions for economic infrastructure facilities, it is unclear why it is considered appropriate to exclude such decisions from review under the ADJR Act. In this regard, the committee notes that the Council's report states that it may be appropriate to exclude judicial review under the ADJR Act where review is *not* available under section 39B of the Judiciary Act—on the basis that certain decisions may be most appropriately heard by the High Court in the first instance.<sup>8</sup> However, the committee notes that both the Judiciary Act and the ADJR Act confer jurisdiction on the Federal Court. Moreover, the jurisdiction granted to the Federal Court under the ADJR Act, like that granted by section 39B of the Judiciary Act, does not enable decisions to be reviewed on their merits. In both jurisdictions, the Federal Court may only issue a remedy if an error of law is identified.

2.14 The committee also reiterates that the ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that may arise in applications for judicial review under alternative jurisdictional bases (principally, section 39B of the Judiciary Act), and provides for the right to reasons in some circumstances. The committee considers that, from a scrutiny perspective, exclusions from the ADJR Act should be avoided.

**2.15 The committee requests that the key information provided by the Assistant Treasurer be included in the explanatory memorandum, noting the importance of that 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*).**

**2.16 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of excluding decisions relating to exemptions for economic infrastructure facilities from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.**

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8 Administrative Review Council, *Federal Judicial Review in Australia* (September 2012), pp. 104-105.

## Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018

<b>Purpose</b>	<p>This bill seeks to amend various Acts in relation to taxation to:</p> <ul style="list-style-type: none"> <li>• amend the Research and Development (R &amp; D) Tax Incentive to encourage firms to increase the proportion of additional R &amp; D expenditure;</li> <li>• ensure that R &amp; D claimants are unable to inappropriately obtain a tax benefit from the program and that R &amp; D offsets are recouped appropriately;</li> <li>• amend the guidance framework to provide certainty to applicants and streamline administration processes;</li> <li>• amend the capitalisation rules to entities;</li> <li>• ensure that offshore sellers of Australian hotel accommodation calculate their GST turnover in the same way as local sellers from 1 July 2019;</li> <li>• remove luxury car tax liability on cars re-imported into Australia following service, repair or refurbishment overseas from 1 January 2019; and</li> <li>• amend the definition of significant global entity</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 20 September 2018
<b>Bill status</b>	Before the House of Representatives

### Retrospective application<sup>9</sup>

2.17 In [Scrutiny Digest 12 of 2018](#)<sup>10</sup> the committee requested the Assistant Treasurer's advice as to why it is necessary to retrospectively apply proposed amendments under Schedules 1 and 2 to income years commencing on or after 1 July 2018, or to tax benefits derived on or after 1 July 2018, and whether any persons would be detrimentally affected by the retrospective application.

9 Schedule 1, item 17 and Schedule 2, item 56. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2018*, at pp. 56-57.

**Assistant Treasurer's response**<sup>11</sup>**2.18 The Assistant Treasurer advised:**

The Government's reforms to the Research and Development Tax Incentive will better target the program, and improve its effectiveness, integrity and fiscal affordability.

The reforms were announced on 8 May 2018 as part of the 2018-19 Budget in response to the 2016 Review of the R&D Tax Incentive. The reforms generally apply to income years commencing on or after 1 July 2018. Affected taxpayers were aware of the reforms and the potential impact the reforms would have on the scope of the program from the date of the Budget announcement. An Exposure Draft of the legislation implementing the reforms was also released for public consultation prior to the 1 July 2018 application date.

While the reforms may be important considerations for some taxpayers from 1 July 2018, taxpayers will only be expected to register for the program and lodge income tax returns under the reforms following the end of the income year, from 1 July 2019.

The reforms also amend the General Anti-Avoidance Rule contained in Part IVA of the *Income Tax Assessment Act 1936* to ensure the Commissioner can deny inappropriate tax benefits taxpayers may seek to obtain from the program by entering into artificial or contrived arrangements. These integrity amendments apply to tax benefits derived from 1 July 2018, including where the tax avoidance schemes were entered into prior to that date. This is appropriate because tax avoidance schemes operate contrary to the intention of the current law.

**Committee comment**

2.19 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that, as the proposed reforms to the Research and Development Tax Incentive were announced as part of the 2018-19 budget on 8 May 2018 and generally apply to income years commencing on or after 1 July 2018, affected taxpayers were aware of the reforms and their potential impact on the scope of the incentive program prior to the proposed application date and an exposure draft of the legislation was released for consultation prior to 1 July 2018. The committee also notes the Assistant Treasurer's advice that, while the reforms will be important considerations for some taxpayers from 1 July 2018, these taxpayers will not register for the program and lodge tax returns under the reforms until 1 July 2019. Finally, the committee notes the Assistant Treasurer's advice that it

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11 The Assistant Treasurer responded to the committee's comments in a letter dated 29 October 2018. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2018* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest)

is appropriate to apply the proposed reforms to the general anti-avoidance rule in Part IVA of the *Income Tax Assessment Act 1936* to tax benefits derived from 1 July 2018, including where a tax avoidance scheme was entered into prior to this date, because tax avoidance schemes operate contrary to the intention of the current law.

2.20 In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.

2.21 However, in outlining scrutiny issues around this matter previously, the committee has been prepared to accept that some amendments may have some retrospective effect when the legislation is introduced if this has been limited to the introduction of a bill within six calendar months after the date of that announcement. In fact, where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 44). The committee also notes that those likely to be affected by these reforms are large research and development entities and not individuals.

**2.22 The committee requests that the key information provided by the Assistant 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*).**

**2.23 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>12</sup>**

2.24 In [Scrutiny Digest 12 of 2018](#)<sup>13</sup> the committee considered that it may be appropriate to amend the bill to require that the Innovation and Science Australia Board (the Board), or a committee appointed to advise the Board, be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated, and requested the Assistant Treasurer's advice in relation to this matter.

### ***Assistant Treasurer's response***

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12 Schedule 3, items 18 and 19. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest No. 12 of 2018*, at pp.57-58.

2.25 The Assistant Treasurer advised:

Schedule 3 to the Bill allows the Board of ISA and its committees to delegate their functions to members of the Australian Public Service assisting the Board. This expands the existing delegation power that authorises the Board to delegate to Senior Executive Service employees only.

I note the Committee considers it may be appropriate to require ISA to be satisfied of a person's expertise before delegating a function.

ISA is authorised to approve delegations under the existing legislation and satisfies itself that persons performing delegated functions have the expertise appropriate to the function delegated as part of its approval processes. It is proposed that functions delegated under the amended powers include high-volume, low-risk functions such as granting extensions of time to submit applications and requesting information on an application.

I do not consider that an amendment is necessary or would contribute to the effective administration of the program in light of ISA's existing and proposed processes that support delegations.

***Committee comment***

2.26 The committee thanks the Assistant Treasurer for this response and notes the advice that the Board, when exercising its current powers to delegate functions or powers to Senior Executive Service employees, satisfies itself that persons performing delegated functions or powers have appropriate expertise as part of its approval processes. The committee also notes the Assistant Treasurer's advice that he does not consider that an amendment is necessary or would contribute to the administration of the program in light of the board's existing and proposed delegation processes.

2.27 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 advice as to how the Board currently exercises its delegation powers in relation to Senior Executive Service employees, it reiterates that the proposed amendments would expand the scope of employees to whom powers and functions can be delegated to include members of staff at *any* level and that there is nothing on the face of the bill to require the Board to be satisfied such employees have expertise appropriate to the function or power delegated. It remains unclear to the committee why it would not be appropriate to amend the bill to require that the Board be satisfied that delegates have appropriate expertise, given the Assistant Treasurer's advice that the existing and proposed administrative processes of the Board are designed to ensure this is the case in any event.

**2.28** The committee requests that the key information provided by the Assistant 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*).

**2.29** The committee considers it would be appropriate to amend the bill so as to require that the Innovation and Science Australia Board, or a committee appointed to advise the Board, be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.

**2.30** The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of permitting the Innovation and Science Australia Board to delegate its functions and powers to staff members at any level with no legislative requirement that they have expertise appropriate to the function or power delegated.

## 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 draws the following bill to the attention of Senators:

- **National Housing Finance and Investment Corporation Amendment Bill 2018**—Schedule 1, item 1, proposed section 47A.

**Senator John Williams**  
**Acting 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](#).

