

The Senate

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Standing  
Committee for the  
Scrutiny of Bills

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# Terms of Reference

## Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.



# 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 in relation to:

- whether it unduly trespasses on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient 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 often correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. 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 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 Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017**

#### **Purpose**

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

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

	<ul style="list-style-type: none"> <li>• provide the Minister with the discretion to revoke a person's Australian citizenship under certain circumstances;</li> <li>• enable the Minister to make a legislative instrument under certain circumstances in relation to acquiring Australian citizenship;</li> <li>• modify provisions relating to the scope of the Minister's discretion for residence requirements for spouses and de facto partners of Australian citizens, and spouses or de facto partners of deceased Australian citizens;</li> <li>• provide for the discretionary cancellation of approval of Australian citizenship under certain circumstances</li> <li>• provide the Minister with the power to set aside decisions of the Administrative Appeals Tribunal concerning character and identity;</li> <li>• modify provisions relating to access to merits review for conferral applicants under 18 years of age;</li> <li>• provide that certain personal decisions made by the Minister are not subject to merits review;</li> <li>• allow the Minister, the Secretary or an officer to use and disclose personal information obtained under the Citizenship Act; and</li> <li>• make certain consequential amendments</li> </ul>
<b>Portfolio</b>	Immigration and Border Protection
<b>Introduced</b>	House of Representatives on 15 June 2017
<b>Scrutiny principles</b>	Standing Order 24(1)(a)(i), (ii), (iii) and (iv)

1.2 The committee commented on a number of the measures in this bill when it considered the Australian Citizenship and Other Legislation Amendment Bill 2014 (the 2014 bill) in the previous Parliament.<sup>1</sup> The committee takes the opportunity to reiterate the relevant comments below and make some additional comments.

### **Broad discretionary power and broad delegation of legislative power<sup>2</sup>**

1.3 Proposed paragraph 21(2)(fa) adds a criterion to the general eligibility criteria for Australian citizenship by conferral. The new criterion is that the Minister must be satisfied that the person 'has integrated into the Australian community'. Item 53 would introduce a power for the Minister to determine, by legislative

1 See the committee's *Seventeenth Report of 2014*, pp 1029-1055 and the *Fifth Report of 2015*, pp 311-313.

2 Schedule 1, items 43 and 53. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(ii) and (iv) of the committee's terms of reference.

instrument, the matters to which the Minister may or must have regard to when determining whether a person has integrated into the Australian community.<sup>3</sup>

1.4 The explanatory memorandum provides examples of the type of matters the Minister may determine that regard may be had to, including:

a person's employment status, study being undertaken by the person, the person's involvement with community groups, the school participation of the person's children, or, adversely, the person's criminality or conduct that is inconsistent with the Australian values to which they committed throughout their application process.<sup>4</sup>

1.5 The question of whether a person has integrated into the Australian community is a matter about which there may reasonable disagreement. The concept of integration in this context is imprecise and matters relevant to understanding integration (even if these are agreed) will inevitably raise questions of degree. The combined effect of these provisions is to delegate to the Minister a large discretionary power to determine whether or not the proposed new criterion has been met by an applicant.

1.6 The committee also notes that there is no requirement that a legislative instrument must be made to guide the exercise of the Minister's judgment in reaching a conclusion about whether an applicant has sufficiently integrated into the Australian community.

**1.7 From a scrutiny perspective, the committee considers that the matters relevant to determining whether a person has integrated into the Australian community is a substantive policy question and not technical detail, and as such, are not appropriate for broad delegation to the executive branch of government. The committee therefore suggests that, if the addition of this new eligibility criterion is deemed necessary, it may be appropriate for the bill to be amended to provide guidance in the primary legislation as to what is meant by the phrase 'has integrated into the Australian community' and how this criterion should be applied. At a minimum, it is suggested that it may be appropriate that there be a requirement in the bill that the Minister *must* make a disallowable legislative instrument to guide the exercise of this power prior to it being exercised. The committee requests the Minister's response in relation to these matters.**

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3 See item 53, proposed paragraph 21(9)(e).

4 Explanatory memorandum, p. 27.

## Broad delegation of legislative power<sup>5</sup>

1.8 Item 41 seeks to amend the *Australian Citizenship Act 2007* (Citizenship Act) so that instead of the Minister being satisfied that an applicant for citizenship 'possesses a basic knowledge of the English language' it would require that the Minister be satisfied that the person 'has competent English'. Item 53, proposed paragraph 21(9)(a), provides that the Minister may make a legislative instrument that determines the circumstances in which a person has 'competent English'.

1.9 While the question of whether a person possesses 'competent English' may appear to be a matter of technical detail, from a scrutiny perspective, the committee considers it is difficult to separate the technical issues from broader policy questions that should more appropriately be determined by Parliament than by ministerial determination. Competence in a particular skill is a question that can only be judged by reference to the purpose for which the skill is required. Whereas determination of English language competency, for example, for university studies may be based on evidence and clear requirements intrinsic to particular studies, the same cannot be said in relation to citizenship. Put differently, the level of English language ability a new member of the Australian community who wishes to become an Australian citizen should possess, is affected by subjective values rather than an assessment of technical requirements.

1.10 The explanatory memorandum does not provide any detail as to the level of English that will be considered to constitute 'competent' English. It states that the determination will enable the Minister to determine, for example, 'that a person has competent English where the person has sat an examination administered by a particular entity and the person achieved at least a particular score'.<sup>6</sup> It also states that this amendment:

reflects the Government's position that English language proficiency is essential for economic participation and promotes integration into the Australian community. It is an important creator of social cohesion and is essential to experiencing economic and social success in Australia.<sup>7</sup>

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5 Schedule 1, items 41 and 53 (proposed paragraph 21(9)(a)). The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) of the committee's terms of reference

6 Explanatory memorandum, p. 26.

7 Explanatory memorandum, p. 27.

**1.11 Noting that regulation making powers can be used to fine tune and supplement legislatively set schemes, the committee requests the Minister's detailed justification as to why the primary legislation should not contain more detail about what constitutes 'competent English', and requests the Minister's advice as to the level of English it is anticipated an applicant will be required to demonstrate that their English is 'competent'.**

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### **Restriction on judicial review<sup>8</sup>**

1.12 Proposed section 22AA seeks to confer a new personal, non-compellable power on the Minister to waive the general residence requirement where the Minister is satisfied either that:

- (a) an administrative error made by or on behalf of the Commonwealth causes an applicant to believe that he or she was an Australian citizen, and the error contributed to the applicant not being able to satisfy the residence requirement; or
- (b) that it is in the public interest to do so.

1.13 However, proposed subsection 22AA(4) makes it clear that the Minister has no duty to even consider whether or not to exercise this power, in any circumstance.

1.14 '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. Even where a decision has been made to consider the exercise of the power, some judicial review remedies will not be available.<sup>9</sup>

1.15 The explanatory memorandum does not explain why subsection 22AA(4) has been included, other than to say that it makes it clear that subsection 22AA(1) does not impose a duty on the Minister and the power is purely discretionary.

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8 Schedule 1, item 68, proposed subsection 22AA(4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

9 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.

**1.16 The committee considers that provisions that provide that a Minister has no duty to exercise a statutory power should be thoroughly justified. Noting that the appropriateness of this clause may differ depending on the purpose for which the power may be exercised (that is, administrative error or the public interest), the committee requests the Minister's explanation as to why proposed subsection 22AA(4) is considered necessary and appropriate.**

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### **Broad discretionary power—citizenship revoked if requirements of Act not met<sup>10</sup>**

1.17 Proposed section 33A gives the Minister the discretion to revoke the citizenship of a person who had been registered as an Australian citizen by descent. The Minister is required to be satisfied that the approval should not have been given to register that person's citizenship on the basis that the requirements of the Citizenship Act had not been met. The requirements for citizenship by descent include the requirement in paragraph 16(2)(c) of the Citizenship Act that a person is of good character at the time they are approved for registration. This proposed amendment enables the Minister to revoke citizenship if the Minister later becomes satisfied that the person was in fact not of good character at the time they were registered as a citizen by descent. Proposed subsection 33A(3) provides that a person who has their citizenship revoked under section 33A ceases to be an Australian citizen at the time of revocation.

1.18 The explanatory memorandum justifies the discretionary nature of the Minister's power under the proposed section on the basis that it enables the Minister to take into account the particular circumstances of a person's case, such as the length of time that the person has been a citizen and the seriousness of any character concerns.<sup>11</sup>

1.19 However, the committee notes that there is no time limit placed on the use of the Minister's discretionary power to revoke the citizenship of a citizen by descent. Further, if the decision was made personally by the Minister, merits review of the decision would not be available.<sup>12</sup>

1.20 When the committee considered an identical provision to this in the 2014 bill, the committee sought the then Minister's advice as to whether consideration had been given to placing a time limit on the exercise of the power. The response previously provided to the committee stated, among other things:

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10 Schedule 1, item 111, proposed section 33A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

11 Explanatory memorandum, p. 49.

12 See item 126.

It is not necessary to place a time limit on the exercise of the power because the discretionary nature of the decision means that issues such as the length of time that the person has been a citizen, and the seriousness of any character concerns, would be taken into account. In addition, the revocation would take effect from the time of decision on revocation rather than from the date of the decision to approve the person becoming an Australian citizen. This means that the person's status in the intervening period will not alter.<sup>13</sup>

1.21 However, the committee notes that while it is possible that the length of time that a person has been a citizen may be taken into account by the Minister when considering revoking citizenship, there is no requirement that the Minister take this into account.

**1.22 The committee has scrutiny concerns about conferring a non-time limited broad discretionary power on the Minister to cancel a person's citizenship on the basis that when citizenship was granted the person was not of good character (proposed section 33A). The committee's scrutiny concerns are heightened by the fact that merits review is not available in relation to decisions made personally by the Minister.**

**1.23 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of this broad discretionary power.**

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### **Broad discretionary power—citizenship revoked for fraud or misrepresentation<sup>14</sup>**

1.24 Proposed section 34AA gives the Minister the discretion to revoke a person's citizenship in circumstances where the Minister is satisfied that the person became an Australian citizen as a result of fraud or misrepresentation. The fraud or misrepresentation may be associated with a person's entry to Australia, the grant of a visa or the approval of citizenship. Paragraph 34AA(1)(c) provides that the Minister must also be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

1.25 The committee notes that proposed subsection 34AA(2) provides that the fraud or misrepresentation need not have constituted an offence by any person and may have been committed by *any person* (i.e. it need not have been committed by the person whose citizenship may be revoked). The revocation power can be

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13 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2014*, at pp 1031-1032.

14 Schedule 1, item 113, proposed section 34AA. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

exercised if the fraud or misrepresentation occurred during the period of 10 years before the day of revocation.

1.26 Under the proposed amendments, the fraud or misrepresentation need not be established by a court and, in some instances, is not subject to merits review. The question of whether fraud or misrepresentation has been established is left entirely to the Minister or his or her delegate's 'satisfaction'. In relation to decisions made personally by the Minister (which are not subject to merits review)<sup>15</sup> this means factual errors about the existence of fraud or misrepresentation could only be challenged by way of judicial review. However, as an error of fact (even a serious error) is not, in and of itself, an error of law, the availability of judicial review would not address this concern.

1.27 In addition, the power may be exercised even if the person whose citizenship is revoked is not responsible for the fraud or misrepresentation. The explanatory memorandum suggests that as 'the power to revoke...is discretionary, it will be open to the Minister to consider arguments that the person was unaware of the fraud or misrepresentation in deciding whether to revoke their Australian citizenship'.<sup>16</sup> However, the committee notes that the power is framed as a broad discretion and there are no express constraints in the legislation which would prevent the revocation of citizenship in these circumstances. These scrutiny concerns are heightened by the fact that the power may be exercised for up to 10 years after the wrongdoing occurred (even if the citizen was not responsible for that wrongdoing).

1.28 When the committee considered an identical provision to this in the 2014 bill the committee previously requested the then Minister's advice as to the appropriateness of the 10 year period, and why it was not possible for merits review to, at a minimum, be available in relation to findings that a person became an Australian citizen as a result of fraud or misrepresentation.

1.29 The response previously provided to the committee advised that the discretionary power to revoke a person's citizenship due to fraud or misrepresentation aligns with community expectations about the government's role in upholding the integrity of the Australian citizenship programme. The response further stated:

The proposed standard of decision making is that the Minister must be satisfied that fraud or misrepresentation has occurred. This means that the Minister must be *actually persuaded* of the occurrence or existence of the fraud or misrepresentation to attain the requisite level of satisfaction. Given that there are serious consequences attached to the decision to revoke citizenship, the Minister's satisfaction must be based on findings or

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15 See item 126.

16 Explanatory memorandum, p. 50.

inferences of fact that are supported by probative material or logical grounds.<sup>17</sup>

1.30 The committee notes that the above justification has been incorporated in the explanatory memorandum.<sup>18</sup>

1.31 Regarding the appropriateness of the 10 year period, the response previously provided to the committee noted that this period was 'considered to be an appropriate safeguard when moving from revocation based on criminal conviction to revocation based on Ministerial satisfaction'. In relation to concerns raised by the committee regarding the absence of merits review for persons affected by the proposed section, the response noted that any decision made personally by the Minister to revoke a person's citizenship would be subject to judicial review.

1.32 The committee notes that access to judicial review does not alleviate the committee's scrutiny concerns as the extent of review available under judicial review is not the same as that available under merits review; including that judicial review does not allow the courts to review for all errors of fact or allow the courts to consider whether a persuasive case has been made for the making of the decision under review.

**1.33 The committee retains scrutiny concerns over the broad discretionary power granted to the Minister in proposed section 34AA to cancel a person's citizenship on the basis of fraud or misrepresentation, particularly in light of:**

- **the significance of the impact of the exercise of this discretionary power on affected individuals;**
- **the fact that the affected person need not have been responsible for the fraud or misrepresentation;**
- **that the fraud or misrepresentation need not be established by a court but is left entirely to the Minister or his or her delegate's 'satisfaction';**
- **that the power may be used up to 10 years after the grant of citizenship;**  
**and**
- **the absence of merits review in relation to decisions made personally by the Minister.**

**1.34 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of this broad discretionary power.**

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17 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2014*, at pp 1034-1035.

18 Explanatory memorandum, p. 50.

### **Exemption from disallowance—Australian Values Statement<sup>19</sup>**

1.35 Proposed subsections 46(5) and 46(6) provides that the Minister may determine an Australian Values Statement and any requirements relating to that statement, but that such a determination is not subject to disallowance under the *Legislation Act 2003*. The committee has consistently taken the view that removing parliamentary oversight is a serious matter and any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum.

1.36 In this instance, the explanatory memorandum states:

Like the Australian Values Statement made for the Migration Regulations, the instrument made under new subsection 46(5) to determine the Australian Values Statement is exempt from disallowance because it concerns matters which should be under Executive control. The instrument provides the wording of the Australian Values Statement that an applicant must sign to make a valid application for citizenship. This aligns with the process for a visa application under the Migration Act which many applicants will have already signed as part of their visa application process. Australian citizenship is core Government policy and aligns with national identity and as such matters going directly to the substance of citizenship policy such as Australian Values should be under Executive control, to provide certainty for applicants and to ensure that the Government's intended policy is upheld in its application.<sup>20</sup>

1.37 The committee also notes that item 42 seeks to amend section 21 of the Citizenship Act to make it an eligibility requirement that the applicant has 'adequate knowledge of Australia's values'. It is unclear whether the Australian Values Statement, to be determined by a non-disallowable legislative instrument, will be considered as part of the determination as to what constitutes 'Australia's values'.

**1.38 The committee notes that the explanatory memorandum states that Australian values are matters that go 'directly to the substance of citizenship policy'. The committee considers that matters that go directly to the substance of a policy would appear to be matters that are appropriate for parliamentary oversight.**

**1.39 The committee also notes that the explanatory memorandum states that putting the determination of the Australian Values Statement under Executive control provides certainty to applicants. The committee notes that certainty could be provided as to what constitutes Australian values by increasing parliamentary oversight of this matter, rather than including this in a legislative instrument and**

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19 Schedule 1, item 119, proposed subsections 46(5) and 46(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

20 Explanatory memorandum, p. 53.

exempting it from disallowance altogether. The committee observes that it would be possible to provide for such increased scrutiny in ways that would ensure the definition was not subject to unexpected change, for example by:

- including at least core 'Australian values' in the primary legislation;
- requiring the positive approval of each House of the Parliament before the instrument comes into effect;<sup>21</sup>
- providing that the instrument does not come into effect until the relevant disallowance period has expired;<sup>22</sup> or
- a combination of these processes.<sup>23</sup>

**1.40** Noting the importance of appropriate parliamentary scrutiny, the committee requests the Minister's further justification for exempting from disallowance a determination setting out an Australian Values Statement, and the Minister's response to the committee's suggestions set out above at paragraph [1.39].

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### **Exclusion of merits review—personal decision of Minister<sup>24</sup>**

1.41 Item 126 proposes to introduce a new subsection 52(4) to provide that citizenship decisions which are generally reviewable by the Administrative Appeals Tribunal (AAT) will not be reviewable where the decision is made by the Minister personally and the Minister has issued a notice under section 47 that includes a statement that the Minister is satisfied that the decision was made in the public interest.

1.42 In justifying the exclusion of decisions made by the Minister personally in these circumstances, the explanatory memorandum states:

As an elected Member of Parliament, the Minister represents the Australian community and has a particular insight into Australian community standards and values and what is in Australia's public interest.

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21 See, for example, section 10B of the *Health Insurance Act 1973*.

22 See, for example, section 79 of the *Public Governance, Performance and Accountability Act 2013*.

23 See, for example, section 198AB of the *Migration Act 1958* and sections 45-20 and 50-20 of the *Australian Charities and Not-for-profits Commission Act 2012*. However, the committee considers that any modified disallowance procedures should still retain the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003*—that is, that instruments are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period.

24 Schedule 1, item 126, proposed subsection 52(4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

As such, it is not appropriate for an unelected administrative tribunal to review such a personal decision of a Minister on the basis of merit, when that decision is made in the public interest. As a matter of practice it is expected that only appropriate cases will be brought to the Minister's personal attention, so that merits review is not excluded as a matter of course.<sup>25</sup>

1.43 Further, the explanatory memorandum states that the person is still able to seek judicial review of these decisions and the proposal would bring the exclusion of personal decisions of the Minister from merits review more in line with similar provisions under the *Migration Act 1958*.

1.44 The committee reiterates its view set out above at paragraph [1.32] that it does not consider the availability of judicial review to be a factor that justifies the exclusion of merits review.

1.45 The committee notes that although there are general policy questions that may arise in relation to making a decision on citizenship, for example in applying 'good character' requirements, any explicit government policy developed to guide decision-making in these areas would be considered by the AAT in making its decision.<sup>26</sup> As such, the Minister's role in 'representing the Australian community' could be pursued through the development of applicable policy to guide the exercise of these powers.

1.46 The committee notes that errors may occur in some decisions as to a question of fact or law, and review of these sorts of questions (e.g. whether there was a misrepresentation) would not require the AAT to second-guess judgments about what the public interest requires. The committee notes that this raises a more general question as to why all aspects of decisions made personally by the Minister should be excluded from review. For example, it would be possible to give the AAT the power to review whether there are grounds to be satisfied that fraud or misrepresentation resulted in a person becoming an Australian citizen, but not to determine whether it would be 'contrary to the public interest for the person to remain an Australian citizen'.<sup>27</sup>

1.47 As such, when the committee previously considered an identical provision to this in the 2014 bill, it sought the then Minister's justification as to why exclusion of merits review was appropriate. The response previously provided to the committee explained that the exclusion of decisions personally made by the Minister aligns with 'similar provisions involving personal decisions of the Minister under the Migration

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25 Explanatory memorandum, p. 55.

26 To avoid any doubt about this it would be possible for the legislation to be amended to require the AAT to apply any relevant general policy positions on issues relevant to the application of requirements that have a public interest dimension.

27 See item 113, proposed paragraph 34AA(1)(c).

Act', and that 'the Citizenship Act itself has a precedent for non-reviewable personal decisions of the Minister, being paragraph 52(3)(b)'.<sup>28</sup>

1.48 The committee remains of the view that the existence of similar legislative provisions is not, of itself, a sufficient precedent that justifies the proposed amendment.

**1.49 The committee considers that discretionary powers which have a direct and immediate effect on personal rights and interests should, in principle, be subject to merits review. The committee does not consider that a conclusion that a decision has been made in the public interest is, in itself, sufficient to exclude merits review, where decisions have the capacity to directly impact on significant individual interests.**

**1.50 In this respect the committee reiterates that the Administrative Appeals Tribunal would routinely apply government policy on public interest considerations. For these reasons the committee retains its scrutiny concerns that personal powers exercised to determine individual cases on the basis of unspecified references to the 'public interest' may have the effect of undermining administrative justice unless accompanied by merits review.**

**1.51 Finally, as previously noted, if merits review is to be excluded, the committee is of the view that a justification for excluding merits review should be made in relation to each separate decision-making power and the particular elements of those powers.**

**1.52 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of excluding merits review in these circumstances.**

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### **Merits review—power to set aside Tribunal decisions<sup>29</sup>**

1.53 Proposed section 52A provides the Minister with a power to set aside certain decisions of the AAT if the Minister is satisfied that it would be in the public interest to do so. The power applies in relation to decisions to refuse to approve, or to cancel an approval for citizenship, where the original decision-maker was not satisfied that the person was of good character or was not satisfied of the identity of the person, and the AAT set the decision aside on review. It does not apply to decisions made to revoke citizenship. Subsection 52A(2) provides that the power may only be exercised by the Minister personally.

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28 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2014*, at p. 1041.

29 Schedule 1, item 127, proposed section 52A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

1.54 In justifying this provision the explanatory memorandum points to three significant decisions by the AAT which it is suggested are 'outside community standards' and three others in which people have been found to be of 'good character despite having committed domestic violence offences'.<sup>30</sup> The explanatory memorandum also notes that there 'is the potential for some decisions made by the AAT on identity grounds to pose a risk to the integrity of the citizenship programme'.<sup>31</sup>

1.55 The explanatory memorandum also states that while guidance will continue to be provided and updated as appropriate to reflect government policy in relation to community standards and other matters, the potential remains for AAT decisions to be made which are inconsistent with such policies.<sup>32</sup> Although it may be accepted that the government has a legitimate interest in aligning citizenship decisions with community standards, the committee considers this must be balanced with community expectations relating to the integrity of the system of independent merits review. The availability of merits review in relation to decisions which may adversely affect important individual interests can be thought of as an essential part of the Australian administrative justice system. As such, aligning decisions with the Minister's view of community standards in individual cases is not the only consideration relevant to assessing the justification of the proposed power to override AAT determinations.

1.56 Any system of independent merits review runs the risk that a tribunal may reverse a decision preferred by the original decision-maker or the Minister. However, overriding a decision by an independent decision-maker poses a risk to community perceptions about the availability of independent merits review and the risk that individual cases may be unduly influenced by political considerations. The AAT has long accepted that it will not depart from government policy unless there are 'cogent reasons' against its application in the individual circumstances of a case, especially in cases where the policy has been exposed to parliamentary scrutiny.<sup>33</sup> While this does not guarantee in rare instances clear government policy will not be applied, it does suggest that such cases will, in relative terms, be few.

1.57 The committee previously considered a substantially similar provision to this in the 2014 bill and sought and considered a short advice provided to it.<sup>34</sup>

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30 Explanatory memorandum, p. 55.

31 Explanatory memorandum, p. 55.

32 Explanatory memorandum, p. 55.

33 See *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

34 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2014*, at pp 1043-1044.

**1.58** The committee retains scrutiny concerns about the appropriateness of enabling the Minister to set aside a decision of the Administrative Appeals Tribunal in individual cases. The committee considers such a power may undermine the integrity of the system of independent merits review. The committee therefore considers it may be more appropriate to clarify government policy on the matters referred to in proposed section 52A, to which the Tribunal would need to have regard to, rather than overriding outcomes in individual cases.

**1.59** The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of enabling the Minister to set aside decisions made by an independent Tribunal.

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### **Broad instrument-making power<sup>35</sup>**

1.60 Proposed subsection 54(2), provides that the regulations (not the primary Act) may confer on the Minister the power to make a legislative instrument. In effect, this gives the Minister the power to specify instruments in writing under the *Australian Citizenship Regulations 2016* (the Regulations). The explanatory memorandum states that the purpose of the amendment is to enable the Minister to make legislative instruments that include, but will not be limited to, the payment of citizenship application fees in foreign currencies and foreign countries.<sup>36</sup>

1.61 In effect this confers a broad power for further delegated legislation to be made under the Regulations. The explanatory memorandum justifies this as follows:

It is appropriate for this instrument making power to be in the Regulation because it is the Regulation which addresses issues such as setting the fees to accompany citizenship applications (see Regulation 16). Parliamentary scrutiny would be maintained because the legislative instrument would be disallowable.<sup>37</sup>

1.62 The committee notes that while the use of delegated legislation in technical and established circumstances (such as the payment of fees) is not controversial, it is unusual for primary legislation to provide for the making of a regulation which, in turn, provides a Minister with a wide power to make further delegated legislation for unspecified purposes.

1.63 The committee previously considered an identical provision to this in the 2014 bill and sought the Minister's advice as to why an appropriately described power to make delegated legislation could not be included in the primary Act. The

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35 Schedule 1, item 130, proposed subsection 54(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

36 Explanatory memorandum, p. 59.

37 Explanatory memorandum, p. 59.

response previously provided to the committee stated that while it would be possible to limit the Minister's power to make further delegated legislation to specified matters in the Citizenship Act, it was not necessary to do so as the (now) *Legislation Act 2003* provides that any instrument made under the Regulations would be read so as not to exceed the authorising powers in the Act and the Regulations.<sup>38</sup>

**1.64 The committee does not consider that the broad power in proposed subsection 54(2) to make further delegated legislation is necessary. The committee considers it would be more appropriate to constrain the power to make further delegated legislation to the purposes for which it is directly intended, rather than leaving it to be assessed against the broader scope of the bill.**

**1.65 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of giving the Minister the power to make further delegated legislation for unspecified purposes.**

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### **Retrospective application—citizenship by birth<sup>39</sup>**

1.66 Paragraph 12(1)(b) of the Citizenship Act currently provides that a person born in Australia is an Australian citizen if the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born. In effect this means that a child born in Australia will automatically become an Australian citizen once they turn 10 (if they lived in Australia their whole life), even if their parents are not Australian citizens.

1.67 Proposed subsections 12(4) and 12(5) provide that a person born in Australia can no longer acquire citizenship by birth automatically on the basis of being ordinarily resident throughout the 10 year period, if at any time during that period (a) they were an unlawful non-citizen or (b) the person was outside Australia and, at that time, the person did not hold a visa permitting the person to travel to, enter and remain in Australia.

1.68 Subitem 135(2) provides that these amendments apply in relation to a 10 year period that ends on or after the commencement, whether the birth occurred before that commencement. Subitem 135(3) provides that to avoid doubt, in relation to a birth that occurs before commencement the amendments apply in relation to any part of the 10 year period, whether that part occurs before, on or after commencement.

1.69 The practical effect of these subitems is that a child who may be expecting to acquire citizenship on the basis of the existing provisions will not be able to do so,

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38 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, at pp 311-313.

39 Schedule 1, subitems 135(2) and 135(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference

even in circumstances where they are due to acquire citizenship very soon after the commencement of the provisions.

1.70 The committee previously raised concerns about the fairness of the intended purpose of the amendments when it considered an identical provision in the 2014 bill. The committee previously noted that the question of fairness arises because a person who, in some cases, may have spent a lengthy period in Australia (up to 10 years) and who reasonably expects, on the basis of the current provisions, to soon acquire citizenship, will no longer acquire citizenship if these amendments are made into law. In these circumstances the committee noted there is a risk that a person may have reasonably relied on the existing provisions on the assumption that any changes would not apply to persons born before commencement. As such, the committee sought the then Minister's advice as to why it is considered fair to apply the provisions retrospectively in relation to subsections 12(4) and (5).

1.71 Much of the response previously provided to the committee has now been included in the explanatory memorandum. The explanatory memorandum states:

It is considered fair to apply the amendments to any person who would otherwise come within the operation of existing paragraph 12(1)(b) on or after the date of commencement. While an individual may hold an expectation that at some point in the future they will benefit under the existing paragraph 12(1)(b), there is no right to citizenship in these circumstances. A person can acquire citizenship through the conferral process and a stateless person may apply for citizenship at any time under subsection 21(8) of the Act. Consequently, the amendments do not trespass unduly on personal rights; nor do the amendments impact on the individual's liberty or obligations.<sup>40</sup>

**1.72 The committee considers that under the law as it currently stands a person has a right to acquire citizenship by birth in the circumstances set out in section 12 of the Citizenship Act. A person may have spent a lengthy period in Australia (up to 10 years) and may have reasonably relied on the existing provisions on the assumption that any changes would not apply to persons born before commencement. As such, the committee considers that the application of any amendments to these provisions to births that occurred before commencement raises questions of fairness similar to those which may arise when laws retrospectively alter rights and obligations.**

**1.73 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying changes to acquiring citizenship by birth to people born before commencement of these amendments.**

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40 Explanatory memorandum, p. 64.

### **Retrospective application—applications made on or after 20 April 2017<sup>41</sup>**

1.74 Items 136, 137 and 139 provide that various provisions of the Citizenship Act, as amended by this bill, are to apply to applications made on or after 20 April 2017. This includes amendments made to introduce requirements for taking a pledge of allegiance, integrating into the Australian community, having competent (rather than basic) levels of English and changes to application requirements (particularly around the Australian Values Statement). This has the effect of applying these amendments retrospectively.

1.75 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively,<sup>42</sup> as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.76 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.77 In this case, the explanatory memorandum provides no detail as to why elements of items 136 and 137 are to apply retrospectively. In relation to item 139 the explanatory memorandum states:

The effect of this application provision is that applications made on or after 20 April 2017 which may have been made in reliance on the requirements of section 46 as it was before being amended by the Bill will not meet the application requirements set out in section 46 as amended by the Bill on and after the commencement of this item. This application provision reflects the changes to citizenship requirements that were announced by the Prime Minister and the Minister on 20 April 2017.<sup>43</sup>

1.78 Thus, the only justification given is that announcements were made on 20 April 2017 by the Executive that it was intended that legislation would be introduced into Parliament to seek to amend the citizenship laws. No detail is provided as to the number of persons likely to be adversely affected and the extent to which their interests are likely to be affected.

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41 Schedule 1, subitems 136(1), 136(2), 137(6) and item 139. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

42 Including provisions that back-date commencement to the date of the announcement of the bill or measure (i.e. 'legislation by press release').

43 Explanatory memorandum, p. 68.

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**1.79** The committee requests the Minister's detailed advice as to the number of persons likely to be affected by the proposals in items 136, 137 and 139 to apply certain amendments made by the bill retrospectively, and whether it is likely that applications may have been made on or after 20 April 2017, but before any passage of the bill, that would not meet the criteria for eligibility for citizenship as a result of the retrospective application of these amendments.

## Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend various Acts relating to broadcasting to:</p> <ul style="list-style-type: none"> <li>• amend media regulations and repeal the '75 per cent audience reach rule' and the '2 out of 3 cross-media control rule' in the <i>Broadcasting Services Act 1992</i> (BSA);</li> <li>• amend and introduce additional local programming obligations under the BSA;</li> <li>• amend the anti-siphoning scheme and the anti-siphoning notice;</li> <li>• abolish annual television and radio licence fees, and datacasting charges payable by commercial broadcasters;</li> <li>• remove apparatus taxes payable by commercial broadcasters;</li> <li>• establish tax collection and assessment arrangements for the new interim transmitter licence tax;</li> <li>• establish a statutory review of new tax arrangements in 2021 consistent with the broader review of spectrum pricing underway; and</li> <li>• establish a transitional support payment scheme for 19 commercial broadcasters</li> </ul>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	House of Representatives on 15 June 2017

*The committee has no comment on this bill.*

## Commercial Broadcasting (Tax) Bill 2017

<b>Purpose</b>	This bill seeks to introduce a tax for transmitter licences issued under section 102 of the <i>Radiocommunications Act 1992</i> that are associated with commercial broadcasting licences issued under Part 4 of the <i>Broadcasting Services Act 1992</i>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	House of Representatives on 15 June 2017
<b>Scrutiny principles</b>	Standing Order 24(1)(a)(iv) and (v)

### Significant matters in delegated legislation<sup>44</sup>

1.80 This bill seeks to introduce a tax for certain transmitter licences. The bill is complementary to provisions of the Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 which, among other things, seeks to repeal existing broadcasting licence fees and datacasting charges as well as establish collection and assessment arrangements for the proposed new transmitter licence tax.

1.81 Under the bill, the Minister may, by legislative instrument, determine the amount of tax for each individual transmitter (the 'individual transmitter amount');<sup>45</sup> however, this amount must not exceed the cap amounts specified in the bill.<sup>46</sup> The capped amount applies as a default if no determination is in force.<sup>47</sup>

1.82 In addition, the Minister may also make legislative instruments that:

- determine a specified time is the 'termination time' for the purposes of this bill (no further tax would be imposed after the 'termination time');<sup>48</sup> and
- make provision for rebates of the whole or part of an amount of tax payable by a person.<sup>49</sup>

1.83 One of the most fundamental functions of the Parliament is to levy taxation.<sup>50</sup> The committee's consistent scrutiny view is that it is for the Parliament,

44 Clauses 8, 11 and 14. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

45 Clause 8.

46 Clause 9.

47 Paragraph 8(1)(b).

48 Clause 11.

49 Clause 14.

rather than makers of delegated legislation, to set a rate of tax. In this case, the fact that a cap on the amount of tax is set in the primary legislation partly addresses the committee's scrutiny concerns. However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers.

1.84 In relation to specifying a 'termination time', the explanatory memorandum states that 'it is expected that if the Minister were to make such a determination in the future, it would be after five years of its operation, in order to transition the commercial broadcasters to a spectrum usage charging regime'.<sup>51</sup> There is, however, no provision in the bill limiting the making of a determination specifying a 'termination time' in this way.

1.85 In relation to the provision of rebates by the Minister, the explanatory memorandum states that 'it is expected that the rebates could be applied, where there is a strong policy rationale, to specified classes of transmitters or persons, or different periods'.<sup>52</sup> Again, there is no provision in the bill to guide the exercise of the Minister's power to determine rebates (for example, there are no relevant policy considerations in the bill which must be taken into account prior to making these instruments).

**1.86 Noting the determinations made under clauses 8, 11 and 14 delegate to the executive significant legislative power in relation to taxation, from a scrutiny perspective, the committee considers that it may be appropriate for these clauses to be amended to require the positive approval of each House of the Parliament before a new determination comes into effect.**<sup>53</sup>

**1.87 In relation to clauses 11 and 14, the committee suggests it may, as an alternative, be appropriate to amend these clauses to provide further guidance in relation to the exercise of these powers on the face of bill (see paragraphs [1.84]–[1.85] above).**

**1.88 The committee requests the Minister's response in relation to this matter.**

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50 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'.

51 Explanatory memorandum, p. 16.

52 Explanatory memorandum, p. 18.

53 See, for example, section 10B of the *Health Insurance Act 1973*.

## Modified disallowance procedures<sup>54</sup>

1.89 In relation to ministerial determinations of the 'individual transmitter amount' made under clause 8, the bill proposes to modify the usual commencement and disallowance procedures for these determinations in two ways.<sup>55</sup>

1.90 First, subclause 13(4) improves parliamentary oversight of these instruments by ensuring that they do not come into effect until 15 sitting days after the disallowance period has expired. The committee welcomes this modified commencement procedure.

1.91 However, subclause 13(2) seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* to require the Parliament to positively pass a resolution disallowing a determination within the 15 sitting day disallowance period in order for the disallowance to be effective.<sup>56</sup> Normally, subsection 42(2) of the *Legislation Act* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.<sup>57</sup>

1.92 Under the modified disallowance procedure proposed in subclause 13(2), if a disallowance motion is lodged, but not brought on for debate before the end of the 15 sitting day disallowance period, the relevant instrument will take effect. In practice, as the executive has significant control over the conduct of business in the Senate, there may be occasions where no time is made available to consider the disallowance motion within 15 sitting days after the motion is lodged and therefore the instrument would be able to take effect regardless of the attempt to disallow it. As a result, the proposed procedure would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days. The explanatory memorandum provides no

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54 Clauses 8 and 13. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

55 The usual commencement and disallowance procedures are contained in sections 12 and 42 of the *Legislation Act 2003*, respectively.

56 Subsection 13(5) also states that section 42 of the *Legislation Act* does not apply to the determination.

57 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14<sup>th</sup> ed, 2016), p. 445.

justification for this proposed reversal of the usual disallowance procedures in subsection 42(2) of the Legislation Act.

**1.93** Noting the significant practical impact on parliamentary scrutiny of this measure, the committee requests the Minister's detailed justification as to why it is proposed to reverse the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* so that where a motion to disallow an instrument is not resolved by the end of the disallowance period, the instrument will be taken *not* to have been disallowed and would therefore be able to come into effect.

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## Corporations Amendment (Modernisation of Members Registration) Bill 2017

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<b>Purpose</b>	This bill seeks to amend the <i>Corporations Act 2001</i> to insert an email address as information that must be contained in the register of members
<b>Sponsor</b>	Senator Nick Xenophon
<b>Introduced</b>	Senate on 15 June 2017

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*The committee has no comment on this bill.*

## Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend the <i>Environment Protection and Biodiversity Conservation Act 1999</i> to ensure that:</p> <ul style="list-style-type: none"> <li>the Commonwealth government cannot contribute funding to a railway relating to the proposed Adani coal mine via the Northern Australia Infrastructure Facility by creating a broad 'suitable person' test under the <i>Northern Australia Infrastructure Facility Act 2016</i></li> <li>environmental history, including overseas environmental history, must always be considered when approvals are given, varied, suspended, revoked or transferred; and</li> <li>an automatic review is conducted of Adani's existing environmental approvals</li> </ul>
<b>Sponsor</b>	Senator Larissa Waters
<b>Introduced</b>	Senate on 15 June 2017

*The committee has no comment on this bill.*

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## Great Barrier Reef Marine Park Amendment Bill 2017

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<b>Purpose</b>	This bill seeks to amend the <i>Great Barrier Reef Marine Park Act 1975</i> to make a technical amendment to rectify an unintended consequence of the sunseting regime established under the <i>Legislation Act 2003</i>
<b>Portfolio</b>	Environment and Energy
<b>Introduced</b>	House of Representatives on 16 June 2017

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*The committee has no comment on this bill.*

## Liquid Fuel Emergency Amendment Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Liquid Fuel Emergency Act 1984</i> to enable the Secretary of the Department of the Environment and Energy or a delegate, to enter into contracts for offshore and onshore oil stockholdings, on behalf of the Australian Government
<b>Portfolio</b>	Environment and Energy
<b>Introduced</b>	House of Representatives on 15 June 2017

*The committee has no comment on this bill.*

## Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017

<b>Purpose</b>	This bill amends various Acts relating to passports and criminal law to: <ul style="list-style-type: none"> <li>• require the Minister to deny a passport to a reportable offender when requested by a 'competent authority'; and</li> <li>• create a new Commonwealth offence for reportable offenders to travel overseas, or attempt to travel overseas, without permission from a 'competent authority'</li> </ul>
<b>Portfolio</b>	Foreign Affairs and Trade
<b>Introduced</b>	House of Representatives on 14 June 2017
<b>Bill status</b>	Passed both Houses on 20 June 2017
<b>Scrutiny principle</b>	Standing Order 24(1)(a)(i)

### Trespass on personal rights and liberties—general comment<sup>58</sup>

1.94 The bill provides that a passport must not be issued and must be cancelled where a competent authority makes a refusal or cancellation request. A request may be made in relation to a reportable offender, which means an Australian citizen whose name is entered on a child protection register of a State or Territory and who has reporting obligations in connection with that entry on the register. A 'competent authority' is defined in the *Australian Passports Act 2005* as a person with responsibility for, or powers, functions or duties in relation to, reportable offenders or a person specified in a Minister's determination as a competent authority.<sup>59</sup> The explanatory memorandum states this 'will generally be a State and/or Territory's court, sex offender registry, or police'.<sup>60</sup> The explanatory memorandum states that the purpose of the bill is to ensure reportable offenders are prevented from travelling overseas 'to sexually exploit or sexually abuse vulnerable children in overseas countries where the law enforcement framework is weaker and their activities are not monitored'.<sup>61</sup>

58 Schedule 1. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

59 Subsection 12(3) of the *Australian Passports Act 2005*.

60 Explanatory memorandum, p. 10.

61 Explanatory memorandum, p. 2.

1.95 While there is no question that the protection of children is vitally important, a number of scrutiny questions—separate to the overarching policy considerations underpinning this bill—arise around the practical exercise of this proposed power and whether the bill provides appropriate safeguards to ensure it does not unduly trespass on personal rights and liberties.<sup>62</sup>

1.96 In particular, it appears that a competent authority will not make a case-by-case assessment of each reportable offender before requesting that their passport be cancelled or not issued. The explanatory memorandum states that Commonwealth legislation already provides that a child sex offender's passport may be refused, cancelled or surrendered on the basis of a competent authority's assessment of the offender's likelihood to cause harm.<sup>63</sup> However, it goes on to say:

This process is resource intensive, being done on a case-by-case basis, and is subject to review by the Administrative Appeals Tribunal. As a result, States and Territories do not use these provisions at all. The measures in the Bill address these constraints to protect vulnerable overseas children.<sup>64</sup>

1.97 The explanatory memorandum also states that following the changes introduced by this bill the number of competent authority requests 'will rise substantially to capture the existing 20,000 registered child sex offenders and additional 2,500 offenders added to the registers each year'.<sup>65</sup> It therefore appears that it is anticipated that the competent authorities will make requests in relation to all reportable offenders without any consideration of the risk each individual poses or their individual circumstances or whether it is necessary to restrict travel entirely rather than to specific countries 'where the law enforcement framework is weaker'.<sup>66</sup>

1.98 It is also unclear what, if any, review processes are available to a person whose passport is cancelled or not issued. The bill provides that there is no merits review of a decision made by the Minister to cancel or refuse to issue a passport, as once a competent authority makes a request the Minister's decision is mandatory.<sup>67</sup> The explanatory memorandum states that where 'there are good reasons for making an exception, a competent authority will be able to permit a reportable offender to travel on a case by case basis'.<sup>68</sup> It goes on to say that a competent authority 'will be

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62 See Standing Order 24(1)(a)(i).

63 This would appear to be provided for in existing section 14 of the *Australian Passports Act 2005*.

64 Explanatory memorandum, p. 2.

65 Explanatory memorandum, p. 12.

66 Explanatory memorandum, p. 2.

67 See explanatory memorandum, p. 12.

68 Explanatory memorandum, p. 9.

able to withdraw or amend their competent authority request' where there are good reasons, such as to visit a dying family member,<sup>69</sup> and the offender 'may still seek permission from the relevant competent authority to travel overseas'.<sup>70</sup> However, no information is provided as to the processes by which a person could apply to the competent authority to seek permission to be able to travel overseas or whether there is any process for merits review of any decision that the competent authority makes.

1.99 It is also unclear from the bill and explanatory memorandum which offenders will be included as subject to having their passport cancelled or not issued. The explanatory memorandum provides no detail of which offenders are put on a State or Territory child protection register, other than to say that the bill applies to 'registered child sex offenders'.<sup>71</sup> However, the bill provides a reportable offender is one whose name is entered on a State or Territory 'child protection offender register', however described. It appears that this may include those who have been convicted of harmful, but not sexual, offences against children and offences not involving children. For example, it appears that in the Northern Territory, Queensland, Tasmania and Victoria, a person convicted of incest (which could apply in relation to adults) could be included on a child protection register.<sup>72</sup> It therefore appears that the range of offences for which a person could be included on a child protection offender register may be wider than child sex offences.

**1.100 The committee emphasises that the scrutiny questions raised by the committee are separate to the overarching policy considerations underpinning this bill. Rather, the questions relate to how this power will be exercised in practice and whether the bill provides appropriate safeguards to ensure it does not unduly trespass on personal rights and liberties.**<sup>73</sup>

**1.101 Despite the bill having passed both Houses of Parliament, the committee requests the Minister's advice as to:**

- **the process a competent authority will undertake in deciding to make a refusal/cancellation request in relation to each reportable offender, and**

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69 Explanatory memorandum, p. 10.

70 Explanatory memorandum, p. 12.

71 Explanatory memorandum, p. 2.

72 See *Child Protection (Offender Reporting and Registration) Act 2004* (Northern Territory); *Child Protection (Offender Reporting) Act 2004* (Queensland); *Community Protection (Offender Reporting) Act 2005* (Tasmania); *Sex Offenders Registration Act 2004* (Victoria). For a summary of offender registration legislation in each Australia state or territory, see: <https://aifs.gov.au/cfca/offender-registration-legislation-each-australian-state-and-territory> (accessed 15 June 2017).

73 See Standing Order 24(1)(a)(i).

- whether the competent authority will consider individual risk factors before making a request;
- the process by which a reportable offender could seek internal review by a competent authority of their decision to make a refusal/cancellation request in relation to the reportable offender (or to refuse a reportable offender's case-by-case request to travel 'for good reasons') and the availability of external merits review;
  - whether a person whose name is entered on a child protection offender register could include offenders who have not committed sexual offences against children and, if so, what is the justification for doing so; and
  - further detail as to why existing section 14 of the *Australian Passports Act 2005*, which provides that a travel document may be refused if a competent authority reasonably suspects a person would engage in harmful conduct, is not sufficient to deal with the stated concerns, noting that the committee has not generally considered resource constraints and the availability of merits review to be a sufficient justification for provisions that may unduly trespass on personal rights and liberties.

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### Reversal of evidential burden of proof<sup>74</sup>

1.102 Subsection 271A.1(1) makes it an offence for an Australian citizen, if their name is entered on a child protection offender register and the person has reporting obligations in connection with that entry on the register, to leave Australia. Proposed subsection 271A.1(3) provides an exception (an offence-specific defence) to this offence, stating that the offence does not apply if a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. The offence carries a maximum penalty of five years imprisonment.

1.103 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.

1.104 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. The committee expects any reversal of the burden of proof to be justified in the explanatory memorandum.

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74 Schedule 1, item 13, proposed subsection 271A.1(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

1.105 The explanatory memorandum states that it is reasonable that the burden of proving relevant circumstances (such as whether the defendant has permission to travel or their reporting requirements have been suspended) falls to the defendant because these circumstances 'will be within the knowledge of, and easily evidenced by, a registered child sex offender' and the circumstances 'are particularly within the knowledge of the person concerned'.<sup>75</sup> The statement of compatibility repeats these comments and states that 'it is clearly more practical for the defendant to prove that they satisfy the requirements of the defence'.<sup>76</sup>

1.106 The committee notes that the *Guide to Framing Commonwealth Offences*<sup>77</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>78</sup>

1.107 In this case, it is not apparent that matters such as whether a competent authority has given permission for the person to leave Australia or the reporting obligations being suspended at the time the person leaves Australia, are matters *peculiarly* within the defendant's knowledge, or that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

**1.108 Despite the bill having passed both Houses of Parliament, the committee requests the Minister's detailed justification as to the appropriateness of including the specified matters as an offence-specific defence. The committee suggests that it may have been appropriate if proposed subsection 271A.1(1) had been amended to provide that the offence will be committed if the person has reporting obligations that have not been suspended at the time the person leaves Australia and a competent authority has not given permission for the person to leave Australia. The committee requests the Minister's advice in relation to this matter.**

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75 Explanatory memorandum, p. 14.

76 Statement of compatibility, p. 6.

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

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

## Productivity Commission Amendment (Addressing Inequality) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Productivity Commission Act 1998</i> to: <ul style="list-style-type: none"><li>• expand the general policy guidelines for the exercise of the Productivity Commission's functions to require considerations of inequality; and</li><li>• establish a framework for the Productivity Commission to regularly report on economic inequality</li></ul>
<b>Sponsor</b>	Senator Jenny McAllister
<b>Introduced</b>	Senate on 14 June 2017

*The committee has no comment on this bill.*

## Regional Investment Corporation Bill 2017

<b>Purpose</b>	This bill seeks to establish a Regional Investment Corporation
<b>Portfolio</b>	Agriculture and Water Resources
<b>Introduced</b>	House of Representatives on 14 June 2017
<b>Scrutiny principles</b>	Standing Order 24(1)(a)(ii), (iv) and (v)

### Parliamentary scrutiny—section 96 grants to the States<sup>79</sup>

1.109 This bill seeks to establish a Regional Investment Corporation. One of the functions of the Corporation will be to administer, on behalf of the Commonwealth, financial assistance to States and Territories in relation to water infrastructure projects.<sup>80</sup> As part of this role the Corporation will:

- liaise, negotiate and cooperate with States and Territories and other parties on possible water infrastructure projects;<sup>81</sup>
- provide advice to ministers on water infrastructure projects<sup>82</sup> (for example, on matters such as feasibility, alignment of the project with government objectives for water infrastructure, as well as suitable terms and conditions for any financial assistance);<sup>83</sup>
- on direction from the relevant ministers, enter into agreements to grant financial assistance to States and Territories in relation to water infrastructure projects;<sup>84</sup> and
- review these grants periodically, including the terms and conditions on which such financial assistance is granted.<sup>85</sup>

1.110 If the Corporation is established it will be the administrator of the National Water Infrastructure Loan Facility, although the legislative provisions do not limit the Corporation's functions to the administration of this particular Facility. As a result,

79 Paragraphs 8(1)(b) and 8(1)(c), subclause 12(3), paragraph 15(1)(c), and clause 46. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(v) of the committee's terms of reference.

80 Paragraphs 8(1)(b) and 8(1)(c).

81 Subparagraph 8(1)(c)(i).

82 Subparagraph 8(1)(c)(ii).

83 Explanatory memorandum, p. 7.

84 Subparagraph 8(1)(c)(iii).

85 Subparagraph 8(1)(c)(iv).

the Corporation may administer other programs of financial assistance to States and Territories in relation to water infrastructure projects in the future.

1.111 As the explanatory memorandum notes, grants of financial assistance to the States are made under section 96 of the Constitution. The explanatory memorandum further suggests that the Corporation will undertake the administration of these financial assistance programs *on behalf of the Commonwealth* because 'the decision on whether to provide the financial assistance remains with the government, not the Corporation'.<sup>86</sup>

1.112 The committee takes this opportunity to highlight that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution.<sup>87</sup> Where the Parliament delegates this power to the executive, 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.

**1.113 Noting this, and the fact that the terms and conditions of financial assistance may be of significance to water infrastructure policy generally, the committee suggests it may be appropriate for the bill to be amended to:**

- **include at least some high-level guidance as to the types of terms and conditions that States and Territories will be required to comply with in order to receive payments of financial assistance for water infrastructure projects;**
- **include a legislative requirement that any directions made by the responsible ministers under subclause 12(3) and any agreements with the States and Territories about these grants of financial assistance are:**
  - **tabled in the Parliament within 15 sitting days after being made, and**
  - **published on the internet within 30 days after being made.**

**1.114 The committee requests the Minister's response in relation to this matter.**

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86 Explanatory memorandum, pp 6–7.

87 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'.

## Exemption from disallowance and sunseting<sup>88</sup>

1.115 Clauses 11 and 12 of the bill would allow the responsible ministers to give directions, by legislative instrument, to the Regional Investment Corporation. Clause 11 relates to directions making up the Corporation's 'Operating Mandate' and clause 12 relates to 'other directions'.

1.116 In relation to the Operating Mandate,<sup>89</sup> the explanatory memorandum states that:

The Operating Mandate has been specified in the Act to be a legislative instrument. This is because it will specify matters which are legislative in character. As a legislative instrument, the Operating Mandate is required to be registered on the Federal Register of Legislation and tabled in Parliament. This approach will also provide for transparency and accountability when the government issues directions via the Operating Mandate.

1.117 However, as the Operating Mandate is made up of directions given by a Minister to a corporate Commonwealth entity it will be a non-disallowable instrument, and will not be subject to sunseting, as it falls within relevant exemptions in the Legislation (Exemptions and Other Matters) Regulation 2015. The explanatory memorandum states that this approach 'reflects that the mandate will be the mechanism in which the government sets its expectations for the Corporation' and that it 'ensures a mandate is in force at all times'.<sup>90</sup>

1.118 In relation to 'other directions' to the Corporation,<sup>91</sup> the explanatory memorandum states that these directions are not legislative instruments (and therefore will not be subject to disallowance, sunseting or a requirement to table them in Parliament) because they are:

subject to the exclusion in item 3 of the table in subsection 6(1) of the Legislation (Exemptions and Other Matters) Regulation 2015. This provides that a direction given by a Minister to a corporate Commonwealth entity ... is not a legislative instrument.<sup>92</sup>

1.119 Some of the matters to be determined in these non-disallowable directions are relatively significant. For example, the directions may include directions relating to:

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88 Clauses 11 and 12. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

89 Clause 11.

90 Explanatory memorandum, p. 9.

91 Clause 12.

92 Explanatory memorandum, p. 10.

- eligibility criteria for loans or financial assistance;<sup>93</sup>
- a class of farm business loans;<sup>94</sup>
- terms and conditions attaching to agreements with the States and Territories in relation to water infrastructure projects;<sup>95</sup> and
- where the Corporation is to be located.<sup>96</sup>

1.120 In relation to the 'other directions' provided for in clause 12, the responsible ministers must seek the Board's advice in relation to directions about farm business loans and water infrastructure projects, but they are not required to seek the Board's advice in relation to directions about where the Corporation is to be located.

1.121 Other than noting that these directions fall within relevant exemptions from disallowance and sunseting contained in the Legislation (Exemptions and Other Matters) Regulation 2015, the explanatory memorandum does not explain why it is necessary for all of these directions to be exempt from disallowance and sunseting (and in the case of 'other directions' also why there is no requirement to table the directions in Parliament).<sup>97</sup> The committee's consistent position is that significant concepts relating to a legislative scheme should be defined in primary legislation (or at least in legislative instruments subject to parliamentary disallowance, sunseting and tabling) unless a sound justification for using non-disallowable delegated legislation is provided.

**1.122 The committee requests the Minister's advice as to why it is appropriate for all of the ministerial directions under clauses 11 and 12 not to be subject to disallowance and sunseting, and why it is appropriate that there is no requirement to table 'other directions' made under clause 12 in the Parliament.**

**1.123 The committee also requests the Minister's advice as to why there is no requirement to seek the Board's advice prior to the making of a direction about where the Corporation is to be located under subclause 12(5).**

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93 Paragraph 11(2)(c).

94 Subclause 12(1).

95 Subclause 12(3).

96 Subclause 12(5).

97 Explanatory memorandum, p. 12.

## **Broad delegation of administrative powers<sup>98</sup>**

1.124 Clauses 49 to 51 of the bill would allow all or any of the powers or functions of the Corporation,<sup>99</sup> Board<sup>100</sup> and CEO<sup>101</sup> to be delegated or subdelegated to any member of the staff of the Corporation. Some of these powers and functions are significant including, for example, the power to sign an agreement, on behalf of the Commonwealth, with a State or Territory for the grant of financial assistance in relation to a water infrastructure project, and the power to sign loan agreements to be administered by the Corporation.

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

1.126 In this case, the explanatory memorandum states that these provisions have 'been included to provide flexibility to the operation of the Corporation' and that:

Allowing the CEO to delegate or subdelegate their powers or functions to a staff member of the Corporation (who would then undertake the task concerned) facilitates the efficient and effective performance of the Corporation's functions. It is envisaged the CEO would carefully consider the skills and experience of the relevant staff member before making the delegation or subdelegation. It is also envisaged the CEO would be held accountable by the Board for monitoring and managing the activities of staff who perform activities that have been delegated or subdelegated by the CEO.

1.127 The committee notes this explanation, however, there is no guidance on the face of the bill as to the relevant skills or experience that would be required to undertake delegated functions. Nor is there any limitation on the level to which significant powers or functions could be delegated. 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.

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98 Clauses 8, 15, 35 and 49–51. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

99 Clause 8.

100 Clause 15.

101 Clause 35.

**1.128** The committee requests the Minister's advice as to why it is necessary to allow *all* of the powers and functions of the Corporation, Board and CEO to be delegated or subdelegated to *any* member of the staff of the Corporation and requests the Minister's advice as to the appropriateness of amending the bill 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.

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### **No requirement to table report in Parliament<sup>102</sup>**

1.129 Clause 53 requires the Agriculture Minister to arrange for a review of the operation of the Act. The review must be finalised on or before 1 July 2024 and must consider the scope of the Corporation's activities after 30 June 2026 and the appropriate governance arrangements after that date.

1.130 In explaining the reason for this statutory review, the explanatory memorandum states that 'it is likely the role of the Corporation will change in line with the time-limited nature of the activities it currently has authority to administer' and 'this provision will enable the operation of the legislation to be reviewed, with consideration given to the scope of the Corporation's activities and appropriate governance arrangements going forward'.<sup>103</sup>

1.131 While subclause 53(3) provides that a written report of the review must be given to the Agriculture Minister, there is no requirement for the report to be made public or to be tabled in the Parliament.

**1.132** In order to facilitate appropriate parliamentary scrutiny of the operation of this Act (and the new Corporation), the committee suggests it may be appropriate for clause 53 of the bill to be amended to include a legislative requirement that any report of the review be:

- **tabled in the Parliament within 15 sitting days after it is received by the Agriculture Minister, and**
- **published on the internet within 30 days after it is received by the Agriculture Minister.**

**1.133** The committee requests the Minister's response in relation to this matter.

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102 Clause 53. The committee draws Senators' attention to this provision pursuant to principle 1(a)(v) of the committee's terms of reference.

103 Explanatory memorandum, p. 21.

## Treasury Laws Amendment (2017 Measures No. 3) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Australian Securities and Investments Commission Act 2001</i> and the <i>Corporations Act 2001</i> to validate certain agreements to employ or engage Australian Securities and Investments Commission staff that were purportedly made before the end of 9 March 2017
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 14 June 2017

*The committee has no comment on this bill.*

## Commentary on amendments and explanatory materials

### **Native Title Amendment (Indigenous Land Use Agreements) Bill 2017<sup>104</sup>**

#### ***[Scrutiny Digests 3 and 4 of 2017]***

1.134 The committee thanks the Attorney-General for including key additional information relating to the retrospective validation of Indigenous Land Use Agreements in the supplementary explanatory memorandum, as previously requested by the committee.<sup>105</sup>

1.135 As this bill has already passed both Houses of Parliament, the committee makes no further comment in relation to the bill.

#### **No comments**

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

- Health Insurance Amendment (National Rural Health Commissioner) Bill 2017<sup>106</sup>

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104 On 14 June 2016 the Senate agreed to five Government amendments and the Attorney-General (Senator Brandis) tabled three supplementary explanatory memoranda. On the same day the House of Representatives agreed to the Senate amendments and the bill was passed.

105 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 4 of 2017*, 29 March 2017, pp 49–50.

106 On 14 June 2016 the Senate agreed to six Government amendments and the Minister for Regional Development (Senator Nash) tabled a supplementary explanatory memorandum.

## Chapter 2

### Commentary on ministerial responses

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

2.2 Correspondence relating to these matters is included at **Appendix 1**.

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

#### Purpose

This bill seeks to amend various Acts relating to communications to:

- amend account keeping and licence fee administration arrangements for commercial broadcasters and datacasting transmitter licensees;
- remove the requirement that licensees audit certain financial information that they are required to provide to the Australian Communications and Media Authority (ACMA);
- repeal the requirement for licensees to use the film classification scheme the *Classification (Publications, Films and Computer Games) Act 1995* when broadcasting films;
- amend the ACMA's complaints handling and investigation functions;
- amend the publication methods for notices in respect of program standards or standards relating to datacasting;
- enable the telecommunications industry to develop an industry-based scheme for the management of telephone numbering resources;
- repeal tariff filing directions applying to certain carriers and carriage service providers;
- amend the statutory information and reporting functions of the ACMA and the Australian Competition and Consumer Commission (ACCC);
- remove the ability of NBN Co to issue and keep a register of statements that it is not installing fibre in a new real estate development;
- provide for NBN Co to dispose of surplus non-communications goods; and

	<ul style="list-style-type: none"> <li>remove redundant and unnecessary legislation including through the repeal of various spent historical Acts</li> </ul>
<b>Portfolio</b>	Communications and the Arts
<b>Introduced</b>	House of Representatives on 29 March 2017
<b>Scrutiny principles</b>	Standing Order 24(1)(a)(iv) and (v)

2.3 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 14 June 2017. 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 at Appendix 1.

### **Parliamentary scrutiny—removing requirements to table certain documents<sup>1</sup>**

#### ***Initial scrutiny – extract***

2.4 Certain provisions in the bill propose to remove requirements in the *Competition and Consumer Act 2010* and the *Telecommunications Act 1997* for the Minister to table documents in Parliament, including:

- annual reports of the ACCC regarding competitive safeguards within the telecommunications industry (this does not apply where the ACCC is directed by the Minister to report);<sup>2</sup>
- monitoring by the ACCC of telecommunications charges paid by consumers; and<sup>3</sup>
- the annual report of the ACMA.<sup>4</sup>

2.5 While the bill ensures that some of this information will be published online, the bill proposes to remove legislative provisions which *require* that this information be made available to the Parliament (and therefore the public at large).

2.6 The committee notes that removing the requirement for certain information to be tabled in Parliament reduces the scope for parliamentary scrutiny. 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. As such, the committee expects there to be appropriate

1 Schedule 3, items 15, 18 and 22.

2 Schedule 3, item 15, amendments to section 151CL of the *Competition and Consumer Act 2010*.

3 Schedule 3, item 18, amendments to section 151CM of the *Competition and Consumer Act 2010*.

4 Schedule 3, item 22, amendments to section 105 of the *Telecommunication Act 1997*.

justification for removing a tabling requirement. The committee generally does not consider the costs involved in tabling the documents to be a sufficient basis for removing the requirement to table in Parliament.

2.7 The reason for removing these tabling requirements appears to be on the basis that it is also proposed that the ACCC and the ACMA will no longer be required to provide such reports to the Minister. Rather, flexibility will be given to the ACCC and the ACMA as to what matters are reported on. The explanatory memorandum states:

The ACCC would be empowered to decide which charges to monitor and report on...The ACCC would no longer report to the Minister, and the report would no longer be tabled in Parliament, but instead the ACCC would be required to publish the report on its website as soon as practicable but no later than 6 months after the end of the financial year.<sup>5</sup>

...

It is preferable to provide the ACMA with greater flexibility to prepare targeted reports.<sup>6</sup>

2.8 However, while the committee notes the basis for making the reporting requirements to the Minister more flexible, this does not provide a justification for why the requirement to table the reports that are produced by the ACCC and the ACMA is being removed.

2.9 Noting the potential impact on parliamentary scrutiny of removing the requirement for certain information to be made available to the Parliament, the committee requests the Minister's advice as to why the requirement for these documents to be tabled in Parliament is proposed to be removed.

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

2.10 The Minister advised:

The Bill proposes amendments to replace the requirements to table annual reports prepared by the Australian Competition and Consumer Commission (the ACCC) and Australian Communications and Media Authority (ACMA) that relate to market and industry developments with requirements to publish the reports online. In particular, the amendments would require the reports to be published online "as soon as practicable and no later than 6 months after the end of the financial year concerned". These changes will enable market information to be made available to the public, the communications industry and Parliamentarians sooner. The reports will also be more readily available to the public because online publication will be required.

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5 Explanatory memorandum, p. 21.

6 Explanatory memorandum, p. 22.

The annual reports provide an overview of the performance of the telecommunications industry, market developments, consumer trends and industry compliance. As such, the value of the reports is maximised the sooner and wider they are made available to the public. The process of tabling these reports means that by the time the reports become publicly available, much of the information they contain is dated. For example, the ACCC report on telecommunications competition and price changes for the period ending 30 June 2016 was published in February 2017. This delays the public and the Parliament from reviewing the latest market information. The timely publication of the report is also important to industry participants, who may rely on the reports to gather market information. While these reports are typically published online, making them available to users of the internet, this is not a legislated requirement.

Under the proposed amendments, the reports will be made available to the public on the ACCC and ACMA's websites. The ACCC and ACMA's practice of issuing media releases upon the release of their reports will help alert interested parties to the release of the reports.

The proposed amendments also align with a movement towards publishing online more industry information collected by agencies. For example, in the Communications portfolio, the *Broadcasting Services Act 1992* requires the ACMA to publish on its website a copy of the annual captioning compliance report is provided by commercial broadcasting licensees or national broadcasters.

As noted by the Committee, reports on consumer safeguards in the telecommunications industry prepared by the ACCC at the direction of the Minister will continue to be tabled. Annual reports concerning the operation of the ACCC and the ACMA as statutory bodies will also continue to be tabled in Parliament.

The other amendments in the Bill cited by the Committee to enable the ACCC and the ACMA to better tailor their reports are not put forward as a justification for online publication.

### ***Committee comment***

2.11 The committee thanks the Minister for this response. The committee notes the Minister's advice that while the amendments remove the requirement for the ACCC and ACMA to table certain reports in the Parliament, the amendments also require the reports to be published online 'as soon as practicable and no later than 6 months after the end of the financial year concerned'. The Minister advised that these changes 'will enable market information to be made available to the public, the communications industry and Parliamentarians sooner' and that the 'reports will also be more readily available to the public because online publication will be required'. The committee also notes the Minister's advice that reports on consumer safeguards in the telecommunications industry prepared by the ACCC at the direction of the Minister and annual reports concerning the operation of the ACCC and the ACMA as statutory bodies will continue to be tabled in Parliament.

2.12 While the committee accepts that publication of reports online assists in making information available to the public sooner, the committee reiterates 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.

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

2.14 In light of the information provided and the fact that certain reports of the ACCC and the ACMA will continue to be tabled in Parliament, the committee makes no further comment on this matter.

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## Consultation prior to making delegated legislation<sup>7</sup>

### *Initial scrutiny – extract*

2.15 Schedule 5, item 2 seeks to repeal section 152ELB of the *Competition and Consumer Act 2010*. This would remove the requirement for the ACCC to, before making any Procedural Rules, publish a draft on the ACCC's website and to invite people to make submissions during a period of at least 30 days and consider any submissions received. In explaining the repeal of this provision, the explanatory memorandum states that:

this provision is considered unnecessary in light of the standard consultation requirement in section 17 of the *Legislation Act 2003*, which require a rule maker, subject to certain exceptions, to be satisfied that appropriate and practicable consultation has been undertaken prior to making a legislative instrument.<sup>8</sup>

2.16 However, 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 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, there are no equivalent process requirements to those contained in the current provision, which provides for at least 30 days for people to make submissions on the draft Rules and for those submissions to be considered. In

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7 Schedule 5, item 2, in relation to the proposed repeal of section 152ELB of the *Competition and Consumer Act 2010*.

8 Explanatory memorandum, p. 28.

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>9</sup>

2.17 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.

2.18 The committee therefore requests the Minister's detailed justification for removing the current, specific requirements for consultation by the ACCC prior to the making of procedural rules by legislative instrument.

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

2.19 The Minister advised:

The proposed removal of the consultation requirements in section 152ELB of the *Competition and Consumer Act 2010* forms part of a broader program of reform of statutory consultation requirements in the Communications portfolio. These reforms have been progressed over several years, including through the *Omnibus Repeal Day (Autumn 2014) Act 2014*, which made similar amendments to the *Broadcasting Services Act 1992*, *Interactive Gambling Act 2001*, *Radiocommunications Act 1992* and the *Telecommunications Act 1997*.

The rationale for the removal of bespoke consultation requirements is that such requirements are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislation Act 2003* (the *Legislation Act*), which sets out the standard consultation requirements for all Commonwealth legislative instruments.

The provisions that have been repealed mandated a variety of inconsistent approaches with respect to the time and method of consultation. There is no policy rationale for this inconsistency, which introduces unnecessary inflexibility and cost without corresponding benefits above those supplied by the standard consultation arrangements. The proposed repeal of section 152ELB is intended to contribute to the underlying goal of simplifying and harmonising the law.

The Committee has noted that the *Legislation Act* consultation requirements are less prescriptive and subject to certain exemptions. One of the significant benefits of Chapter 3 of the *Legislation Act* is the fact that it does not purport to prescribe in detail exactly how consultation should occur. It simply requires a rule-maker to be satisfied that all appropriate

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

and reasonably practicable consultation has been undertaken. This means that targeted consultation can be undertaken, with flexibility to ensure that the consultation meets the needs of stakeholders and also that unnecessary costs to the Government and stakeholders are minimised.

The Committee has also expressed concern that the provisions under the Legislation Act allow consultation to be tailored without affecting the validity or enforceability of an instrument. In this context, I note that Part 5 of the Legislation Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if Parliament were dissatisfied with the consultation of the ACCC on Procedural Rules made under section 152ELA, the relevant instrument may be disallowed.

### **Committee comment**

2.20 The committee thanks the Minister for this response. The committee notes the Minister's advice that the reason for removing the bespoke consultation requirements is that such requirements are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislation Act 2003*, which sets out the standard consultation requirements for all Commonwealth legislative instruments. The Minister further advised that the bespoke consultation provisions mandate a variety of inconsistent approaches with respect to the time and method of consultation and that there is no policy rationale for this inconsistency, which introduces unnecessary inflexibility and cost without corresponding benefits. The Minister also advised that the consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if Parliament were dissatisfied with the consultation undertaken by the ACCC the relevant instrument may be disallowed.

2.21 The committee notes this advice, however, the committee retains scrutiny concerns where specific requirements for consultation prior to the making of delegated legislation are sought to be removed. The committee does not consider a general desire for consistency or harmonisation, of itself, to be a sufficient justification for removing bespoke consultation requirements. Where specific consultation requirements are sought to be removed specific detail and examples about why the current specific consultation requirements are inappropriate should be provided.

2.22 The committee takes this opportunity to reiterate 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. In this regard, the committee notes that where the standard consultation requirements in the Legislation Act are relied on it is possible for no

consultation to 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. The committee also notes it may be difficult for parliamentarians to know whether appropriate consultation has taken place within the timeframe for disallowance.

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

**2.24** The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of removing the specific consultation requirements imposed on the ACCC prior to the making of delegated legislation.

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

## Major Bank Levy Bill 2017

<b>Purpose</b>	This bill seeks to introduce a levy on authorised deposit-taking institutions with total liabilities of greater than \$100 billion
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 30 May 2017
<b>Bill status</b>	Passed both Houses on 19 June 2017
<b>Scrutiny principles</b>	Standing Order 24(1)(a)(iv) and (v)

2.26 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Treasurer responded to the committee's comments in a letter dated 19 June 2017. 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 at Appendix 1.

### **Incorporation of materials existing from time to time<sup>10</sup>**

#### ***Initial scrutiny – extract***

2.27 Subclauses 5(4), 6(4) and 8(1) enable the Minister to, by legislative instrument, determine a kind of amount relating to a levy or the method for working out an amount of liability. Subclauses 5(5), 6(5) and 8(2) allow any such legislative instrument to apply, adopt or incorporate any matter contained in any other instrument or writing as in force or existing from time to time. The explanatory memorandum provides no explanation as to what type of instruments or documents may need to be applied, adopted or incorporated and does not explain why it would be necessary for the material to apply as in force or existing from time to time.

2.28 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

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10 Subclauses 5(5), 6(5) and 8(2). The committee draws Senators' attention to this provision pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

- 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).

2.29 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.

2.30 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>11</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.

2.31 Noting the above comments, the committee requests the Treasurer's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclauses 5(5), 6(5) and 8(2), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

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

2.32 The Treasurer advised:

In its *Scrutiny Digest No. 6 of 2017*, the committee noted that subclauses 5(4), 6(4) and 8(1) of the Major Bank Levy Bill provide that the Minister may, by legislative instrument, determine a kind of amount relating to the Major Bank Levy or the method for working out an amount of liability for the levy.

The committee also noted that subclauses 5(5), 6(5) and 8(2) of the Major Bank Levy Bill provide that these legislative instruments may make provision in relation to a matter by applying, adopting or incorporating any matter contained in another instrument or document as in force from time to time.

The committee has requested advice as to:

- the type of documents that may be incorporated by reference under subclauses 5(5), 6(5) and 8(2);

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

- whether such documents will be made freely available to all persons interested in the law; and
- why it is necessary to apply the documents as in force from time to time, rather than when the instrument is first made.

Subclauses 5(5), 6(5) and 8(2) of the Major Bank Levy Bill provide that a legislative instrument made under subclause 5(4), 6(4) or 8(1) can make provision in relation to a matter by applying, adopting or incorporating any matter contained in another instrument or document as in force from time to time. The legislative instrument would be made to specify how certain amounts are determined or calculated for the purpose of the major bank levy. Subclauses 5(5), 6(5) and 8(2) of the Major Bank Levy Bill allow the legislative instrument to incorporate APRA prudential standards and accounting standards as in force from time to time.

This is appropriate because the amounts that are determined or calculated for the purpose of the major bank levy are likely to be based on amounts that are determined by the affected banks for prudential or accounting purposes.

The APRA prudential standards are publicly available and can be obtained from the APRA website. The Australian accounting standards are publicly available and can be obtained from the AASB website.

APRA prudential standards and Australian accounting standards may change from time to time to take into account developments in prudential regulation and accounting principles. Therefore, the approach in the Bill will reduce compliance costs and ensure that it is not necessary to amend the legislative instrument each time a change is made to the relevant prudential standards or accounting standards.

### ***Committee comment***

2.33 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that these provisions would allow the legislative instrument to incorporate APRA prudential standards and Australian accounting standards as in force from time to time. The committee notes the advice that both the APRA prudential standards and the Australian accounting standards are publicly available and can be obtained via relevant websites. The committee also notes the Treasurer's advice that it is necessary to apply the documents as in force from time to time as the standards may change and take into account new developments, and so the approach in the bill will reduce compliance costs and ensure it is not necessary to amend the instrument each time a change is made to the relevant standard.

2.34 The committee takes this opportunity to reiterate that it is fundamental principle of the rule of the 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. In this instance, the committee welcomes the Treasurer's advice that all material incorporated by legislative instrument will be publicly and readily available.

2.35 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*).

**2.36 The committee thanks the Treasurer for providing this further information and notes that it would have been useful had this information been included in the explanatory memorandum.**

**2.37 In light of the information provided and the fact that this bill has already passed both Houses of Parliament, the committee makes no further comment on this matter.**

## Treasury Laws Amendment (Major Bank Levy) Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend various Acts in relation to taxation to:</p> <ul style="list-style-type: none"> <li>• set out how to index the levy's \$100 billion threshold to growth in nominal Gross Domestic Product;</li> <li>• allow the Australian Prudential Regulation Authority (APRA) to collect the data necessary to calculate the levy;</li> <li>• allow APRA to provide information relating to the major bank levy to the Australian Taxation Office (ATO);</li> <li>• ensure that when the major bank levy is payable to the ATO the ordinary collection and recovery provisions apply; and</li> <li>• introduce an anti-avoidance provision to protect the integrity of the levy</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 30 May 2017
<b>Bill status</b>	Passed both Houses on 19 June 2017
<b>Scrutiny principles</b>	Standing Order 24(1)(a)(i), (iv) and (v)

2.38 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Treasurer responded to the committee's comments in a letter dated 19 June 2017. 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 at Appendix 1.

### Reversal of evidential burden of proof<sup>12</sup>

#### *Initial scrutiny – extract*

2.39 Section 56(2) of the *Australian Prudential Regulation Authority Act 1998* makes it an offence to disclose information acquired without authorisation. The offence carries a maximum penalty of imprisonment for 2 years. Proposed subsection 56(5D) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the production by a person of a document that was given to the Australian Prudential Regulation Authority (APRA) under

12 Schedule 1, item 1, proposed subsection 56(5D). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

section 13 of the *Financial Sector (Collection of Data) Act 2001* is to the Commissioner of Taxation for the purposes of the *Major Bank Levy Act 2017*.

2.40 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.

2.41 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.

2.42 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed subsection 56(5D) has not been addressed in the explanatory materials.

2.43 As the explanatory materials do not address this issue, the committee requests the Treasurer's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>13</sup>

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

2.44 The Treasurer advised:

In its *Scrutiny Digest No. 6 of 2017*, the committee noted that proposed subsection 56(5D) in item 1 of Schedule 1 to the Treasury Laws Amendment Bill provides a defence to the secrecy provision in section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act).

Broadly, subsection 56(2) of the APRA Act provides that a person commits an offence if he or she discloses protected information or a protected document and the disclosure is not made in accordance with one of the defences set out in subsections 56(3) to (7C) of the Act. The penalty for contravening subsection 56(2) is a penalty of imprisonment of up to 2 years.

Item 1 of Schedule 1 to the Treasury Laws Amendment Bill includes proposed subsection 56(5D) which will include another defence to the secrecy provision in section 56. Proposed subsection 56(5D) provides that

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

it is not an offence to provide a document to the Commissioner of Taxation for the purposes of the Major Bank Levy if the information was provided to APRA under section 13 of the *Financial Sector (Collection of Data) Act 2001*. In establishing the defence, the defendant must satisfy an evidential burden in relation to the facts set out in proposed subsection 56(5D).

The committee has requested advice as to why proposed subsection 56(5D) provides that the defendant must satisfy an evidential burden when seeking to establish the defence.

The Attorney General's Department *Guide to Framing Commonwealth Offences* provides as follows:

Offence-specific defences reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence. Therefore, 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.

The facts relating to the disclosure of protected information or protected documents are matters that will be peculiarly within the knowledge of the defendant. Likewise, it would be more difficult and costly for the prosecution to disprove these matters than for the defendant to establish them. Accordingly, the use of an offence-specific defence is appropriate in the context of proposed subsection 56(5D).

Further, proposed subsection 56(5D) is consistent with the basic principle that confidential taxpayer information should be subject to the strongest secrecy and confidentiality protections. I also note that the information provided to APRA (and then to the A TO) will include information that is commercial in confidence and should be subject to strong secrecy and confidentiality protections.

Finally, I note that the evidential burden in proposed subsection 56(5D) is consistent with the evidential burden in the other defences in section 56 of the APRA Act (for example, see subsections 56(3), (4), (5), (SAA), (5A), (5B), (6), (7), (7A), (7B) and (7C) of that Act).

### **Committee comment**

2.45 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the facts relating to the disclosure 'are matters that will be peculiarly within the knowledge of the defendant' and it 'would be more difficult and costly for the prosecution to disprove these matters than for the defendant to establish them'. The committee also notes the Treasurer's advice that the provision is consistent with the basic principle that confidential taxpayer information should be

subject to the strongest secrecy and confidentiality protections and the proposed evidential burden is consistent with existing evidential burdens in the other defences.

2.46 The committee notes that no reasoning was provided as to how the matters in the defence are peculiarly within the defendant's knowledge. It is therefore not clear to the committee how information about the production of a document that was given to APRA is to the Commissioner of Taxation for the purposes of the *Major Bank Levy Act 2017* is peculiarly within the knowledge of the defendant. The committee also notes that the fact that there are existing defences that reverse the evidential burden of proof is not, of itself, a justification for including an additional defence which reverses the evidential burden of proof.

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

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## **Incorporation of external materials existing from time to time<sup>14</sup>**

### ***Initial scrutiny – extract***

2.48 Section 13 of the *Financial Sector (Collection of Data) Act 2001* provides that APRA may determine in writing reporting standards that are required to be complied with by certain financial sector entities. Proposed subsection 13(2C) provides that a reporting standard may make provision in relation to matters relating to the reporting of amounts for the purposes of the *Major Bank Levy Act 2017*, by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time. The explanatory memorandum provides no explanation as to what type of instruments or documents may need to be applied, adopted or incorporated in a reporting standard and does not explain why it would be necessary for the material to apply as in force or existing from time to time.

2.49 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

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14 Schedule 1, item 3, proposed subsection 13(2C). The committee draws Senators' attention to this provision pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

- 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).

2.50 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.

2.51 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>15</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.

2.52 Noting the above comments, the committee requests the Treasurer's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subsection 13(2C), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the document is first made.

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

2.53 The Treasurer advised:

In its *Scrutiny Digest No. 6 of 2017*, the committee noted that section 13 of the *Financial Sector (Collection of Data) Act 2001* provides that APRA may determine reporting standards. The committee also noted that proposed subsection 13(2C) of the Treasury Laws Amendment Bill provides that a reporting standard may make provision in relation to matters relating to reporting amounts for the purposes of the *Major Bank Levy Act 2017*.

The committee has requested advice as to:

- the type of documents that may be incorporated by reference under proposed subsection 13(2C);
- whether such documents will be made freely available to all persons interested in the law; and
- why it is necessary to apply the documents as in force from time to time, rather than when the instrument is first made.

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

Item 3 of the Treasury Laws Amendment Bill amends the *Financial Sector (Collection of Data) Act 2001* and provides that a reporting standard made under proposed subsection 13(2B) of that Act for the purposes of the major bank levy may make provision in relation to a matter by applying, adopting or incorporating any matter contained in another instrument or document as in force from time to time.

This is appropriate because the amounts that are determined or calculated for the purpose of the major bank levy are likely to be based on amounts that are determined by the affected banks for prudential or accounting purposes.

The APRA prudential standards are publicly available and can be obtained from the APRA website. The Australian accounting standards are publicly available and can be obtained from the AASB website.

APRA prudential standards and Australian accounting standards may change from time to time to take into account developments in prudential regulation and accounting principles. Therefore, the approach in the Bill will reduce compliance costs and ensure that it is not necessary to amend the reporting standard each time a change is made to the relevant prudential standards or accounting standards.

### **Committee comment**

2.54 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the amounts to be determined for the purpose of the major bank levy are likely to be based on amounts that are determined by the affected banks for prudential or accounting purposes. The committee notes the advice that both the APRA prudential standards and the Australian accounting standards are publicly available and can be obtained via relevant websites. The committee also notes the Treasurer's advice that it is necessary to apply the documents as in force from time to time as the standards may change and take into account new developments, and so the approach in the bill will reduce compliance costs and ensure it is not necessary to amend the instrument each time a change is made to the relevant standard.

2.55 The committee takes this opportunity to reiterate that it is fundamental principle of the rule of the 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. In this instance, the committee welcomes the Treasurer's advice that all material incorporated by legislative instrument will be publicly and readily available.

2.56 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*).

**2.57 The committee thanks the Treasurer for providing this further information and notes that it would have been useful had this information been included in the explanatory memorandum.**

**2.58 In light of the information provided and the fact that this bill has already passed both Houses of Parliament, the committee makes no further comment on this matter.**



## Chapter 3

### Scrutiny of standing appropriations

3.1 The committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

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

3.2 Further details of the committee's approach to scrutiny of standing appropriations are set out in the committee's *Fourteenth Report of 2005*.

3.3 No bills were introduced in the previous sitting week that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

**Senator Helen Polley**  
Chair



# **Appendix 1**

## **Ministerial correspondence**





**SENATOR THE HON MITCH FIFIELD**  
**MINISTER FOR COMMUNICATIONS**  
**MINISTER FOR THE ARTS**  
**MANAGER OF GOVERNMENT BUSINESS IN THE SENATE**

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

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

Dear Senator Polley *Helen*

I refer to the letter dated 11 May 2017 from the Committee Secretary of the Senate Scrutiny of Bills Committee requesting a response in relation to the above mentioned Bill.

My response to the matters raised by the Committee are set out below.

**Removal of requirements to table certain documents**

The Bill proposes amendments to replace the requirements to table annual reports prepared by the Australian Competition and Consumer Commission (the ACCC) and Australian Communications and Media Authority (ACMA) that relate to market and industry developments with requirements to publish the reports online. In particular, the amendments would require the reports to be published online “as soon as practicable and no later than 6 months after the end of the financial year concerned”. These changes will enable market information to be made available to the public, the communications industry and Parliamentarians sooner. The reports will also be more readily available to the public because online publication will be required.

The annual reports provide an overview of the performance of the telecommunications industry, market developments consumer trends and industry compliance. As such, the value of the reports is maximised the sooner and wider they are made available to the public. The process of tabling these reports means that by the time the reports become publicly available, much of the information they contain is dated. For example, the ACCC report on telecommunications competition and price changes for the period ending 30 June 2016 was published in February 2017. This delays the public and the Parliament from reviewing the latest market information. The timely publication of the reports is also important to industry participants, who may rely on the reports to gather market information. While these reports are typically published online, making them available to users of the internet, this is not a legislated requirement.

Under the proposed amendments, the reports will be made available to the public on the ACCC and ACMA's websites. The ACCC and ACMA's practice of issuing media releases upon the release of their reports will help alert interested parties to the release of the reports.

The proposed amendments also align with a movement towards publishing online more industry information collected by agencies. For example, in the Communications portfolio, the *Broadcasting Services Act 1992* requires the ACMA to publish on its website a copy of the annual captioning compliance reports provided by commercial broadcasting licensees or national broadcasters.

As noted by the Committee, reports on consumer safeguards in the telecommunications industry prepared by the ACCC at the direction of the Minister will continue to be tabled. Annual reports concerning the operation of the ACCC and the ACMA as statutory bodies will also continue to be tabled in Parliament.

The other amendments in the Bill cited by the Committee to enable the ACCC and the ACMA to better tailor their reports are not put forward as a justification for online publication.

### **Consultation prior to making delegated legislation**

The proposed removal of the consultation requirements in section 152ELB of the *Competition and Consumer Act 2010* forms part of a broader program of reform of statutory consultation requirements in the Communications portfolio. These reforms have been progressed over several years, including through the *Omnibus Repeal Day (Autumn 2014) Act 2014*, which made similar amendments to the *Broadcasting Services Act 1992*, *Interactive Gambling Act 2001*, *Radiocommunications Act 1992* and the *Telecommunications Act 1997*.

The rationale for the removal of bespoke consultation requirements is that such requirements are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislation Act 2003* (the Legislation Act), which sets out the standard consultation requirements for all Commonwealth legislative instruments.

The provisions that have been repealed mandated a variety of inconsistent approaches with respect to the time and method of consultation. There is no policy rationale for this inconsistency, which introduces unnecessary inflexibility and cost without corresponding benefits above those supplied by the standard consultation arrangements. The proposed repeal of section 152ELB is intended to contribute to the underlying goal of simplifying and harmonising the law.

The Committee has noted that the Legislation Act consultation requirements are less prescriptive and subject to certain exemptions. One of the significant benefits of Chapter 3 of the Legislation Act is the fact that it does not purport to prescribe in detail exactly how consultation should occur. It simply requires a rule-maker to be satisfied that all appropriate and reasonably practicable consultation has been undertaken. This means that targeted consultation can be undertaken, with flexibility to ensure that the consultation meets the needs of stakeholders and also that unnecessary costs to the Government and stakeholders are minimised.

The Committee has also expressed concern that the provisions under the Legislation Act allow consultation to be tailored without affecting the validity or enforceability of an instrument. In this context, I note that Part 5 of the Legislation Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if Parliament were dissatisfied with the consultation of the ACCC on Procedural Rules made under section 152ELA, the relevant instrument may be disallowed.

I trust this information will be of assistance.

14/6/17





## TREASURER

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

Dear Senator Polley

Thank you for your letter dated 15 June 2017 requesting further information about the Major Bank Levy Bill 2017 and the Treasury Laws Amendment (Major Bank Levy) Bill 2017.

### **Subclauses 5(5), 6(5) and 8(2) of the Major Bank Levy Bill**

In its *Scrutiny Digest No. 6 of 2017*, the committee noted that subclauses 5(4), 6(4) and 8(1) of the Major Bank Levy Bill provide that the Minister may, by legislative instrument, determine a kind of amount relating to the Major Bank Levy or the method for working out an amount of liability for the levy.

The committee also noted that subclauses 5(5), 6(5) and 8(2) of the Major Bank Levy Bill provide that these legislative instruments may make provision in relation to a matter by applying, adopting or incorporating any matter contained in another instrument or document as in force from time to time.

The committee has requested advice as to:

- the type of documents that may be incorporated by reference under subclauses 5(5), 6(5) and 8(2);
- whether such documents will be made freely available to all persons interested in the law; and
- why it is necessary to apply the documents as in force from time to time, rather than when the instrument is first made.

Subclauses 5(5), 6(5) and 8(2) of the Major Bank Levy Bill provide that a legislative instrument made under subclause 5(4), 6(4) or 8(1) can make provision in relation to a matter by applying, adopting or incorporating any matter contained in another instrument or document as in force from time to time. The legislative instrument would be made to specify how certain amounts are determined or calculated for the purpose of the major bank levy. Subclauses 5(5), 6(5) and 8(2) of the Major Bank Levy Bill allow the legislative instrument to incorporate APRA prudential standards and accounting standards as in force from time to time.

This is appropriate because the amounts that are determined or calculated for the purpose of the major bank levy are likely to be based on amounts that are determined by the affected banks for prudential or accounting purposes.

The APRA prudential standards are publicly available and can be obtained from the APRA website. The Australian accounting standards are publicly available and can be obtained from the AASB website.

APRA prudential standards and Australian accounting standards may change from time to time to take into account developments in prudential regulation and accounting principles. Therefore, the approach in the Bill will reduce compliance costs and ensure that it is not necessary to amend the legislative instrument each time a change is made to the relevant prudential standards or accounting standards.

**Item 1 of Schedule 1 to the Treasury Laws Amendment (Major Bank Levy) Bill 2017 (proposed subsection 56(5D))**

In its *Scrutiny Digest No. 6 of 2017*, the committee noted that proposed subsection 56(5D) in item 1 of Schedule 1 to the Treasury Laws Amendment Bill provides a defence to the secrecy provision in section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act).

Broadly, subsection 56(2) of the APRA Act provides that a person commits an offence if he or she discloses protected information or a protected document and the disclosure is not made in accordance with one of the defences set out in subsections 56(3) to (7C) of the Act. The penalty for contravening subsection 56(2) is a penalty of imprisonment of up to 2 years.

Item 1 of Schedule 1 to the Treasury Laws Amendment Bill includes proposed subsection 56(5D) which will include another defence to the secrecy provision in section 56. Proposed subsection 56(5D) provides that it is not an offence to provide a document to the Commissioner of Taxation for the purposes of the Major Bank Levy if the information was provided to APRA under section 13 of the *Financial Sector (Collection of Data) Act 2001*. In establishing the defence, the defendant must satisfy an evidential burden in relation to the facts set out in proposed subsection 56(5D).

The committee has requested advice as to why proposed subsection 56(5D) provides that the defendant must satisfy an evidential burden when seeking to establish the defence.

The Attorney General's Department *Guide to Framing Commonwealth Offences* provides as follows:

*Offence-specific defences reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence. Therefore, 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.*

The facts relating to the disclosure of protected information or protected documents are matters that will be peculiarly within the knowledge of the defendant. Likewise, it would be more difficult and costly for the prosecution to disprove these matters than for the defendant to establish them. Accordingly, the use of an offence-specific defence is appropriate in the context of proposed subsection 56(5D).

Further, proposed subsection 56(5D) is consistent with the basic principle that confidential taxpayer information should be subject to the strongest secrecy and confidentiality protections. I also note that the information provided to APRA (and then to the ATO) will include information that is commercial in confidence and should be subject to strong secrecy and confidentiality protections.

Finally, I note that the evidential burden in proposed subsection 56(5D) is consistent with the evidential burden in the other defences in section 56 of the APRA Act (for example, see subsections 56(3), (4), (5), (5AA), (5A), (5B), (6), (7), (7A), (7B) and (7C) of that Act).

**Item 3 of Schedule 1 to the Treasury Laws Amendment (Major Bank Levy) Bill 2017 (proposed subsection 13(2C))**

In its *Scrutiny Digest No. 6 of 2017*, the committee noted that section 13 of the *Financial Sector (Collection of Data) Act 2001* provides that APRA may determine reporting standards. The committee also noted that proposed subsection 13(2C) of the Treasury Laws Amendment Bill provides that a reporting standard may make provision in relation to matters relating to reporting amounts for the purposes of the *Major Bank Levy Act 2017*.

The committee has requested advice as to:

- the type of documents that may be incorporated by reference under proposed subsection 13(2C);
- whether such documents will be made freely available to all persons interested in the law; and
- why it is necessary to apply the documents as in force from time to time, rather than when the instrument is first made.

Item 3 of the Treasury Laws Amendment Bill amends the *Financial Sector (Collection of Data) Act 2001* and provides that a reporting standard made under proposed subsection 13(2B) of that Act for the purposes of the major bank levy may make provision in relation to a matter by applying, adopting or incorporating any matter contained in another instrument or document as in force from time to time.

This is appropriate because the amounts that are determined or calculated for the purpose of the major bank levy are likely to be based on amounts that are determined by the affected banks for prudential or accounting purposes.

The APRA prudential standards are publicly available and can be obtained from the APRA website. The Australian accounting standards are publicly available and can be obtained from the AASB website.

APRA prudential standards and Australian accounting standards may change from time to time to take into account developments in prudential regulation and accounting principles. Therefore, the approach in the Bill will reduce compliance costs and ensure that it is not necessary to amend the reporting standard each time a change is made to the relevant prudential standards or accounting standards.

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19/6/2017